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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2003

MARCH 2 THROUGH JUNE 8, 2004

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

OFFICERS OF THE COURT

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THEODORE B. OLSON, Solicitor General.
WILLIAM K. SUTER, Clerk.
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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

For the District of Columbia Circuit, William H. Rehnquist, Chief Justice.

For the First Circuit, David H. Souter, Associate Justice.

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

For the Third Circuit, David H. Souter, Associate Justice.

For the Fourth Circuit, William H. Rehnquist, Chief Justice.

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, John Paul Stevens, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Clarence Thomas, Associate Justice.

For the Ninth Circuit, Sandra Day O'Connor, Associate Justice.

For the Tenth Circuit, Stephen Breyer, Associate Justice.

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

For the Federal Circuit, William H. Rehnquist, Chief Justice.

September 30, 1994.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2003

RAYMOND B. YATES, M. D., P. C. PROFIT SHARING PLAN, ET AL. *v.* HENDON, TRUSTEE

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

No. 02–458. Argued January 13, 2004—Decided March 2, 2004

Enacted "to protect . . . the interests of participants in employee benefit plans and their beneficiaries," 29 U. S. C. § 1001(b), the Employee Retirement Income Security Act of 1974 (ERISA) comprises four titles. Relevant here, Title I, 29 U. S. C. § 1001 *et seq.*, mandates minimum participation, vesting, and funding schedules for covered pension plans, and establishes fiduciary conduct standards for plan administrators. Title II, codified in 26 U. S. C., amended various Internal Revenue Code (IRC) provisions pertaining to qualification of pension plans for special tax treatment, in order, *inter alia*, to conform to Title I's standards. Title III, 29 U. S. C. § 1201 *et seq.*, contains provisions designed to coordinate enforcement efforts of different federal departments. Title IV, 29 U. S. C. § 1301 *et seq.*, created the Pension Benefit Guaranty Corporation and an insurance program to protect employees against the loss of "nonforfeitable" benefits upon termination of pension plans lacking sufficient funds to pay benefits in full. This case concerns Title I's definition and coverage provisions, though those provisions, indicating who may participate in an ERISA-sheltered plan, inform each of ERISA's four titles. Title I defines "employee benefit plan" as "an employee welfare benefit plan or an employee pension benefit plan or . . . both," § 1002(3); "participant" to encompass "any employee . . . eligible to receive a benefit . . . from an employee benefit plan," § 1002(7); "employee" as "any individual employed by an employer," § 1002(6); and

"employer" to include "any person acting . . . as an employer, or . . . in the interest of an employer," § 1002(5).

Yates was sole shareholder and president of a professional corporation that maintained a profit sharing plan (Plan). From the Plan's inception, at least one person other than Yates or his wife was a Plan participant. The Plan qualified for favorable tax treatment under IRC § 401. As required by the IRC, 26 U. S. C. § 401(a)(13), and ERISA, 29 U. S. C. § 1056(d), the Plan contained an antialienation provision. Entitled "Spendthrift Clause," the provision stated, in relevant part: "Except for . . . loans to Participants as [expressly provided for in the Plan], no benefit or interest available hereunder will be subject to assignment or alienation." In December 1989, Yates borrowed $20,000 from another of his corporation's pension plans (which later merged into the Plan), but failed to make any of the required monthly payments. In November 1996, however, Yates paid off the loan in full with the proceeds of the sale of his house. Three weeks later, Yates's creditors filed an involuntary petition against him under Chapter 7 of the Bankruptcy Code. Respondent Hendon, the Bankruptcy Trustee, filed a complaint against petitioners (the Plan and Yates, as Plan trustee), asking the Bankruptcy Court to avoid the loan repayment. Granting Hendon summary judgment, the Bankruptcy Court first determined that the repayment qualified as a preferential transfer under 11 U. S. C. § 547(b). That finding was not challenged on appeal. The Bankruptcy Court then held that the Plan and Yates, as Plan trustee, could not rely on the Plan's antialienation provision to prevent Hendon from recovering the loan repayment for the bankruptcy estate. That holding was dictated by Sixth Circuit precedent, under which a self-employed owner of a pension plan's corporate sponsor could not "participate" as an "employee" under ERISA and therefore could not use ERISA's provisions to enforce the restriction on transfer of his beneficial interest in the plan. The District Court and the Sixth Circuit affirmed on the same ground. The Sixth Circuit's determination that Yates was not a "participant" in the Plan for ERISA purposes obviated the question whether, had Yates qualified as such a participant, his loan repayment would have been shielded from the Bankruptcy Trustee's reach.

Held: The working owner of a business (here, the sole shareholder and president of a professional corporation) may qualify as a "participant" in a pension plan covered by ERISA. If the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants. Such a working owner, in common with other employees, quali-

fies for the protections ERISA affords plan participants and is governed by the rights and remedies ERISA specifies. Pp. 12–24.

(a) Congress intended working owners to qualify as plan participants. Because ERISA's definitions of "employee" and, in turn, "participant" are uninformative, the Court looks to other ERISA provisions for instruction. See *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 323. ERISA's multiple textual indications that Congress intended working owners to qualify as plan participants provide, in combination, "specific guidance," *ibid.*, so there is no cause in this case to resort to common law. ERISA's enactment in 1974 did not change the existing backdrop of IRC provisions permitting corporate shareholders, partners, and sole proprietors to participate in tax-qualified pension plans. Rather, Congress' objective was to harmonize ERISA with these longstanding tax provisions. Title I of ERISA and related IRC provisions expressly contemplate the participation of working owners in covered benefit plans. Most notably, Title I frees certain plans in which working owners likely participate from all of ERISA's fiduciary responsibility requirements. See 29 U. S. C. § 1101(a) and 26 U. S. C. §§ 414(q)(1)(A) and 416(i)(1)(B)(i). Title I also contains more limited exemptions from ERISA's fiduciary responsibility requirements for plans that ordinarily include working owners as participants. See 29 U. S. C. §§ 1103(a) and (b)(3)(A) and 26 U. S. C. §§ 401(c)(1) and (2)(A)(i), 1402(a) and (c). Further, Title I contains exemptions from ERISA's prohibited transaction exemptions, which, like the fiduciary responsibility exemptions, indicate that working owners may participate in ERISA-qualified plans. See 29 U. S. C. §§ 1108(b)(1)(B) and (d)(1) and 26 U. S. C. § 401(c)(3). Exemptions of this order would be unnecessary if working owners could not qualify as participants in ERISA-protected plans in the first place. Provisions of Title IV of ERISA are corroborative. For example, Title IV does not apply to plans "established and maintained *exclusively* for substantial owners," 29 U. S. C. § 1321(b)(9) (emphasis added), a category that includes sole proprietors and shareholders and partners with a ten percent or greater ownership interest, § 1322(b)(5)(A). But Title IV does cover plans in which substantial owners participate *along with* other employees. See § 1322(b)(5)(B). Particularly instructive, Title IV and the IRC, as amended by Title II, clarify a key point missed by several lower courts: Under ERISA, a working owner may wear two hats, *i. e.*, he can be an employee entitled to participate in a plan and, at the same time, the employer who established the plan. See § 1301(b)(1) and 26 U. S. C. § 401(c)(4). Congress' aim to promote and facilitate employee benefit plans is advanced by the Court's reading of ERISA's text. The working employer's opportunity personally to participate and gain ERISA coverage serves as an incentive to the creation of plans that will

benefit employer and nonowner employees alike. Treating the working owner as a participant in an ERISA-sheltered plan also avoids the anomaly that the same plan will be controlled by discrete regimes: federal-law governance for the nonowner employees; state-law governance for the working owner. Excepting working owners from ERISA's coverage is hardly consistent with the statutory goal of "uniform national treatment of pension benefits," *Patterson* v. *Shumate*, 504 U. S. 753, 765, and would generate administrative difficulties. A 1999 Department of Labor advisory opinion (hereinafter Advisory Opinion 99–04A) accords with the Court's comprehension of Title I's definition and coverage provisions. Concluding that working owners may qualify as participants in ERISA-protected plans, the Department's opinion reflects a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140. Pp. 12–18.

(b) This Court rejects the lower courts' position that a working owner may rank only as an "employer" and not also as an "employee" for purposes of ERISA-sheltered plan participation. The Sixth Circuit's leading decision in point relied, in large part, on an incorrect reading of a portion of a Department of Labor regulation, 29 CFR §2510.3–3, which states: "[T]he term 'employee benefit plan' [as used in Title I] shall not include any plan . . . under which no employees are participants"; "*[f]or purposes of this section*," "[a]n individual and his or her spouse shall not be deemed to be employees with respect to a . . . business" they own. (Emphasis added.) In common with other Courts of Appeals that have held working owners do not qualify as participants in ERISA-governed plans, the Sixth Circuit apparently understood the regulation to provide a generally applicable definition of "employee," controlling for all Title I purposes. The Labor Department's Advisory Opinion 99–04A, however, interprets the regulation to mean that the statutory term "employee benefit plan" does not include a plan whose *only* participants are the owner and his or her spouse, but does include a plan that covers as participants one or more common-law employees, in addition to the self-employed individuals. This agency view, overlooked by the Sixth Circuit, merits the Judiciary's respectful consideration. Cf. *Clackamas Gastroenterology Associates, P. C.* v. *Wells*, 538 U. S. 440, 448–449. Moreover, the Department's regulation itself reveals the definitional prescription's limited scope. The prescription describes "employees" only "[f]or purposes of this section," *i. e.*, the section defining "employee benefit plans." 29 CFR §2510.3–3. Accordingly, the regulation addresses only what plans qualify as "employee benefit plans" under ERISA's Title I. Plans that cover only sole owners or partners and their spouses, the regulation instructs, fall outside Title I's domain,

Syllabus

while plans that cover working owners *and* their nonowner employees fall entirely within ERISA's compass. The Sixth Circuit's leading decision also mistakenly relied on ERISA's "anti-inurement" provision, 29 U. S. C. § 1103(c)(1), which states that plan assets shall not inure to the benefit of employers. Correctly read, that provision does not preclude Title I coverage of working owners as plan participants. It demands only that plan assets be held to supply benefits to plan participants. Its purpose is to apply the law of trusts to discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets, by employers and others. Those concerns are not implicated by paying benefits to working owners who participate on an equal basis with nonowner employees in ERISA-protected plans. This Court expresses no opinion as to whether Yates himself, in his handling of loan repayments, engaged in conduct inconsistent with the anti-inurement provision, an issue not yet reached by the courts below. Pp. 18–23.

(c) Given the undisputed fact that Yates failed to honor his loan's periodic repayment requirements, these questions should be addressed on remand: (1) Did the November 1996 close-to-bankruptcy repayments, despite the prior defaults, become a portion of Yates's interest in the Plan that is excluded from his bankruptcy estate and (2) if so, were the repayments beyond the reach of the Bankruptcy Trustee's power to avoid and recover preferential transfers? P. 24.

287 F. 3d 521, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. SCALIA, J., *post*, p. 24, and THOMAS, J., *post*, p. 25, each filed an opinion concurring in the judgment.

James A. Holifield, Jr., argued the cause and filed briefs for petitioners.

Matthew D. Roberts argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Deputy Solicitor General Kneedler*, *Howard M. Radzely*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Ellen L. Beard.*

C. Mark Troutman argued the cause for respondent. With him on the brief was *John A. Walker, Jr.**

**Mark E. Schmidtke* and *William J. Kayatta, Jr.*, filed a brief for UNUMProvident Corporation as *amicus curiae* urging reversal.

JUSTICE GINSBURG delivered the opinion of the Court.

This case presents a question on which federal courts have divided: Does the working owner of a business (here, the sole shareholder and president of a professional corporation) qualify as a "participant" in a pension plan covered by the Employee Retirement Income Security Act of 1974 (ERISA or Act), 88 Stat. 832, as amended, 29 U. S. C. § 1001 *et seq.* The answer, we hold, is yes: If the plan covers one or more employees other than the business owner and his or her spouse, the working owner may participate on equal terms with other plan participants. Such a working owner, in common with other employees, qualifies for the protections ERISA affords plan participants and is governed by the rights and remedies ERISA specifies. In so ruling, we reject the position, taken by the lower courts in this case, that a business owner may rank only as an "employer" and not also as an "employee" for purposes of ERISA-sheltered plan participation.

I

A

Enacted "to protect . . . the interests of participants in employee benefit plans and their beneficiaries," 29 U. S. C. § 1001(b), ERISA comprises four titles. Title I, 29 U. S. C. § 1001 *et seq.*, "requires administrators of all covered pension plans to file periodic reports with the Secretary of Labor, mandates minimum participation, vesting and funding schedules, establishes standards of fiduciary conduct for plan administrators, and provides for civil and criminal enforcement of the Act." *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 361, n. 1 (1980). Title II, codified in various parts of Title 26 of the United States Code, "amended various [Internal Revenue Code] provisions . . . pertaining to qualification of pension plans for special tax treatment, in order, among other things, to conform to the standards set forth in Title I." 446 U. S., at 361, n. 1. Title

III, 29 U. S. C. § 1201 *et seq.*, "contains provisions designed to coordinate enforcement efforts of different federal departments, and provides for further study of [benefit plans]." 446 U. S., at 361, n. 1. Title IV, 29 U. S. C. § 1301 *et seq.*, "created the Pension Benefit Guaranty Corporation (PBGC) and a termination insurance program to protect employees against the loss of 'nonforfeitable' benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full." 446 U. S., at 361–362, n. 1. See also *Mead Corp.* v. *Tilley*, 490 U. S. 714, 717 (1989); Brief for United States as *Amicus Curiae* 2.

This case concerns the definition and coverage provisions of Title I, though those provisions, indicating who may participate in an ERISA-sheltered plan, inform each of ERISA's four titles. Title I defines the term "employee benefit plan" to encompass "an employee welfare benefit plan or an employee pension benefit plan or a plan which is both . . . ." 29 U. S. C. § 1002(3). The same omnibus section defines "participant" as "any employee or former employee of an employer, . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . , or whose beneficiaries may be eligible to receive any such benefit." § 1002(7). "Employee," under Title I's definition section, means "any individual employed by an employer," § 1002(6), and "employer" includes "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan," § 1002(5).

B

Dr. Raymond B. Yates was the sole shareholder and president of Raymond B. Yates, M. D., P. C., a professional corporation. 287 F. 3d 521, 524 (CA6 2002); App. to Pet. for Cert. 10a. The corporation maintained the Raymond B. Yates, M. D., P. C. Profit Sharing Plan (Profit Sharing Plan or Plan), for which Yates was the administrator and trustee. *Ibid.*

From the Profit Sharing Plan's inception, at least one person other than Yates or his wife was a participant. *Ibid.;* App. 269a. The Profit Sharing Plan qualified for favorable tax treatment under § 401 of the Internal Revenue Code (IRC). 287 F. 3d, at 524; App. 71a–73a. As required by both the IRC, 26 U. S. C. § 401(a)(13), and Title I of ERISA, 29 U. S. C. § 1056(d), the Plan contained an antialienation provision. That provision, entitled "Spendthrift Clause," stated in relevant part: "Except for . . . loans to Participants as [expressly provided for in the Plan], no benefit or interest available hereunder will be subject to assignment or alienation, either voluntarily or involuntarily." App. 252a.

In December 1989, Yates borrowed $20,000 at 11 percent interest from the Raymond B. Yates, M. D., P. C. Money Purchase Pension Plan (Money Purchase Pension Plan), which later merged into the Profit Sharing Plan. *Id.*, at 268a–269a. The terms of the loan agreement required Yates to make monthly payments of $433.85 over the five-year period of the loan. *Id.*, at 269a. Yates failed to make any monthly payment. 287 F. 3d, at 524. In June 1992, coinciding with the Money Purchase Pension Plan-Profit Sharing Plan merger, Yates renewed the loan for five years. App. 269a. Again, he made no monthly payments. In fact, Yates repaid nothing until November 1996. 287 F. 3d, at 524. That month, he used the proceeds from the sale of his house to make two payments totaling $50,467.46, which paid off in full the principal and interest due on the loan. *Ibid.* Yates maintained that, after the repayment, his interest in the Profit Sharing Plan amounted to about $87,000. App. to Pet. for Cert. 39a.

Three weeks after Yates repaid the loan to the Profit Sharing Plan, on December 2, 1996, Yates's creditors filed an involuntary petition against him under Chapter 7 of the Bankruptcy Code. *Id.*, at 12a; accord App. 300a. In August 1998, respondent William T. Hendon, the Bankruptcy Trustee, filed a complaint, pursuant to 11 U. S. C. §§ 547(b)

and 550, against petitioners Profit Sharing Plan and Yates, in his capacity as the Plan's trustee. App. 1a–3a. Hendon asked the Bankruptcy Court to "avoi[d] the . . . preferential transfer by [Yates] to [the Profit Sharing Plan] in the amount of $50,467.46 and [to] orde[r] [the Plan and Yates, as trustee,] to pay over to the [bankruptcy] trustee the sum of $50,467.46, plus legal interest . . . , together with costs . . . ." *Id.*, at 3a. On cross-motions for summary judgment, the Bankruptcy Court ruled for Trustee Hendon. App. to Pet. for Cert. 36a–50a.

The Bankruptcy Court first determined that the loan repayment qualified as a preferential transfer under 11 U. S. C. § 547(b).[1] App. to Pet. for Cert. 41a–42a. That finding was not challenged on appeal. The Bankruptcy Court then held that the Profit Sharing Plan and Yates, as trustee, could not rely on the Plan's antialienation provision to prevent Hendon from recovering the loan repayment. As "a self-employed

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[1] Section 547(b) provides:

"Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

"(1) to or for the benefit of a creditor;

"(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

"(3) made while the debtor was insolvent;

"(4) made—

"(A) on or within 90 days before the date of the filing of the petition; or

"(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

"(5) that enables such creditor to receive more than such creditor would receive if—

"(A) the case were a case under chapter 7 of this title;

"(B) the transfer had not been made; and

"(C) such creditor received payment of such debt to the extent provided by the provisions of this title."

This provision permits the bankruptcy trustee to avoid certain transfers of "property that would have been part of the [bankruptcy] estate had it not been transferred before the commencement of bankruptcy proceedings." *Begier* v. *IRS*, 496 U. S. 53, 58 (1990).

owner of the professional corporation that sponsor[ed] the pension plan," the Bankruptcy Court stated, Yates could not "participate as an employee under ERISA and . . . [therefore could not] use its provisions to enforce the restriction on the transfer of his beneficial interest in the Defendant Plan." *Id.*, at 43a–44a. In so ruling, the Bankruptcy Court relied on Circuit precedent, including *SEC* v. *Johnston*, 143 F. 3d 260 (CA6 1998), and *Fugarino* v. *Hartford Life & Accident Ins. Co.*, 969 F. 2d 178 (CA6 1992).

The District Court affirmed the Bankruptcy Court's judgment. App. to Pet. for Cert. 9a–35a. Acknowledging that other Courts of Appeals had reached a different conclusion, *id.*, at 19a, the District Court observed that it was bound by Sixth Circuit precedent. According to the controlling Sixth Circuit decisions, neither a sole proprietor, *Fugarino*, 969 F. 2d, at 186, nor a sole owner of a corporation, *Agrawal* v. *Paul Revere Life Ins. Co.*, 205 F. 3d 297, 302 (2000), qualifies as a "participant" in an ERISA-sheltered employee benefit plan. App. to Pet. for Cert. 20a–21a. Applying Circuit precedent, the District Court concluded:

> "The fact Dr. Yates was not qualified to participate in an ERISA protected plan means none of the money he contributed to the Plan as an 'employee' was ever a part of an ERISA plan. The $50,467.46 he returned to the Plan was not protected by ERISA, because none of the money he had in the Plan was protected by ERISA." *Id.*, at 20a.

The Sixth Circuit affirmed the District Court's judgment. 287 F. 3d 521. The Court of Appeals adhered to its "published caselaw [holding] that 'a sole proprietor or sole shareholder of a business must be considered an employer and not an employee . . . for purposes of ERISA.' " *Id.*, at 525 (quoting *Fugarino*, 969 F. 2d, at 186). "[T]he spendthrift clause in the Yates profit sharing/pension plan," the appeals court accordingly ruled, "[was] not enforceable by Dr. Yates under

ERISA." 287 F. 3d, at 526. The Sixth Circuit's determination that Yates was not a "participant" in the Profit Sharing Plan for ERISA purposes obviated the question whether, had Yates qualified as such a participant, his loan repayment would have been shielded from the Bankruptcy Trustee's reach. See App. to Pet. for Cert. 46a–47a.

We granted certiorari, 539 U. S. 957 (2003), in view of the division of opinion among the Circuits on the question whether a working owner may qualify as a participant in an employee benefit plan covered by ERISA. Compare *Agrawal*, 205 F. 3d, at 302 (sole shareholder is not a participant in an ERISA-qualified plan); *Fugarino*, 969 F. 2d, at 186 (sole proprietor is not a participant); *Kwatcher* v. *Massachusetts Serv. Employees Pension Fund*, 879 F. 2d 957, 963 (CA1 1989) (sole shareholder is not a participant); *Giardono* v. *Jones*, 867 F. 2d 409, 411–412 (CA7 1989) (sole proprietor is not a participant); *Peckham* v. *Board of Trustees of Int'l Brotherhood of Painters and Allied Trades Union*, 653 F. 2d 424, 427–428 (CA10 1981) (sole proprietor is not a participant), with *Vega* v. *National Life Ins. Servs., Inc.*, 188 F. 3d 287, 294 (CA5 1999) (co-owner is a participant); *In re Baker*, 114 F. 3d 636, 639 (CA7 1997) (majority shareholder is a participant); *Madonia* v. *Blue Cross & Blue Shield of Virginia*, 11 F. 3d 444, 450 (CA4 1993) (sole shareholder is a participant).[2]

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[2] The Courts of Appeals are also divided on whether working owners may qualify as "beneficiaries" of ERISA-sheltered employee benefit plans. Compare 287 F. 3d 521, 525 (CA6 2002) (case below) (sole shareholder is not a beneficiary of an ERISA-qualified plan); *Agrawal*, 205 F. 3d, at 302 (sole shareholder is not a beneficiary), with *Gilbert* v. *Alta Health & Life Ins. Co.*, 276 F. 3d 1292, 1302 (CA11 2001) (sole shareholder is a beneficiary); *Wolk* v. *UNUM Life Ins. of Am.*, 186 F. 3d 352, 356 (CA3 1999) (partner is a beneficiary); *Prudential Ins. Co. of Am.* v. *Doe*, 76 F. 3d 206, 208 (CA8 1996) (controlling shareholder is a beneficiary); *Robinson* v. *Linomaz*, 58 F. 3d 365, 370 (CA8 1995) (co-owners are beneficiaries); *Peterson* v. *American Life & Health Ins. Co.*, 48 F. 3d 404, 409 (CA9 1995) (partner is a beneficiary). The United States, as *amicus curiae*, urges

II

A

ERISA's definitions of "employee," and, in turn, "participant," are uninformative. See *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 323 (1992) ("ERISA's nominal definition of 'employee' as 'any individual employed by an employer' is completely circular and explains nothing." (citation omitted)). We therefore look to other provisions of the Act for instruction. See *ibid.* ERISA's text contains multiple indications that Congress intended working owners to qualify as plan participants. Because these indications combine to provide "specific guidance," *ibid.*, there is no cause in this case to resort to common law.[3]

Congress enacted ERISA against a backdrop of IRC provisions that permitted corporate shareholders, partners, and sole proprietors to participate in tax-qualified pension plans. Brief for United States as *Amicus Curiae* 19–20. Working shareholders have been eligible to participate in such plans since 1942. See Revenue Act of 1942, ch. 619, § 165(a)(4), 56 Stat. 862 (a pension plan shall be tax exempt if, *inter alia*, "the contributions or benefits provided under the plan do not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated

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that treating working owners as "beneficiaries" of an ERISA-qualified plan is not an acceptable solution. Brief for United States as *Amicus Curiae* 9 (The beneficiary approach "has no logical stopping point, because it would allow a plan to cover anyone it chooses, including independent contractors excluded by [*Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318 (1992)]" and "fails to resolve participation questions for pension plans which, unlike welfare plans, tie coverage directly to service as an employee."); *id.*, at 24–25. This issue is not presented here, and we do not resolve it.

[3] Cf. *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318 (1992), and *Clackamas Gastroenterology Associates, P. C.* v. *Wells*, 538 U. S. 440 (2003) (finding textual clues absent, Court looked to common law for guidance).

employees"). Two decades later, still prior to ERISA's adoption, Congress permitted partners and sole proprietors to establish tax-favored pension plans, commonly known as "H. R. 10" or "Keogh" plans. Self-Employed Individuals Tax Retirement Act of 1962, 76 Stat. 809; Brief for United States as *Amicus Curiae* 19. Thus, by 1962, working owners of all kinds could contribute to tax-qualified retirement plans.

ERISA's enactment in 1974 did not change that situation.[4] Rather, Congress' objective was to harmonize ERISA with longstanding tax provisions. Title I of ERISA and related IRC provisions expressly contemplate the participation of working owners in covered benefit plans. *Id.*, at 14–16. Most notably, several Title I provisions partially exempt certain plans in which working owners likely participate from otherwise mandatory ERISA provisions. Exemptions of this order would be unnecessary if working owners could not qualify as participants in ERISA-protected plans in the first place.

To illustrate, Title I frees the following plans from the Act's fiduciary responsibility requirements:

> "(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or
>
> "(2) any agreement described in section 736 of [the IRC], which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest." 29 U. S. C. § 1101(a).

The IRC defines the term "highly compensated employee" to include "any employee who . . . was a 5-percent owner at any time during the year or the preceding year." 26 U. S. C.

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[4] A particular employee benefit plan may be covered by one title of ERISA, but not by another. See Brief for United States as *Amicus Curiae* 18, n. 9.

§ 414(q)(1)(A). A "5-percent owner," the IRC further specifies, is "any person who owns . . . more than 5 percent of the outstanding stock of the corporation or stock possessing more than 5 percent of the total combined voting power of all stock of the corporation" if the employer is a corporation, or "any person who owns more than 5 percent of the capital or profits interest in the employer" if the employer is not a corporation. § 416(i)(1)(B)(i). Under these definitions, some working owners would fit the description "highly compensated employees." Similarly, agreements that make payments to retired partners, or to deceased partners' successors in interest, surely involve plans in which working partners participate.

Title I also contains more limited exemptions from ERISA's fiduciary responsibility requirements. These exemptions, too, cover plans that ordinarily include working owners as participants. To illustrate, assets of an employee benefit plan typically must be held in trust. See 29 U. S. C. § 1103(a). That requirement, however, does not apply, *inter alia*, "to a plan . . . some or all of the participants of which are employees described in section 401(c)(1) of [the IRC]." § 1103(b)(3)(A). IRC § 401(c)(1)(A) defines an "employee" to include "a self-employed individual"; and IRC §§ 401(c)(1)(B) and (2)(A)(i), in turn, define "a self-employed individual" to cover an individual with "earned income" from "a trade or business in which personal services of the taxpayer are a material income-producing factor." This definition no doubt encompasses working sole proprietors and partners. 26 U. S. C. §§ 1402(a) and (c).

Title I also contains exemptions from ERISA's prohibited transaction provisions. Like the fiduciary responsibility exemptions, these exemptions indicate that working owners may participate in ERISA-qualified plans. For example, although Title I generally bars transactions between a plan and a party in interest, 29 U. S. C. § 1106, the Act permits, among other exceptions, loans to plan participants if certain

conditions are satisfied, § 1108(b)(1). One condition is that loans must not be "made available to highly compensated employees . . . in an amount greater than the amount made available to other employees." § 1108(b)(1)(B). As just observed, see *supra*, at 13–14, some working owners, including shareholder-employees, qualify as "highly compensated employees." Title I goes on to exclude "owner-employees," as defined in the IRC, from the participant loan exemption. § 1108(d)(1). Under the IRC's definition, owner-employees include partners "who ow[n] more than 10 percent of either the capital interest or the profits interest in [a] partnership" and sole proprietors, but not shareholder-employees. 26 U. S. C. § 401(c)(3). In sum, Title I's provisions involving loans to plan participants, by explicit inclusion or exclusion, assume that working owners—shareholder-employees, partners, and sole proprietors—may participate in ERISA-qualified benefit plans.

Provisions of Title IV of ERISA are corroborative. Brief for United States as *Amicus Curiae* 17, and n. 8. Title IV does not apply to plans "established and maintained *exclusively* for substantial owners," 29 U. S. C. § 1321(b)(9) (emphasis added), a category that includes sole proprietors and shareholders and partners with a ten percent or greater ownership interest, § 1322(b)(5)(A). But Title IV does cover plans in which substantial owners participate *along with* other employees. See § 1322(b)(5)(B). In addition, Title IV does not cover plans established by "professional service employer[s]" with 25 or fewer active participants. § 1321(b)(13). Yates's medical practice was set up as a professional service employer. See § 1321(c)(2)(A) (a "professional service employer" is "any proprietorship, partnership, corporation . . . owned or controlled by professional individuals . . . the principal business of which is the performance of professional services"). But significantly larger plans—plans covering more than 25 employees—established

by a professional service employer would presumably qualify for protection.

Particularly instructive, Title IV and the IRC, as amended by Title II, clarify a key point missed by several lower courts: Under ERISA, a working owner may have dual status, *i. e.*, he can be an employee entitled to participate in a plan and, at the same time, the employer (or owner or member of the employer) who established the plan. Both Title IV and the IRC describe the "employer" of a sole proprietor or partner. See 29 U. S. C. § 1301(b)(1) ("An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of [the IRC]."); 26 U. S. C. § 401(c)(4) ("An individual who owns the entire interest in an unincorporated trade or business shall be treated as his own employer. A partnership shall be treated as the employer of each partner who is an employee within the meaning of [§ 401(c)(1)]."). These descriptions expressly anticipate that a working owner can wear two hats, as an employer and employee. Cf. *Clackamas Gastroenterology Associates, P. C.* v. *Wells*, 538 U. S. 440, 453 (2003) (GINSBURG, J., dissenting) ("Clackamas readily acknowledges that the physician-shareholders are 'employees' for ERISA purposes.").

In sum, because the statute's text is adequately informative, we need not look outside ERISA itself to conclude with security that Congress intended working owners to qualify as plan participants.[5]

Congress' aim is advanced by our reading of the text. The working employer's opportunity personally to partici-

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[5] We do not suggest that each provision described *supra*, at 13–15 and this page, in isolation, would compel the Court's reading. But cf. *post*, at 25–26 (THOMAS, J., concurring in judgment). In combination, however, the provisions supply "specific guidance" adequate to obviate any need to expound on common law. See *Darden*, 503 U. S., at 323.

pate and gain ERISA coverage serves as an incentive to the creation of plans that will benefit employer and nonowner employees alike. See Brief for United States as *Amicus Curiae* 21–22. Treating working owners as participants not only furthers ERISA's purpose to promote and facilitate employee benefit plans. Recognizing the working owner as an ERISA-sheltered plan participant also avoids the anomaly that the same plan will be controlled by discrete regimes: federal-law governance for the nonowner employees; state-law governance for the working owner. See, *e. g., Agrawal*, 205 F. 3d, at 302 (because sole shareholder does not rank as a plan participant under ERISA, his state-law claims against insurer are not preempted). ERISA's goal, this Court has emphasized, is "uniform national treatment of pension benefits." *Patterson* v. *Shumate*, 504 U. S. 753, 765 (1992). Excepting working owners from the federal Act's coverage would generate administrative difficulties and is hardly consistent with a national uniformity goal. Cf. *Madonia*, 11 F. 3d, at 450 ("Disallowing shareholders . . . from being plan 'participants' would result in disparate treatment of corporate employees' claims, thereby frustrating the statutory purpose of ensuring similar treatment for all claims relating to employee benefit plans.").

We note finally that a 1999 Department of Labor advisory opinion accords with our comprehension of Title I's definition and coverage provisions. Pension and Welfare Benefits Admin., U. S. Dept. of Labor, Advisory Opinion 99–04A, 26 BNA Pension and Benefits Rep. 559 (hereinafter Advisory Opinion 99–04A). Confirming that working owners may qualify as participants in ERISA-protected plans, the Department's opinion concludes:

> "In our view, the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include 'working owners' within the definition of 'participant' for purposes of Title I of ERISA. Congress could not have intended that a pension plan operated so as to

> satisfy the complex tax qualification rules applicable to benefits provided to 'owner-employees' under the provisions of Title II of ERISA, and with respect to which an employer faithfully makes the premium payments required to protect the benefits payable under the plan to such individuals under Title IV of ERISA, would somehow transgress against the limitations of the definitions contained in Title I of ERISA. Such a result would cause an intolerable conflict between the separate titles of ERISA, leading to the sort of 'absurd results' that the Supreme Court warned against in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U. S. 318 (1992)." *Id.*, at 560–561 (footnote omitted).

This agency view on the qualification of a self-employed individual for plan participation reflects a "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

B

The Sixth Circuit's leading decision in point—its 1992 determination in *Fugarino*—relied, in large part, on an incorrect reading of a Department of Labor regulation, 29 CFR § 2510.3–3. The *Fugarino* court read the Department's regulation to rule out classification of a working owner as an employee of the business he owns. Entitled "Employee benefit plan," the regulation complements § 3(3) of ERISA, 29 U. S. C. § 1002(3), which defines "employee benefit plan," see *supra*, at 7; the regulation provides, in relevant part:

> "(b) Plans without employees. For purposes of title I of the Act and this chapter, the term 'employee benefit plan' shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called 'Keogh' or 'H. R. 10' plan under

> which only partners or only a sole proprietor are participants covered under the plan will not be covered under title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I. . . .
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> "(c) Employees. *For purposes of this section:*
>
> "(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and
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> "(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership." 29 CFR § 2510.3–3 (2003) (emphasis added and deleted).

In common with other Courts of Appeals that have held working owners do not qualify as participants in ERISA-governed employee benefit plans, the Sixth Circuit apparently understood the regulation to provide a generally applicable definition of the term "employee," controlling for all Title I purposes. *Fugarino*, 969 F. 2d, at 185–186 ("As a result of [the] regulatio[n], a plan whose sole beneficiaries are the company's owners cannot qualify as a plan under ERISA. Further, an employer cannot ordinarily be an employee or participant under ERISA." (citation omitted)). See also *Kwatcher*, 879 F. 2d, at 961 ("By its terms, the regulation unambiguously debars a sole shareholder . . . from 'employee' status, notwithstanding that he may work for the corporation he owns, shoulder to shoulder with eligible (non-owner) employees."); *Giardono*, 867 F. 2d, at 412 ("[This] regulatio[n] exclude[s] from the definition of an employee any individual who wholly owns a trade or business, whether incorporated or unincorporated.").

Almost eight years after its decision in *Fugarino,* in *Agrawal,* the Sixth Circuit implied that it may have misread the regulation: "Th[e] limiting definition of employee [in § 2510.3–3(c)] addresses the threshold issue of whether an ERISA plan exists. It is not consistent with the purpose of ERISA to apply this limiting definition of employee to the statutory definitions of participant and beneficiary." 205 F. 3d, at 303. The Circuit, however, did not overrule its earlier interpretation. See 287 F. 3d, at 525 (case below) ("[T]he three judge panel before which this appeal is currently pending has no authority to overrule *Fugarino.*"); *Agrawal,* 205 F. 3d, at 302 ("the decision in the present case is preordained by the *Fugarino* holding").

The Department of Labor's 1999 advisory opinion, see *supra,* at 17, interprets the "Employee benefit plan" regulation as follows:

> "In its regulation at 29 C. F. R. 2510.3–3, the Department clarified that the term 'employee benefit plan' as defined in section 3(3) of Title I does not include a plan the only participants of which are '[a]n individual and his or her spouse . . . with respect to a trade of business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse' or '[a] partner in a partnership and his or her spouse.' The regulation further specifies, however, that a plan that covers as participants 'one or more common law employees, in addition to the self-employed individuals' will be included in the definition of 'employee benefit plan' under section 3(3). *The conclusion of this opinion, that such 'self-employed individuals' are themselves 'participants' in the covered plan, is fully consistent with that regulation.*" Advisory Opinion 99–04A, at 561, n. 7 (emphasis added).

This agency view, overlooked by the Sixth Circuit, see Brief for United States as *Amicus Curiae* 26, merits the Judicia-

ry's respectful consideration. Cf. *Clackamas Gastroenterology Associates, P. C.*, 538 U. S., at 449 (Equal Employment Opportunity Commission guidelines under the Americans with Disabilities Act of 1990 are persuasive).

The Department's regulation itself reveals the definitional prescription's limited scope. The prescription describes "employees" only "[f]or purposes of this section," *supra*, at 19 (emphasis deleted), *i. e.*, the section defining "employee benefit plans." Accordingly, the regulation addresses only what plans qualify as "employee benefit plans" under Title I of ERISA. Plans that cover only sole owners or partners and their spouses, the regulation instructs, fall outside Title I's domain.[6] Plans covering working owners *and* their nonowner employees, on the other hand, fall entirely within ERISA's compass.[7] See *Vega*, 188 F. 3d, at 294 ("We . . . interpret the regulatio[n] to define employee only for purposes of determining the existence of an ERISA plan."); *Ma-*

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[6] Courts agree that if a benefit plan covers only working owners, it is not covered by Title I. See, *e. g.*, *Slamen* v. *Paul Revere Life Ins. Co.*, 166 F. 3d 1102, 1105 (CA11 1999) (sole shareholder is not a participant where disability plan covered only him); *In re Watson*, 161 F. 3d 593, 597 (CA9 1998) (sole shareholder is not a participant where retirement plan covered only him); *SEC* v. *Johnston*, 143 F. 3d 260, 262–263 (CA6 1998) (owner is not a participant where pension plan covered only owner and "perhaps" his wife); *Schwartz* v. *Gordon*, 761 F. 2d 864, 867 (CA2 1985) (self-employed individual is not a participant where he is the only contributor to a Keogh plan). Such a plan, however, could qualify for favorable tax treatment. See Brief for United States as *Amicus Curiae* 18, n. 9.

[7] Section 2510.3–3's preamble supports this interpretation. The preamble states, in relevant part:

"According to the comments [concerning proposed § 2510.3–3], a definition of 'employee' excluding self-employed individuals might raise problems under section 404(a)(1) with respect to disbursements to self-employed individuals from 'Keogh' or 'H. R. 10' plans covering both self-employed individuals and 'common law' employees. *Therefore, the definition of 'employee' formerly appearing in proposed § 2510.3–6 has been inserted into § 2510.3–3 and restricted in scope to that section.*" 40 Fed. Reg. 34528 (1975) (emphasis added).

donia, 11 F. 3d, at 449–450 ("[T]he regulation does not govern the issue of whether someone is a 'participant' in an ERISA plan, once the existence of that plan has been established. This makes perfect sense: once a plan has been established, it would be anomalous to have those persons benefitting from it governed by two disparate sets of legal obligations.").

Also in common with other Courts of Appeals that have denied participant status to working owners, the Sixth Circuit's leading decision mistakenly relied, in addition, on ERISA's "anti-inurement" provision, 29 U. S. C. § 1103(c)(1), which prohibits plan assets from inuring to the benefit of employers. See *Fugarino,* 969 F. 2d, at 186 ("A fundamental requirement of ERISA is that 'the assets of a plan shall never inure to the benefit of any employer . . . .' "); *Kwatcher,* 879 F. 2d, at 960 ("Once a person has been found to fit within the 'employer' integument, [§ 1103(c)(1)] prohibits payments to him from a qualified plan."); *Giardono,* 867 F. 2d, at 411 ("It is a fundamental requirement of ERISA that '. . . the assets of a plan shall never inure to the benefit of any employer . . . .' ").

Correctly read, however, the anti-inurement provision does not preclude Title I coverage of working owners as plan participants. It states that, with enumerated exceptions, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U. S. C. § 1103(c)(1). The provision demands only that plan assets be held for supplying benefits to plan participants. Like the Department of Labor regulation, see *supra,* at 18–19, the anti-inurement provision does not address the discrete question whether working owners, along with non-owner employees, may be participants in ERISA-sheltered plans. As the Fifth Circuit observed in *Vega:*

> "Th[e] [anti-inurement] provision refers to the congressional determination that funds contributed by the employer (and, obviously, by the [nonowner] employees . . .) must never revert to the employer; it does not relate to plan benefits being paid with funds or assets of the plan to cover a legitimate pension or health benefit claim by an employee who happens to be a stockholder or even the sole shareholder of a corporation." 188 F. 3d, at 293, n. 5.

ERISA's anti-inurement provision is based on the analogous exclusive benefit provision in the IRC, 26 U. S. C. § 401(a)(2), which has never been understood to bar tax-qualified plan participation by working owners. See H. R. Conf. Rep. No. 93–1280, pp. 302–303 (1974); Brief for United States as *Amicus Curiae* 29. The purpose of the anti-inurement provision, in common with ERISA's other fiduciary responsibility provisions, is to apply the law of trusts to discourage abuses such as self-dealing, imprudent investment, and misappropriation of plan assets, by employers and others. See, *e. g.*, *Prudential Ins. Co. of Am.* v. *Doe,* 76 F. 3d 206, 209 (CA8 1996). Those concerns are not implicated by paying benefits to working owners who participate on an equal basis with nonowner employees in ERISA-protected plans.

In sum, the anti-inurement provision, like the Department of Labor regulation, establishes no categorical barrier to working owner participation in ERISA plans. Whether Yates himself, in his handling of loan repayments, see *supra*, at 8, engaged in conduct inconsistent with the anti-inurement provision is an issue not yet reached by the courts below, one on which we express no opinion.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion,

including consideration of questions earlier raised but not resolved. Specifically, given the undisputed facts concerning Yates's handling of the loan, *i.e.*, his failure to honor the periodic repayment requirements: (1) Did the November 1996 close-to-bankruptcy repayments, despite the prior defaults, become "a portion of [Yates's] interest in a qualified retirement plan . . . excluded from his bankruptcy estate," App. to Pet. for Cert. 40a; and (2) if so, were the repayments "beyond the reach of [the Bankruptcy] [T]rustee's power to avoid and recover preferential transfers," *id.*, at 47a?

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

The Court uses a sledgehammer to kill a gnat—though it may be a sledgehammer prescribed by *United States* v. *Mead Corp.*, 533 U. S. 218 (2001). I dissented from that case, see *id.*, at 257, and remain of the view that authoritative interpretations of law by the implementing agency, if reasonable, are entitled to respect. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

In the present case the Solicitor General of the United States, in a brief signed by the Acting Solicitor of Labor, has put forward as the "considered view of the agency charged by Congress with the administration and enforcement of Title I of ERISA," an interpretation of the relevant terms of that Act which would allow working owners (including sole owners, such as Dr. Yates) to be plan participants under the Employee Retirement Income Security Act of 1974 (ERISA). Brief for United States as *Amicus Curiae* 26. There is no doubt that this position is the official view of the Department of Labor, and that it has not been contrived for this litigation. The Solicitor General's brief relies upon a Department of Labor advisory opinion, issued more than five years ago, which concluded that "the statutory provisions of ERISA, taken as a whole, reveal a clear Congressional design to include 'working owners' within the definition of 'par-

ticipant' for purposes of Title I of ERISA." Pension and Welfare Benefits Admin., U. S. Dept. of Labor, Advisory Opinion 99–04A (Feb. 4, 1999), 26 BNA Pension and Benefits Rep. 559, 560 (1999).

The Department's interpretive conclusion is certainly reasonable (the Court's lengthy analysis says that it is inevitable); it is therefore binding upon us. See *Barnhart* v. *Thomas*, 540 U. S. 20, 26 (2003). I would reverse the judgment of the Sixth Circuit on that basis. The Court's approach, which denies many agency interpretations their conclusive effect and thrusts the courts into authoritative judicial interpretation, deprives administrative agencies of two of their principal virtues: (1) the power to resolve statutory questions promptly, and with nationwide effect, and (2) the power (within the reasonable bounds of the text) to change the application of ambiguous laws as time and experience dictate. The Court's approach invites lengthy litigation in all the circuits—the product of which (when finally announced by this Court) is a rule of law that only Congress can change.

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that the judgment of the Court of Appeals should be reversed. The Court persuasively addresses the Court of Appeals' many errors in this case. See *ante*, at 18–23. I do not, however, find convincing the Court's reliance on textual "indications," *ante*, at 12. The text of the Employee Retirement Income Security Act of 1974 (ERISA) is certainly consistent with the Court's interpretation of the word "employee" to include so-called "working owners."* *Ibid.* However, the various Title I exemptions relied upon so heavily by the Court, see *ante*, at 13–15,

*The Court does not clearly define who exactly makes up this class of "working owners," even though members of this class are now considered categorically to fall under ERISA's definition of "employee."

are equally consistent with an interpretation of "employee" that would not include all "working owners."

As an example, the Court places weight on the exception to the exemption from 29 U. S. C. § 1106, which bars loans made to parties in interest that are "'made available to highly compensated employees . . . in an amount greater than the amount made available to other employees.'" *Ante*, at 15 (quoting 29 U. S. C. § 1108(b)(1)(B)). The Court notes that "some working owners . . . qualify as 'highly compensated employees.'" *Ante*, at 15. That may be true, but there are surely numerous "highly compensated employees" who would both be "employees" under the usual, common-law meaning of that term (and hence "employees" under ERISA, see *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318 (1992)), and would also not be considered "working owners" as the Court uses the term. It is entirely possible, then, that Congress was merely attempting to exclude these individuals from § 1106, rather than assuming that all "working owners" were "employees." Hence, the existence of this exception tells us nothing about whether Congress "intended working owners" to be "employees" under ERISA. *Ante*, at 12.

Since the text is inconclusive, we must turn to the common-law understanding of the term "employee." *Darden*, *supra*, at 322–323. On remand, then, I would direct the Court of Appeals to address whether the common-law understanding of the term "employee," as used in ERISA, includes Dr. Yates. I would be surprised if it did not, see *In re Baker*, 114 F. 3d 636, 639 (CA7 1997) (corporation's separate legal existence from shareholder must be respected); *Madonia* v. *Blue Cross & Blue Shield of Virginia*, 11 F. 3d 444, 448–449 (CA4 1993) (same), but this is a matter best resolved, in the first instance, by the court below.

Syllabus

BALDWIN *v.* REESE

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

No. 02–964. Argued December 8, 2003—Decided March 2, 2004

Before seeking federal habeas relief, a state prisoner must exhaust available state remedies, 28 U. S. C. § 2254(b)(1), giving the State the "'opportunity to . . . correct' alleged violations of its prisoners' federal rights," *Duncan* v. *Henry*, 513 U. S. 364, 365, which means he must "fairly present" his claim in each appropriate state court to alert that court to the claim's federal nature. After respondent Reese appealed his state convictions and sentences and the lower state courts denied him collateral relief, the Oregon Supreme Court denied him discretionary review. His subsequent federal habeas petition raised, *inter alia*, a federal constitutional ineffective-assistance-of-appellate-counsel claim. The Federal District Court held that Reese had not "fairly presented" this claim to the state courts because his state appeals court brief had not indicated that he was complaining about a *federal* law violation. The Ninth Circuit reversed, finding the "fair presentation" requirement satisfied because the State Supreme Court justices had had the *opportunity* to read the lower court decision before deciding whether to grant discretionary review. And, had they read that opinion, they would have, or should have, realized that his claim rested upon federal law.

Held: A state prisoner ordinarily does not "fairly present" a federal claim to a state court if that court must read beyond a petition, a brief, or similar papers to find material that will alert it to the presence of such a claim. Pp. 30–34.

(a) Assuming that Reese's petition by itself did not properly alert the State Supreme Court to the federal nature of his claim, Reese failed to meet the "fair presentation" standard. To say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading the lower court opinions is to say that those judges *must* read those opinions—for otherwise they would forfeit the State's opportunity to decide the claim in the first instance. Federal habeas law does not impose such a requirement. That requirement would force state appellate judges to alter their ordinary review practices, since they do not necessarily read lower court opinions in every case. And it would impose a serious burden upon those judges with discretionary review powers, whose heavy workloads would be significantly increased if they had to read through lower court opinions or briefs in every instance. Finally, the requirement is unnecessary to

avoid imposing unreasonable procedural burdens upon state prisoners who may eventually seek federal habeas. A litigant can easily indicate his claim's federal law basis in a petition or brief, for example, by citing to the federal source of law on which he relies or simply labeling the claim "federal." Pp. 30–32.

(b) This Court is not wrong to assume that Reese's petition *by itself* failed to alert the State Supreme Court to his claim's federal nature. He must concede that his petition does not explicitly say that "ineffective assistance of appellate counsel" refers to a federal claim, cite any case that might have alerted the court to his claim's alleged federal nature, or even contain a factual description supporting his claim. Reese asserts that the petition nonetheless "fairly presents" a federal "ineffective assistance" claim because (1) "ineffective" is a term of art in Oregon that refers only to federal law claims, and (2) the state-law standards for adjudicating state and federal "inadequate/ineffective appellate assistance" claims are identical. This Court rejects his first argument because he has not demonstrated that state law uses "ineffective assistance" as referring only to a federal-law, rather than a similar state-law, claim. However, Reese's second argument was not addressed by, or presented to, the Ninth Circuit, and first appeared here in Reese's merits brief. Because the issue is complex and lower court consideration would help in its resolution, the Court, without expressing any view on the issue's merits, exercises its Rule 15.2 discretion and deems the argument waived. Pp. 32–34.

282 F. 3d 1184, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 34.

Hardy Myers, Attorney General of Oregon, argued the cause for petitioner. With him on the briefs were *Peter Shepherd*, Deputy Attorney General, *Mary H. Williams*, Solicitor General, and *Janet A. Klapstein* and *Robert B. Rocklin*, Assistant Attorneys General.

Dennis N. Balske, by appointment of the Court, 540 U. S. 806, argued the cause for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Stephen R. Carter*, Attorney General of Indiana, and *Gary Damon Secrest*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama,

JUSTICE BREYER delivered the opinion of the Court.

Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U. S. C. § 2254(b)(1), thereby giving the State the "'"opportunity to pass upon and correct" alleged violations of its prisoners' federal rights.'" *Duncan* v. *Henry*, 513 U. S. 364, 365 (1995) *(per curiam)* (quoting *Picard* v. *Connor*, 404 U. S. 270, 275 (1971)). To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim. *Duncan*, *supra*, at 365–366; *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 845 (1999). This case focuses upon the requirement of "fair presentation."

I

Michael Reese, the respondent, appealed his state-court kidnaping and attempted sodomy convictions and sentences through Oregon's state court system. He then brought collateral relief proceedings in the state courts (where he was represented by appointed counsel). After the lower courts denied him collateral relief, Reese filed a petition for discretionary review in the Oregon Supreme Court.

The petition made several different legal claims. In relevant part, the petition asserted that Reese had received "ineffective assistance of both trial court and appellate court counsel." App. 47. The petition added that "his imprison-

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Bill Lockyer of California, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *G. Steven Rowe* of Maine, *Mike McGrath* of Montana, *Matt McNair* of Nebraska, *Brian Sandoval* of Nevada, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Patrick J. Crank* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

ment is in violation of [Oregon state law]." *Id.*, at 48. It said that his *trial* counsel's conduct violated several provisions of the *Federal* Constitution. *Ibid.* But it did not say that his separate *appellate* "ineffective assistance" claim violated *federal* law. The Oregon Supreme Court denied review.

Reese ultimately sought a federal writ of habeas corpus, raising, among other claims, a federal constitutional claim that his *appellate* counsel did not effectively represent him during one of his direct state-court appeals. The Federal District Court held that Reese had not "fairly presented" his federal "ineffective assistance of appellate counsel" claim to the higher state courts because his brief in the state appeals court had not indicated that he was complaining about a violation of *federal* law.

A divided panel of the Ninth Circuit reversed the District Court. 282 F. 3d 1184 (2002). Although the majority apparently believed that Reese's petition itself did not alert the Oregon Supreme Court to the federal nature of the appellate "ineffective assistance" claim, it did not find that fact determinative. *Id.*, at 1193–1194. Rather, it found that Reese had satisfied the "fair presentation" requirement because the justices of the Oregon Supreme Court had had "the *opportunity* to read . . . the lower [Oregon] court decision claimed to be in error before deciding whether to grant discretionary review." *Id.*, at 1194 (emphasis added). *Had they read the opinion of the lower state trial court*, the majority added, the justices would have, or should have, realized that Reese's claim rested upon federal law. *Ibid.*

We granted certiorari to determine whether the Ninth Circuit has correctly interpreted the "fair presentation" requirement.

II

We begin by assuming that Reese's petition by itself did not properly alert the Oregon Supreme Court to the federal nature of Reese's claim. On that assumption, Reese failed

to meet the "fair presentation" standard, and the Ninth Circuit was wrong to hold the contrary.

We recognize that the justices of the Oregon Supreme Court did have an "opportunity" to read the lower court opinions in Reese's case. That opportunity means that the judges *could have* read them. But to say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that those judges *must* read the lower court opinions—for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance. In our view, federal habeas corpus law does not impose such a requirement.

For one thing, the requirement would force state appellate judges to alter their ordinary review practices. Appellate judges, of course, will often read lower court opinions, but they do not necessarily do so in every case. Sometimes an appellate court can decide a legal question on the basis of the briefs alone. That is particularly so where the question at issue is whether to exercise a discretionary power of review, *i. e.,* whether to review the merits of a lower court decision. In such instances, the nature of the issue may matter more than does the legal validity of the lower court decision. And the nature of the issue alone may lead the court to decide not to hear the case. Indeed, the Oregon Supreme Court is a court with a discretionary power of review. And Oregon Rule of Appellate Procedure 9.05(7) (2003) instructs litigants seeking discretionary review to identify clearly in the petition itself the legal questions presented, why those questions have special importance, a short statement of relevant facts, and the reasons for reversal, "including appropriate authorities."

For another thing, the opinion-reading requirement would impose a serious burden upon judges of state appellate courts, particularly those with discretionary review powers. Those courts have heavy workloads, which would be signifi-

cantly increased if their judges had to read through lower court opinions or briefs in every instance. See National Center for State Courts, State Court Caseload Statistics 2002, pp. 106–110 (Table 2) (for example, in 2001, Oregon appellate courts received a total of 5,341 appeals, including 908 petitions for discretionary review to its Supreme Court; California appellate courts received 32,273, including 8,860 discretionary Supreme Court petitions; Louisiana appellate courts received 13,117, including 3,230 discretionary Supreme Court petitions; Illinois appellate courts received 12,411, including 2,325 discretionary Supreme Court petitions).

Finally, we do not find such a requirement necessary to avoid imposing unreasonable procedural burdens upon state prisoners who may eventually seek habeas corpus. A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

For these reasons, we believe that the requirement imposed by the Ninth Circuit would unjustifiably undercut the considerations of federal-state comity that the exhaustion requirement seeks to promote. We consequently hold that ordinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.

III

Reese argues in the alternative that it is wrong to assume that his petition *by itself* failed to alert the Oregon Supreme Court to the federal nature of his "ineffective assistance of appellate counsel" claim. We do not agree.

Reese must concede that his petition does not explicitly say that the words "ineffective assistance of appellate counsel" refer to a federal claim. The petition refers to provisions of the Federal Constitution in respect to *other* claims but not in respect to this one. The petition provides no citation of any case that might have alerted the court to the alleged federal nature of the claim. And the petition does not even contain a factual description supporting the claim. Cf. *Gray* v. *Netherland*, 518 U. S. 152, 163 (1996); *Duncan*, 513 U. S., at 366.

Reese asserts that the petition nonetheless "fairly presents" a federal "ineffective assistance of appellate counsel" claim for two reasons. First, he says that the word "ineffective" is a term of art in Oregon that refers only to federal-law claims and not to similar state-law claims, which, he adds, in Oregon are solely referred to as "*inadequate* assistance" claims. And thus the Oregon Supreme Court should have known, from his use of the word "ineffective," that his claim was federal.

Reese, however, has not demonstrated that Oregon law uses the words "ineffective assistance" in the manner he suggests, that is, as referring only to a federal-law claim. See, *e. g.*, *Lichau* v. *Baldwin*, 166 Ore. App. 411, 415, 417, 999 P. 2d 1207, 1210, 1211 (2000) (using "*ineffective* assistance" to refer to violations of the Oregon Constitution), rev'd in part, 333 Ore. 350, 39 P. 3d 851 (2002). Indeed, Reese's own petition uses both phrases—"ineffective assistance" and "inadequate assistance"—at different points to refer to what is apparently a single claim.

Second, Reese says that in Oregon the standards for adjudicating state and federal "inadequate/ineffective appellate assistance" claims are identical. He adds that, where that identity exists, a petitioner need not indicate a claim's federal nature, because, by raising a state-law claim, he would necessarily "fairly present" the corresponding federal claim.

However, the Ninth Circuit did not address this argument, and our reading of the briefs filed in the Ninth Circuit leads us to conclude that Reese did not there seek consideration of the argument in that court. Indeed, the argument first made its appearance in this Court in Reese's brief on the merits. Under this Court's Rule 15.2, "a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived." *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75, n. 13 (1996) (internal quotation marks omitted). This argument falls squarely within the rule. The complex nature of Reese's claim and its broad implications suggest that its consideration by the lower courts would help in its resolution. Hence, without expressing any view on the merits of the issue, we exercise our Rule 15.2 discretion and deem the argument waived in this Court. See, *e. g.*, *Roberts* v. *Galen of Va., Inc.*, 525 U. S. 249, 253–254 (1999) *(per curiam); South Central Bell Telephone Co.* v. *Alabama*, 526 U. S. 160, 171 (1999); cf. *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 56, n. 4 (2002).

For these reasons, the judgment of the Ninth Circuit is

Reversed.

JUSTICE STEVENS, dissenting.

It is appropriate to disregard this Court's Rule 15.2 and permit respondents to defend a judgment on grounds not raised in the brief in opposition when the omitted issue is "predicate to an intelligent resolution of the question presented." *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted). I would do so in this case. Respondent satisfactorily demonstrates that there is no significant difference between an ineffective-assistance-of-appellate-counsel claim predicated on the Oregon Constitution and one based on federal law. Brief for Respondent 29–35; see also *Guinn* v. *Cupp*, 304 Ore. 488, 495–496, 747 P. 2d 984, 988–989 (1988) (in banc). It is therefore clear that

the state courts did have a fair opportunity to assess respondent's federal claim. Accordingly, I would affirm the judgment of the Court of Appeals.

Syllabus

CRAWFORD *v.* WASHINGTON

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 02–9410. Argued November 10, 2003—Decided March 8, 2004

Petitioner was tried for assault and attempted murder. The State sought to introduce a recorded statement that petitioner's wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense. Sylvia did not testify at trial because of Washington's marital privilege. Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be "confronted with the witnesses against him." Under *Ohio* v. *Roberts*, 448 U. S. 56, that right does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability,'" a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Id.*, at 66. The trial court admitted the statement on the latter ground. The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, *i. e.*, interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.

Held: The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. Pp. 42–69.

(a) The Confrontation Clause's text does not alone resolve this case, so this Court turns to the Clause's historical background. That history supports two principles. First, the principal evil at which the Clause was directed was the civil-law mode of criminal procedure, particularly the use of *ex parte* examinations as evidence against the accused. The Clause's primary object is testimonial hearsay, and interrogations by law enforcement officers fall squarely within that class. Second, the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination. English authorities and early state cases indicate that this was the common law at the time of the founding. And the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the common-law right of confrontation, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States*, 156 U. S. 237, 243. Pp. 42–56.

Syllabus

(b) This Court's decisions have generally remained faithful to the Confrontation Clause's original meaning. See, *e. g.*, *Mattox*, *supra.* Pp. 57–59.

(c) However, the same cannot be said of the rationales of this Court's more recent decisions. See *Roberts*, *supra*, at 66. The *Roberts* test departs from historical principles because it admits statements consisting of *ex parte* testimony upon a mere reliability finding. Pp. 60–61.

(d) The Confrontation Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Roberts* allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability, thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one. Pp. 61–62.

(e) *Roberts*' framework is unpredictable. Whether a statement is deemed reliable depends on which factors a judge considers and how much weight he accords each of them. However, the unpardonable vice of the *Roberts* test is its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Pp. 62–65.

(f) The instant case is a self-contained demonstration of *Roberts*' unpredictable and inconsistent application. It also reveals *Roberts'* failure to interpret the Constitution in a way that secures its intended constraint on judicial discretion. The Constitution prescribes the procedure for determining the reliability of testimony in criminal trials, and this Court, no less than the state courts, lacks authority to replace it with one of its own devising. Pp. 65–68.

147 Wash. 2d 424, 54 P. 3d 656, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post,* p. 69.

Jeffrey L. Fisher, by appointment of the Court, 540 U. S. 807, argued the cause for petitioner. With him on the briefs was *Bruce E. H. Johnson.*

Steven C. Sherman argued the cause for respondent. With him on the brief was *John Michael Jones.*

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Olson*, *Acting*

Assistant Attorney General Wray, Sri Srinivasan, and *Joel M. Gershowitz.**

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

I

On August 5, 1999, Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife *Miranda* warnings, detectives interrogated each of them twice. Petitioner eventually confessed that he and Sylvia had gone in search of Lee because he was upset over an earlier incident in which Lee had tried to rape her. The two had found Lee at his apartment, and a fight ensued in which Lee was stabbed in the torso and petitioner's hand was cut.

Petitioner gave the following account of the fight:

> "Q. Okay. Did you ever see anything in [Lee's] hands?
>
> "A. I think so, but I'm not positive.
>
> "Q. Okay, when you think so, what do you mean by that?
>
> "A. I could a swore I seen him goin' for somethin' before, right before everything happened. He was like

*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers et al. by *Jeffrey T. Green*, *David M. Porter*, and *Steven R. Shapiro;* and for Sherman J. Clark et al. by *Richard D. Friedman* and *David A. Moran.*

> reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later." App. 155 (punctuation added).

Sylvia generally corroborated petitioner's story about the events leading up to the fight, but her account of the fight itself was arguably different—particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him:

> "Q. Did Kenny do anything to fight back from this assault?
>
> "A. (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.
>
> "Q. After he was stabbed?
>
> "A. He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).
>
> "Q. Okay, you, you gotta speak up.
>
> "A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).
>
> "Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?
>
> "A. Yeah, after, after the fact, yes.
>
> "Q. Did you see anything in his hands at that point?

"A. (pausing) um um (no)." *Id.*, at 137 (punctuation added).

The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. See Wash. Rev. Code § 5.60.060(1) (1994). In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, see *State* v. *Burden*, 120 Wash. 2d 371, 377, 841 P. 2d 758, 761 (1992), so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest, Wash. Rule Evid. 804(b)(3) (2003).

Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be "confronted with the witnesses against him." Amdt. 6. According to our description of that right in *Ohio* v. *Roberts*, 448 U. S. 56 (1980), it does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability.'" *Id.*, at 66. To meet that test, evidence must either fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Ibid.* The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or "justified reprisal"; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a "neutral" law enforcement officer. App. 76–77. The prosecution played the tape for the jury and relied on it in closing, arguing that it was "damning evidence" that "completely

refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). The jury convicted petitioner of assault.

The Washington Court of Appeals reversed. It applied a nine-factor test to determine whether Sylvia's statement bore particularized guarantees of trustworthiness, and noted several reasons why it did not: The statement contradicted one she had previously given; it was made in response to specific questions; and at one point she admitted she had shut her eyes during the stabbing. The court considered and rejected the State's argument that Sylvia's statement was reliable because it coincided with petitioner's to such a degree that the two "interlocked." The court determined that, although the two statements agreed about the events leading up to the stabbing, they differed on the issue crucial to petitioner's self-defense claim: "[Petitioner's] version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia's version has Lee grabbing for something only after he has been stabbed." App. 32.

The Washington Supreme Court reinstated the conviction, unanimously concluding that, although Sylvia's statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness: "'[W]hen a codefendant's confession is virtually identical [to, *i. e.*, interlocks with,] that of a defendant, it may be deemed reliable.'" 147 Wash. 2d 424, 437, 54 P. 3d 656, 663 (2002) (quoting *State* v. *Rice*, 120 Wash. 2d 549, 570, 844 P. 2d 416, 427 (1993)). The court explained:

> "Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap. . . .
>
> "[B]oth of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap. . . .

> "[N]either Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." 147 Wash. 2d, at 438–439, 54 P. 3d, at 664 (internal quotation marks omitted).[1]

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause. 539 U. S. 914 (2003).

II

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. *Pointer* v. *Texas*, 380 U. S. 400, 406 (1965). As noted above, *Roberts* says that an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability—*i. e.*, falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U. S., at 66. Petitioner argues that this test strays from the original meaning of the Confrontation Clause and urges us to reconsider it.

A

The Constitution's text does not alone resolve this case. One could plausibly read "witnesses against" a defendant to

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[1] The court rejected the State's argument that guarantees of trustworthiness were unnecessary since petitioner waived his confrontation rights by invoking the marital privilege. It reasoned that "forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice." 147 Wash. 2d, at 432, 54 P. 3d, at 660. The State has not challenged this holding here. The State also has not challenged the Court of Appeals' conclusion (not reached by the State Supreme Court) that the confrontation violation, if it occurred, was not harmless. We express no opinion on these matters.

mean those who actually testify at trial, cf. *Woodsides* v. *State*, 3 Miss. 655, 664–665 (1837), those whose statements are offered at trial, see 3 J. Wigmore, Evidence § 1397, p. 104 (2d ed. 1923) (hereinafter Wigmore), or something in-between, see *infra*, at 52–53. We must therefore turn to the historical background of the Clause to understand its meaning.

The right to confront one's accusers is a concept that dates back to Roman times. See *Coy* v. *Iowa*, 487 U. S. 1012, 1015 (1988); Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994). The founding generation's immediate source of the concept, however, was the common law. English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers. See 3 W. Blackstone, Commentaries on the Laws of England 373–374 (1768).

Nonetheless, England at times adopted elements of the civil-law practice. Justices of the peace or other officials examined suspects and witnesses before trial. These examinations were sometimes read in court in lieu of live testimony, a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' *i. e.* the witnesses against him, brought before him face to face." 1 J. Stephen, History of the Criminal Law of England 326 (1883). In some cases, these demands were refused. See 9 W. Holdsworth, History of English Law 216–217, 228 (3d ed. 1944); *e. g.*, *Raleigh's Case*, 2 How. St. Tr. 1, 15–16, 24 (1603); *Throckmorton's Case*, 1 How. St. Tr. 869, 875–876 (1554); cf. *Lilburn's Case*, 3 How. St. Tr. 1315, 1318–1322, 1329 (Star Chamber 1637).

Pretrial examinations became routine under two statutes passed during the reign of Queen Mary in the 16th century, 1 & 2 Phil. & M., c. 13 (1554), and 2 & 3 *id.*, c. 10 (1555).

These Marian bail and committal statutes required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court. It is doubtful that the original purpose of the examinations was to produce evidence admissible at trial. See J. Langbein, Prosecuting Crime in the Renaissance 21–34 (1974). Whatever the original purpose, however, they came to be used as evidence in some cases, see 2 M. Hale, Pleas of the Crown 284 (1736), resulting in an adoption of continental procedure. See 4 Holdsworth, *supra*, at 528–530.

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." 1 D. Jardine, Criminal Trials 435 (1832). Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ." 2 How. St. Tr., at 15–16. The judges refused, *id.*, at 24, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," *id.*, at 15, the jury convicted, and Raleigh was sentenced to death.

One of Raleigh's trial judges later lamented that "'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" 1 Jardine, *supra*, at 520. Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses. For example, treason statutes required witnesses to confront the accused "face to face" at his arraignment. *E. g.*, 13 Car. 2, c. 1, § 5 (1661); see 1 Hale,

supra, at 306. Courts, meanwhile, developed relatively strict rules of unavailability, admitting examinations only if the witness was demonstrably unable to testify in person. See *Lord Morley's Case,* 6 How. St. Tr. 769, 770–771 (H. L. 1666); 2 Hale, *supra,* at 284; 1 Stephen, *supra,* at 358. Several authorities also stated that a suspect's confession could be admitted only against himself, and not against others he implicated. See 2 W. Hawkins, Pleas of the Crown, ch. 46, § 3, pp. 603–604 (T. Leach 6th ed. 1787); 1 Hale, *supra,* at 585, n. *(k);* 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791); cf. *Tong's Case,* Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662) (treason). But see *King* v. *Westbeer,* 1 Leach 12, 168 Eng. Rep. 108, 109 (1739).

One recurring question was whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him. In 1696, the Court of King's Bench answered this question in the affirmative, in the widely reported misdemeanor libel case of *King* v. *Paine,* 5 Mod. 163, 87 Eng. Rep. 584. The court ruled that, even though a witness was dead, his examination was not admissible where "the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of a cross-examination." *Id.,* at 165, 87 Eng. Rep., at 585. The question was also debated at length during the infamous proceedings against Sir John Fenwick on a bill of attainder. Fenwick's counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine. See *Fenwick's Case,* 13 How. St. Tr. 537, 591–592 (H. C. 1696) (Powys) ("[T]hat which they would offer is something that Mr. Goodman hath sworn when he was examined . . . ; sir J. F. not being present or privy, and no opportunity given to cross-examine the person; and I conceive that cannot be offered as evidence . . ."); *id.,* at 592 (Shower) ("[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read

against was privy to the examination, and might have cross-examined him . . . . [O]ur constitution is, that the person shall see his accuser"). The examination was nonetheless admitted on a closely divided vote after several of those present opined that the common-law rules of procedure did not apply to parliamentary attainder proceedings—one speaker even admitting that the evidence would normally be inadmissible. See *id.*, at 603–604 (Williamson); *id.*, at 604–605 (Chancellor of the Exchequer); *id.*, at 607; 3 Wigmore § 1364, at 22–23, n. 54. Fenwick was condemned, but the proceedings "must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination." *Id.*, § 1364, at 22; cf. *Carmell* v. *Texas*, 529 U. S. 513, 526–530 (2000).

Paine had settled the rule requiring a prior opportunity for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in felony cases. The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 *id.*, c. 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See *Westbeer*, *supra*, at 12, 168 Eng. Rep., at 109; compare *Fenwick's Case*, 13 How. St. Tr., at 596 (Sloane), with *id.*, at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See *King* v. *Eriswell*, 3 T. R. 707, 710, 100 Eng. Rep. 815, 817 (K. B. 1790) (Grose, J.) (dicta); *id.*, at 722–723, 100 Eng. Rep., at 823–824 (Kenyon, C. J.) (same); compare 1 Gilbert, Evidence, at 215 (admissible only "by Force 'of the Statute' "), with *id.*, at 65. Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases. See *King* v. *Dingler*, 2 Leach 561, 562–563, 168 Eng. Rep. 383, 383–384 (1791); *King* v. *Woodcock*, 1 Leach 500, 502–504, 168 Eng. Rep. 352, 353 (1789);

cf. *King* v. *Radbourne*, 1 Leach 457, 459–461, 168 Eng. Rep. 330, 331–332 (1787); 3 Wigmore § 1364, at 23. Early 19th-century treatises confirm that requirement. See 1 T. Starkie, Evidence 95 (1826); 2 *id.*, at 484–492; T. Peake, Evidence 63–64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, see 11 & 12 Vict., c. 42, § 17, the change merely "introduced in terms" what was already afforded the defendant "by the equitable construction of the law." *Queen* v. *Beeston*, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C. J.).[2]

B

Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having "privately issued several commissions to examine witnesses against particular men *ex parte*," complaining that "the person accused is not admitted to be confronted with, or defend himself against his defamers." A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed. 1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-

[2] There is some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes. See 3 Wigmore § 1364, at 23 (requirement "never came to be conceded at all in England"); T. Peake, Evidence 64, n. *(m)* (3d ed. 1808) (not finding the point "expressly decided in any reported case"); *State* v. *Houser*, 26 Mo. 431, 436 (1858) ("there may be a few cases . . . but the authority of such cases is questioned, even in [England], by their ablest writers on common law"); *State* v. *Campbell*, 30 S. C. L. 124, 130 (App. L. 1844) (point "has not . . . been plainly adjudged, even in the English cases"). Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements. See *Houser*, *supra*, at 436; *Campbell*, *supra*, at 130; T. Cooley, Constitutional Limitations *318.

law procedures and thus routinely took testimony by deposition or private judicial examination. See 5 Geo. 3, c. 12, § 57 (1765); Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. L. 381, 396–397 (1959). Colonial representatives protested that the Act subverted their rights "by extending the jurisdiction of the courts of admiralty beyond its ancient limits." Resolutions of the Stamp Act Congress § 8th (Oct. 19, 1765), reprinted in Sources of Our Liberties 270, 271 (R. Perry & J. Cooper eds. 1959). John Adams, defending a merchant in a high-profile admiralty case, argued: "Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." Draft of Argument in *Sewall* v. *Hancock* (Oct. 1768–Mar. 1769), in 2 Legal Papers of John Adams 194, 207 (L. Wroth & H. Zobel eds. 1965).

Many declarations of rights adopted around the time of the Revolution guaranteed a right of confrontation. See Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to civil-law practices: "The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain

tribunal in Spain, . . . the *Inquisition.*" 2 Debates on the Federal Constitution 110–111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of "written evidence" while objecting to the omission of a vicinage right: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra,* at 469, 473. The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Early state decisions shed light upon the original understanding of the common-law right. *State* v. *Webb,* 2 N. C. 103 (Super. L. & Eq. 1794) *(per curiam),* decided a mere three years after the adoption of the Sixth Amendment, held that depositions could be read against an accused only if they were taken in his presence. Rejecting a broader reading of the English authorities, the court held: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." *Id.,* at 104.

Similarly, in *State* v. *Campbell,* 30 S. C. L. 124 (App. L. 1844), South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: "[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are *ex parte,* and, therefore, utterly incompetent." *Id.,* at 125. The court said that one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on

to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." *Ibid.*

Many other decisions are to the same effect. Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases *even if* the accused had a previous opportunity to cross-examine. See *Finn* v. *Commonwealth*, 26 Va. 701, 708 (1827); *State* v. *Atkins*, 1 Tenn. 229 (Super. L. & Eq. 1807) *(per curiam)*. Most courts rejected that view, but only after reaffirming that admissibility depended on a prior opportunity for cross-examination. See *United States* v. *Macomb*, 26 F. Cas. 1132, 1133 (No. 15,702) (CC Ill. 1851); *State* v. *Houser*, 26 Mo. 431, 435–436 (1858); *Kendrick* v. *State*, 29 Tenn. 479, 485–488 (1850); *Bostick* v. *State*, 22 Tenn. 344, 345–346 (1842); *Commonwealth* v. *Richards*, 35 Mass. 434, 437 (1837); *State* v. *Hill*, 20 S. C. L. 607, 608–610 (App. 1835); *Johnston* v. *State*, 10 Tenn. 58, 59 (Err. & App. 1821). Nineteenth-century treatises confirm the rule. See 1 J. Bishop, Criminal Procedure § 1093, p. 689 (2d ed. 1872); T. Cooley, Constitutional Limitations *318.

III

This history supports two inferences about the meaning of the Sixth Amendment.

A

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements

introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; accord, *Dutton* v. *Evans*, 400 U. S. 74, 94 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court.

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." 2 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . .

contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White* v. *Illinois*, 502 U. S. 346, 365 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. The statements are not *sworn* testimony, but the absence of oath was not dispositive. Cobham's examination was unsworn, see 1 Jardine, Criminal Trials, at 430, yet Raleigh's trial has long been thought a paradigmatic confrontation violation, see, *e. g.*, *Campbell*, 30 S. C. L., at 130. Under the Marian statutes, witnesses were typically put on oath, but suspects were not. See 2 Hale, Pleas of the Crown, at 52. Yet Hawkins and others went out of their way to caution that such unsworn confessions were not admissible against anyone but the confessor. See *supra*, at 45.[3]

[3] These sources—especially Raleigh's trial—refute THE CHIEF JUSTICE's assertion, *post*, at 71 (opinion concurring in judgment), that the right of confrontation was not particularly concerned with unsworn testimonial statements. But even if, as he claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex*

That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. See 1 Stephen, Criminal Law of England, at 221; Langbein, Prosecuting Crime in the Renaissance, at 34–45. England did not have a professional police force until the 19th century, see 1 Stephen, *supra*, at 194–200, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.[4]

B

The historical record also supports a second proposition: that the Framers would not have allowed admission of testi-

parte affidavit perfectly OK. (The claim that unsworn testimony was self-regulating because jurors would disbelieve it, cf. *post*, at 69–70, n. 1, is belied by the very existence of a general bar on unsworn testimony.) Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation—what THE CHIEF JUSTICE calls use of a "proxy," *post*, at 71—but that is hardly a reason not to make the estimation as accurate as possible. Even if, as THE CHIEF JUSTICE mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.

[4] We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island* v. *Innis*, 446 U. S. 291, 300–301 (1980). Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.

monial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. Rather, the "right . . . to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. See *Mattox* v. *United States*, 156 U. S. 237, 243 (1895); cf. *Houser*, 26 Mo., at 433–435. As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations. The numerous early state decisions applying the same test confirm that these principles were received as part of the common law in this country.[5]

[5] THE CHIEF JUSTICE claims that English law's treatment of testimonial statements was inconsistent at the time of the framing, *post*, at 72–73, but the examples he cites relate to examinations under the Marian statutes. As we have explained, to the extent Marian examinations were admissible, it was only because the statutes *derogated* from the common law. See *supra*, at 46–47. Moreover, by 1791 even the statutory-derogation view had been rejected with respect to justice-of-the-peace examinations—explicitly in *King* v. *Woodcock*, 1 Leach 500, 502–504, 168 Eng. Rep. 352, 353 (1789), and *King* v. *Dingler*, 2 Leach 561, 562–563, 168 Eng. Rep. 383, 383–384 (1791), and by implication in *King* v. *Radbourne*, 1 Leach 457, 459–461, 168 Eng. Rep. 330, 331–332 (1787).

None of THE CHIEF JUSTICE's citations proves otherwise. *King* v. *Westbeer*, 1 Leach 12, 168 Eng. Rep. 108 (1739), was decided a half century earlier and cannot be taken as an accurate statement of the law in 1791 given the directly contrary holdings of *Woodcock* and *Dingler*. Hale's treatise is older still, and far more ambiguous on this point, see 1 M. Hale, Pleas of the Crown 585–586 (1736); some who espoused the requirement of a prior opportunity for cross-examination thought it entirely consistent with Hale's views. See *Fenwick's Case*, 13 How. St. Tr. 537, 602 (H. C. 1696) (Musgrave). The only timely authority THE CHIEF JUSTICE cites is *King* v. *Eriswell*, 3 T. R. 707, 100 Eng. Rep. 815 (K. B. 1790), but even that decision provides no substantial support. *Eriswell* was not a criminal

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dis-

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case at all, but a Crown suit against the inhabitants of a town to charge them with care of an insane pauper. *Id.*, at 707–708, 100 Eng. Rep., at 815–816. It is relevant only because the judges discuss the Marian statutes in dicta. One of them, Buller, J., defended admission of the pauper's statement of residence on the basis of authorities that purportedly held *ex parte* Marian examinations admissible. *Id.*, at 713–714, 100 Eng. Rep., at 819. As evidence writers were quick to point out, however, his authorities said no such thing. See Peake, Evidence, at 64, n. *(m)* ("Mr. J. Buller is reported to have said that it was so settled in 1 Lev. 180, and Kel. 55; certainly nothing of the kind appears in those books"); 2 T. Starkie, Evidence 487–488, n. *(c)* (1826) ("Buller, J. . . . refers to *Radbourne*'s case . . . ; but in that case the deposition was taken in the hearing of the prisoner, and of course the question did not arise" (citation omitted)). Two other judges, Grose, J., and Kenyon, C. J., responded to Buller's argument by distinguishing Marian examinations as a statutory exception to the common-law rule, but the context and tenor of their remarks suggest they merely *assumed* the accuracy of Buller's premise without independent consideration, at least with respect to examinations by justices of the peace. See 3 T. R., at 710, 100 Eng. Rep., at 817 (Grose, J.); *id.*, at 722–723, 100 Eng. Rep., at 823–824 (Kenyon, C. J.). In fact, the case reporter specifically notes in a footnote that their assumption was erroneous. See *id.*, at 710, n. *(c)*, 100 Eng. Rep., at 817, n. *(c)*. Notably, Buller's position on pauper examinations was resoundingly rejected only a decade later in *King* v. *Ferry Frystone*, 2 East 54, 55, 102 Eng. Rep. 289 (K. B. 1801) ("The point . . . has been since considered to be so clear against the admissibility of the evidence . . . that it was abandoned by the counsel . . . without argument"), further suggesting that his views on evidence were not mainstream at the time of the framing.

In short, none of THE CHIEF JUSTICE's sources shows that the law in 1791 was unsettled *even as to examinations by justices of the peace under the Marian statutes*. More importantly, however, even if the statutory rule in 1791 were in doubt, the numerous early state-court decisions make abundantly clear that the Sixth Amendment incorporated the *common-law* right of confrontation and not any exceptions the Marian statutes supposedly carved out from it. See *supra*, at 49–50; see also *supra*, at 47, n. 2 (coroner statements). The common-law rule had been settled since *Paine* in 1696. See *King* v. *Paine*, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K. B.).

positive, and not merely one of several ways to establish reliability. This is not to deny, as THE CHIEF JUSTICE notes, that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence. *Post*, at 73. Several had become well established by 1791. See 3 Wigmore § 1397, at 101; Brief for United States as *Amicus Curiae* 13, n. 5. But there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case.[6] Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony. Cf. *Lilly* v. *Virginia*, 527 U. S. 116, 134 (1999) (plurality opinion) ("[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule").[7]

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[6] The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, *e. g.*, *Mattox* v. *United States*, 156 U. S. 237, 243–244 (1895); *King* v. *Reason*, 16 How. St. Tr. 1, 24–38 (K. B. 1722); 1 D. Jardine, Criminal Trials 435 (1832); Cooley, Constitutional Limitations, at *318; 1 G. Gilbert, Evidence 211 (C. Lofft ed. 1791); see also F. Heller, The Sixth Amendment 105 (1951) (asserting that this was the *only* recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock*, *supra*, at 501–504, 168 Eng. Rep., at 353–354; *Reason*, *supra*, at 24–38; Peake, *supra*, at 64; cf. *Radbourne*, *supra*, at 460–462, 168 Eng. Rep., at 332–333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*.

[7] We cannot agree with THE CHIEF JUSTICE that the fact "[t]hat a statement might be testimonial does nothing to undermine the wisdom of one of these [hearsay] exceptions." *Post*, at 74. Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within

IV

Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. *Mattox* v. *United States*, 156 U. S. 237 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . ." *Id.*, at 244.

Our later cases conform to *Mattox*'s holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See *Mancusi* v. *Stubbs*, 408 U. S. 204, 213–216 (1972); *California* v. *Green*, 399 U. S. 149, 165–168 (1970); *Pointer* v. *Texas*, 380 U. S., at 406–408; cf. *Kirby* v. *United States*, 174 U. S. 47, 55–61 (1899). Even where the defendant had such an opportunity, we excluded the testimony where the government had not established unavailability of the witness. See *Barber* v. *Page*, 390 U. S. 719, 722–725 (1968); cf. *Motes* v. *United States*, 178 U. S. 458, 470–471 (1900). We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. See *Roberts* v. *Russell*, 392 U. S. 293, 294–295 (1968) *(per curiam); Bruton* v. *United States*, 391 U. S. 123, 126–128 (1968); *Douglas* v. *Alabama*, 380 U. S. 415, 418–420 (1965). In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. See *Dutton* v. *Evans*, 400 U. S., at 87–89 (plurality opinion).

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some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio* v. *Roberts*, 448 U. S., at 67–70, admitted testimony from a preliminary hearing at which the defendant had examined the witness. *Lilly* v. *Virginia*, *supra*, excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily* v. *United States*, 483 U. S. 171, 181–184 (1987), admitted statements made unwittingly to a Federal Bureau of Investigation informant after applying a more general test that did *not* make prior cross-examination an indispensable requirement.[8]

Lee v. *Illinois*, 476 U. S. 530 (1986), on which the State relies, is not to the contrary. There, we *rejected* the State's attempt to admit an accomplice confession. The State had argued that the confession was admissible because it "interlocked" with the defendant's. We dealt with the argument by rejecting its premise, holding that "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." *Id.*, at 545. Respondent argues that "[t]he logical inference of this state-

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[8] One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White* v. *Illinois*, 502 U. S. 346 (1992), which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations. *Id.*, at 349–351. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Thompson* v. *Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K. B. 1693). In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. See 502 U. S., at 348–349. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded *even if* the witness was unavailable. We "[took] as a given . . . that the testimony properly falls within the relevant hearsay exceptions." *Id.*, at 351, n. 4.

ment is that when the discrepancies between the statements *are* insignificant, then the codefendant's statement *may* be admitted." Brief for Respondent 6. But this is merely a possible inference, not an inevitable one, and we do not draw it here. If *Lee* had meant authoritatively to announce an exception—previously unknown to this Court's jurisprudence—for interlocking confessions, it would not have done so in such an oblique manner. Our only precedent on interlocking confessions had addressed the entirely different question whether a limiting instruction cured prejudice to codefendants from admitting a defendant's *own* confession against him in a joint trial. See *Parker* v. *Randolph*, 442 U. S. 62, 69–76 (1979) (plurality opinion), abrogated by *Cruz* v. *New York*, 481 U. S. 186 (1987).

Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.[9]

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[9] THE CHIEF JUSTICE complains that our prior decisions have "never drawn a distinction" like the one we now draw, citing in particular *Mattox* v. *United States*, 156 U. S. 237 (1895), *Kirby* v. *United States*, 174 U. S. 47 (1899), and *United States* v. *Burr*, 25 F. Cas. 187 (No. 14,694) (CC Va. 1807) (Marshall, C. J.). *Post*, at 71–72. But nothing in these cases contradicts our holding in any way. *Mattox* and *Kirby* allowed or excluded evidence depending on whether the defendant had had an opportunity for cross-examination. *Mattox*, *supra*, at 242–244; *Kirby*, *supra*, at 55–61. That the two cases did not extrapolate a more general class of evidence to which that criterion applied does not prevent us from doing so now. As to *Burr*, we disagree with THE CHIEF JUSTICE's reading of the case. Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy. The "principle so truly important" on which "inroad[s]" had been introduced was the "rule of evidence which rejects mere hearsay testimony." See 25 F. Cas., at 193. Nothing in the opinion concedes exceptions to the Confrontation Clause's exclusion of testimonial statements as we use the term. THE CHIEF JUSTICE fails

V

Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales. *Roberts* conditions the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." 448 U. S., at 66. This test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. See, *e. g.*, *Lilly*, 527 U. S., at 140–143 (BREYER, J., concurring); *White*, 502 U. S., at 366

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to identify a single case (aside from one minor, arguable exception, see *supra*, at 58, n. 8), where we have admitted testimonial statements based on indicia of reliability other than a prior opportunity for cross-examination. If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached.

Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California* v. *Green*, 399 U. S. 149, 162 (1970). It is therefore irrelevant that the reliability of some out-of-court statements "'cannot be replicated, even if the declarant testifies to the same matters in court.'" *Post*, at 74 (quoting *United States* v. *Inadi*, 475 U. S. 387, 395 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee* v. *Street*, 471 U. S. 409, 414 (1985).)

(THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment); A. Amar, The Constitution and Criminal Procedure 125–131 (1997); Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L. J. 1011 (1998). They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law—thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine—thus eliminating the excessive narrowness referred to above.

In *White*, we considered the first proposal and rejected it. 502 U. S., at 352–353. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition. This case does, however, squarely implicate the second proposal.

A

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is

much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. See *Reynolds* v. *United States*, 98 U. S. 145, 158–159 (1879).

The Raleigh trial itself involved the very sorts of reliability determinations that *Roberts* authorizes. In the face of Raleigh's repeated demands for confrontation, the prosecution responded with many of the arguments a court applying *Roberts* might invoke today: that Cobham's statements were self-inculpatory, 2 How. St. Tr., at 19, that they were not made in the heat of passion, *id.*, at 14, and that they were not "extracted from [him] upon any hopes or promise of Pardon," *id.*, at 29. It is not plausible that the Framers' only objection to the trial was that Raleigh's judges did not properly weigh these factors before sentencing him to death. Rather, the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

B

The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception.

The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative. See, *e. g.*, *People* v. *Farrell*, 34 P. 3d 401, 406–407 (Colo. 2001) (eight-factor test). Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," *id.*, at 407, while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting," *United States* v. *Photogrammetric Data Servs., Inc.*, 259 F. 3d 229, 245 (2001). The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), see *Nowlin* v. *Commonwealth*, 40 Va. App. 327, 335–338, 579 S. E. 2d 367, 371–372 (2003), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect, see *State* v. *Bintz*, 2002 WI App. 204, ¶ 13, 257 Wis. 2d 177, ¶13, 650 N. W. 2d 913, ¶13. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, *Farrell*, *supra*, at 407, while that same court, in another case, found a statement more reliable because two years had elapsed, *Stevens* v. *People*, 29 P. 3d 305, 316 (2001).

The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude. Despite the plurality's speculation in *Lilly*, 527 U. S., at 137, that it was "highly unlikely" that

accomplice confessions implicating the accused could survive *Roberts*, courts continue routinely to admit them. See *Photogrammetric Data Servs.*, *supra*, at 245–246; *Farrell*, *supra*, at 406–408; *Stevens*, *supra*, at 314–318; *Taylor* v. *Commonwealth*, 63 S. W. 3d 151, 166–168 (Ky. 2001); *State* v. *Hawkins*, No. 2001–P–0060, 2002 WL 31895118, ¶¶ 34–37, *6 (Ohio App., Dec. 31, 2002); *Bintz*, *supra*, ¶¶ 7–14, 257 Wis. 2d, at 183–188, 650 N. W. 2d, at 916–918; *People* v. *Lawrence*, 55 P. 3d 155, 160–161 (Colo. App. 2001); *State* v. *Jones*, 171 Ore. App. 375, 387–391, 15 P. 3d 616, 623–625 (2000); *State* v. *Marshall*, 136 Ohio App. 3d 742, 747–748, 737 N. E. 2d 1005, 1009 (2000); *People* v. *Schutte*, 240 Mich. App. 713, 718–721, 613 N. W. 2d 370, 376–377 (2000); *People* v. *Thomas*, 313 Ill. App. 3d 998, 1005–1007, 730 N. E. 2d 618, 625–626 (2000); cf. *Nowlin*, *supra*, at 335–338, 579 S. E. 2d, at 371–372 (witness confessed to a related crime); *People* v. *Campbell*, 309 Ill. App. 3d 423, 431–432, 721 N. E. 2d 1225, 1230 (1999) (same). One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases—more than one-third of the time. Kirst, Appellate Court Answers to the Confrontation Questions in *Lilly v. Virginia*, 53 Syracuse L. Rev. 87, 105 (2003). Courts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. See *United States* v. *Aguilar*, 295 F. 3d 1018, 1021–1023 (CA9 2002) (plea allocution showing existence of a conspiracy); *United States* v. *Centracchio*, 265 F. 3d 518, 527–530 (CA7 2001) (same); *United States* v. *Dolah*, 245 F. 3d 98, 104–105 (CA2 2001) (same); *United States* v. *Petrillo*, 237 F. 3d 119, 122–123 (CA2 2000) (same); *United States* v. *Moskowitz*, 215 F. 3d 265, 268–269 (CA2 2000) *(per curiam)* (same); *United States* v. *Gallego*, 191 F. 3d 156, 166–168 (CA2 1999) (same); *United States* v. *Papajohn*, 212 F. 3d 1112, 1118–1120 (CA8 2000) (grand jury testimony); *United States* v. *Thomas*, 30 Fed. Appx. 277, 279 (CA4 2002) *(per curiam)* (same); *Bintz*, *supra*, ¶¶ 15–22, 257 Wis. 2d, at 188–

191, 650 N. W. 2d, at 918–920 (prior trial testimony); *State* v. *McNeill*, 140 N. C. App. 450, 457–460, 537 S. E. 2d 518, 523–524 (2000) (same).

To add insult to injury, some of the courts that admit untested testimonial statements find reliability in the very factors that *make* the statements testimonial. As noted earlier, one court relied on the fact that the witness's statement was made to police while in custody on pending charges—the theory being that this made the statement more clearly against penal interest and thus more reliable. *Nowlin*, *supra*, at 335–338, 579 S. E. 2d, at 371–372. Other courts routinely rely on the fact that a prior statement is given under oath in judicial proceedings. *E. g.*, *Gallego*, *supra*, at 168 (plea allocution); *Papajohn*, *supra*, at 1120 (grand jury testimony). That inculpating statements are given in a testimonial setting is not an antidote to the confrontation problem, but rather the trigger that makes the Clause's demands most urgent. It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one the Confrontation Clause demands.

C

Roberts' failings were on full display in the proceedings below. Sylvia Crawford made her statement while in police custody, herself a potential suspect in the case. Indeed, she had been told that whether she would be released "depend[ed] on how the investigation continues." App. 81. In response to often leading questions from police detectives, she implicated her husband in Lee's stabbing and at least arguably undermined his self-defense claim. Despite all this, the trial court admitted her statement, listing several reasons why it was reliable. In its opinion reversing, the Court of Appeals listed several *other* reasons why the statement was *not* reliable. Finally, the State Supreme Court relied exclusively on the interlocking character of the

statement and disregarded every other factor the lower courts had considered. The case is thus a self-contained demonstration of *Roberts*' unpredictable and inconsistent application.

Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police that she had "shut [her] eyes and . . . didn't really watch" part of the fight, and that she was "in shock." App. 134. The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law enforcement, and, thus, the [questioner] is . . . neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." *Id.*, at 77. The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination could reveal that.

The State Supreme Court gave dispositive weight to the interlocking nature of the two statements—that they were both ambiguous as to when and whether Lee had a weapon. The court's claim that the two statements were *equally* ambiguous is hard to accept. Petitioner's statement is ambiguous only in the sense that he had lingering doubts about his recollection: "A. I could a swore I seen him goin' for somethin' before, right before everything happened. . . . [B]ut I'm not positive." *Id.*, at 155. Sylvia's statement, on the other hand, is truly inscrutable, since the key timing detail was simply assumed in the leading question she was asked: "Q. Did Kenny do anything to fight back from this assault?" *Id.*, at 137 (punctuation added). Moreover, Sylvia specifi-

cally said Lee had nothing in his hands after he was stabbed, while petitioner was not asked about that.

The prosecutor obviously did not share the court's view that Sylvia's statement was ambiguous—he called it "damning evidence" that "completely refutes [petitioner's] claim of self-defense." Tr. 468 (Oct. 21, 1999). We have no way of knowing whether the jury agreed with the prosecutor or the court. Far from obviating the need for cross-examination, the "interlocking" ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth.

We readily concede that we could resolve this case by simply reweighing the "reliability factors" under *Roberts* and finding that Sylvia Crawford's statement falls short. But we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion. Moreover, to reverse the Washington Supreme Court's decision after conducting our own reliability analysis would perpetuate, not avoid, what the Sixth Amendment condemns. The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.

We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. Cf. U. S. Const., Amdt. 6 (criminal jury trial); Amdt. 7 (civil jury trial); *Ring* v. *Arizona,* 536 U. S. 584, 611–612 (2002) (SCALIA, J., concurring). By replacing categorical constitutional guarantees with

open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts'* providing any meaningful protection in those circumstances.

* * *

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial."[10] Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at

[10] We acknowledge THE CHIEF JUSTICE's objection, *post*, at 75–76, that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo. See *supra*, at 63–67, and cases cited. The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.

issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

I dissent from the Court's decision to overrule *Ohio* v. *Roberts*, 448 U. S. 56 (1980). I believe that the Court's adoption of a new interpretation of the Confrontation Clause is not backed by sufficiently persuasive reasoning to overrule long-established precedent. Its decision casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.

The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine. Under the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based.[1] See, *e. g.*, *King* v.

[1] Modern scholars have concluded that at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions, and thus hearsay was still often heard by the jury. See Gallanis, The Rise of Modern Evidence Law, 84 Iowa L. Rev. 499, 534–535 (1999); Mosteller, Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 738–746. In many cases, hearsay alone was generally not considered sufficient to support a conviction; rather, it was used to corroborate sworn witness testimony. See 5 J. Wigmore, Evidence § 1364, pp. 17, 19–20, 19, n. 33 (J. Chadbourn rev. 1974) (hereinafter Wigmore) (noting in the 1600's and early 1700's testimonial and non-

Brasier, 1 Leach 199, 200, 168 Eng. Rep. 202 (K. B. 1779); see also J. Langbein, Origins of Adversary Criminal Trial 235–242 (2003); G. Gilbert, Evidence 152 (3d ed. 1769).[2] Testimonial statements such as accusatory statements to police officers likely would have been disapproved of in the 18th century, not necessarily because they resembled *ex parte* affidavits or depositions as the Court reasons, but more likely than not because they were not made under oath.[3] See *King* v. *Woodcock*, 1 Leach 500, 503, 168 Eng. Rep. 352, 353 (1789) (noting that a statement taken by a justice of the peace may not be admitted into evidence unless taken under oath).

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testimonial hearsay was permissible to corroborate direct testimony); see also J. Langbein, Origins of Adversary Criminal Trial 238–239 (2003). Even when unsworn hearsay was proffered as substantive evidence, however, because of the predominance of the oath in society, juries were largely skeptical of it. See Landsman, Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 Cornell L. Rev. 497, 506 (1990) (describing late 17th-century sentiments); Langbein, Criminal Trial before the Lawyers, 45 U. Chi. L. Rev. 263, 291–293 (1978). In the 18th century, unsworn hearsay was simply held to be of much lesser value than were sworn affidavits or depositions.

[2] Gilbert's noted in 1769:

"Hearsay is no Evidence . . . though a Person Testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the same Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath . . . ."

[3] Confessions not taken under oath were admissible against a confessor because "'the most obvious Principles of Justice, Policy, and Humanity'" prohibited an accused from attesting to his statements. 1 G. Gilbert, Evidence 216 (C. Lofft ed. 1791). Still, these unsworn confessions were considered evidence only against the confessor as the Court points out, see *ante*, at 52, and in cases of treason, were insufficient to support even the conviction of the confessor, 2 W. Hawkins, Pleas of the Crown, ch. 46, § 4, p. 604, n. 3 (T. Leach 6th ed. 1787).

Without an oath, one usually did not get to the second step of whether confrontation was required.

Thus, while I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements. See 2 N. Webster, An American Dictionary of the English Language (1828) (defining "Testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. *Such affirmation in judicial proceedings, may be verbal or written, but must be under oath*" (emphasis added)). As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.[4]

I therefore see no reason why the distinction the Court draws is preferable to our precedent. Starting with Chief Justice Marshall's interpretation as a Circuit Justice in 1807, 16 years after the ratification of the Sixth Amendment, *United States* v. *Burr*, 25 F. Cas. 187, 193 (No. 14,694) (CC Va. 1807), continuing with our cases in the late 19th century, *Mattox* v. *United States*, 156 U. S. 237, 243–244 (1895); *Kirby*

[4] The fact that the prosecution introduced an unsworn examination in 1603 at Sir Walter Raleigh's trial, as the Court notes, see *ante*, at 52, says little about the Court's distinction between testimonial and nontestimonial statements. Our precedent indicates that unsworn testimonial statements, as do some nontestimonial statements, raise confrontation concerns once admitted into evidence, see, *e. g.*, *Lilly* v. *Virginia*, 527 U. S. 116 (1999); *Lee* v. *Illinois*, 476 U. S. 530 (1986), and I do not contend otherwise. My point is not that the Confrontation Clause does not reach these statements, but rather that it is far from clear that courts in the late 18th century would have treated unsworn statements, even testimonial ones, the same as sworn statements.

v. *United States*, 174 U. S. 47, 54–57 (1899), and through today, *e. g.*, *White* v. *Illinois*, 502 U. S. 346, 352–353 (1992), we have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware. I see little value in trading our precedent for an imprecise approximation at this late date.

I am also not convinced that the Confrontation Clause categorically requires the exclusion of testimonial statements. Although many States had their own Confrontation Clauses, they were of recent vintage and were not interpreted with any regularity before 1791. State cases that recently followed the ratification of the Sixth Amendment were not uniform; the Court itself cites state cases from the early 19th century that took a more stringent view of the right to confrontation than does the Court, prohibiting former testimony even if the witness was subjected to cross-examination. See *ante*, at 50 (citing *Finn* v. *Commonwealth*, 26 Va. 701, 708 (1827); *State* v. *Atkins*, 1 Tenn. 229 (Super. L. & Eq. 1807) *(per curiam)*).

Nor was the English law at the time of the framing entirely consistent in its treatment of testimonial evidence. Generally *ex parte* affidavits and depositions were excluded as the Court notes, but even that proposition was not universal. See *King* v. *Eriswell*, 3 T. R. 707, 100 Eng. Rep. 815 (K. B. 1790) (affirming by an equally divided court the admission of an *ex parte* examination because the declarant was unavailable to testify); *King* v. *Westbeer*, 1 Leach 12, 13, 168 Eng. Rep. 108, 109 (1739) (noting the admission of an *ex parte* affidavit); see also 1 M. Hale, Pleas of the Crown 585–586 (1736) (noting that statements of "accusers and witnesses" which were taken under oath could be admitted into evidence if the declarant was "dead or not able to travel"). Wigmore notes that sworn examinations of witnesses before justices of the peace in certain cases would not have been excluded

until the end of the 1700's, 5 Wigmore § 1364, at 26–27, and sworn statements of witnesses before coroners became excluded only by statute in the 1800's, see *ibid.; id.*, § 1374, at 59. With respect to unsworn testimonial statements, there is no indication that once the hearsay rule was developed courts ever excluded these statements if they otherwise fell within a firmly rooted exception. See, *e. g.*, *Eriswell*, *supra*, at 715–719 (Buller, J.), 720 (Ashhurst, J.), 100 Eng. Rep., at 819–822 (concluding that an *ex parte* examination was admissible as an exception to the hearsay rule because it was a declaration by a party of his state and condition). Dying declarations are one example. See, *e. g.*, *Woodcock*, *supra*, at 502–504, 168 Eng. Rep., at 353–354; *King* v. *Reason*, 16 How. St. Tr. 1, 22–23 (K. B. 1722).

Between 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed. See n. 1, *supra*. There were always exceptions to the general rule of exclusion, and it is not clear to me that the Framers categorically wanted to eliminate further ones. It is one thing to trace the right of confrontation back to the Roman Empire; it is quite another to conclude that such a right absolutely excludes a large category of evidence. It is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled.

To find exceptions to exclusion under the Clause is not to denigrate it as the Court suggests. Chief Justice Marshall stated of the Confrontation Clause: "I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important." *Burr*, 25 F. Cas., at 193. Yet, he recognized that such a right was not absolute, acknowledging that exceptions

to the exclusionary component of the hearsay rule, which he considered as an "inroad" on the right to confrontation, had been introduced. See *ibid.*

Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply "cannot be replicated, even if the declarant testifies to the same matters in court." *United States* v. *Inadi*, 475 U. S. 387, 395 (1986). Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission "actually furthers the 'Confrontation Clause's very mission' which is to 'advance the accuracy of the truth-determining process in criminal trials.'" *Id.*, at 396 (quoting *Tennessee* v. *Street*, 471 U. S. 409, 415 (1985) (some internal quotation marks omitted)). Similar reasons justify the introduction of spontaneous declarations, see *White*, 502 U. S., at 356, statements made in the course of procuring medical services, see *ibid.*, dying declarations, see *Kirby*, *supra*, at 61, and countless other hearsay exceptions. That a statement might be testimonial does nothing to undermine the wisdom of one of these exceptions.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure. See *Kentucky* v. *Stincer*, 482 U. S. 730, 737 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial"); see also *Maryland* v. *Craig*, 497 U. S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact"). "[I]n a given instance [cross-

examination may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." 5 Wigmore § 1420, at 251. In such a case, as we noted over 100 years ago, "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Mattox*, 156 U. S., at 243; see also *Salinger* v. *United States*, 272 U. S. 542, 548 (1926). By creating an immutable category of excluded evidence, the Court adds little to a trial's truth-finding function and ignores this longstanding guidance.

In choosing the path it does, the Court of course overrules *Ohio* v. *Roberts*, 448 U. S. 56 (1980), a case decided nearly a quarter of a century ago. *Stare decisis* is not an inexorable command in the area of constitutional law, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), but by and large, it "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *id.*, at 827. And in making this appraisal, doubt that the new rule is indeed the "right" one should surely be weighed in the balance. Though there are no vested interests involved, unresolved questions for the future of everyday criminal trials throughout the country surely counsel the same sort of caution. The Court grandly declares that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" *ante*, at 68. But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists, see *ibid.*, is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts through-

out the country, and parties should not be left in the dark in this manner.

To its credit, the Court's analysis of "testimony" excludes at least some hearsay exceptions, such as business records and official records. See *ante*, at 56. To hold otherwise would require numerous additional witnesses without any apparent gain in the truth-seeking process. Likewise to the Court's credit is its implicit recognition that the mistaken application of its new rule by courts which guess wrong as to the scope of the rule is subject to harmless-error analysis. See *ante*, at 42, n. 1.

But these are palliatives to what I believe is a mistaken change of course. It is a change of course not in the least necessary to reverse the judgment of the Supreme Court of Washington in this case. The result the Court reaches follows inexorably from *Roberts* and its progeny without any need for overruling that line of cases. In *Idaho* v. *Wright*, 497 U. S. 805, 820–824 (1990), we held that an out-of-court statement was not admissible simply because the truthfulness of that statement was corroborated by other evidence at trial. As the Court notes, *ante*, at 66, the Supreme Court of Washington gave decisive weight to the "interlocking nature of the two statements." No re-weighing of the "reliability factors," which is hypothesized by the Court, *ante*, at 67, is required to reverse the judgment here. A citation to *Idaho* v. *Wright*, *supra*, would suffice. For the reasons stated, I believe that this would be a far preferable course for the Court to take here.

Syllabus

IOWA *v.* TOVAR

CERTIORARI TO THE SUPREME COURT OF IOWA

No. 02–1541. Argued January 21, 2004—Decided March 8, 2004

At respondent Tovar's November 1996 arraignment for operating a motor vehicle under the influence of alcohol (OWI), in response to the trial court's questions, Tovar affirmed that he wanted to represent himself and to plead guilty. Conducting the guilty plea colloquy required by the Iowa Rules of Criminal Procedure, the court explained that, if Tovar pleaded not guilty, he would be entitled to a speedy and public jury trial where he would have the right to counsel who could help him select a jury, question and cross-examine witnesses, present evidence, and make arguments on his behalf. By pleading guilty, the court cautioned, Tovar would give up his right to a trial and his rights at that trial to be represented by counsel, to remain silent, to the presumption of innocence, and to subpoena witnesses and compel their testimony. The court then informed Tovar of the maximum and minimum penalties for an OWI conviction, and explained that, before accepting a guilty plea, the court had to assure itself that Tovar was in fact guilty of the charged offense. To that end, the court informed Tovar of the two elements of the OWI charge: The defendant must have (1) operated a motor vehicle in Iowa (2) while intoxicated. Tovar confirmed, first, that on the date in question, he was operating a motor vehicle in Iowa and, second, that he did not dispute the result of the intoxilyzer test showing his blood alcohol level exceeded the legal limit nearly twice over. The court then accepted his guilty plea and, at a hearing the next month, imposed the minimum sentence of two days in jail and a fine. In 1998, Tovar was again charged with OWI, this time as a second offense, an aggravated misdemeanor under Iowa law. Represented by counsel in that proceeding, he pleaded guilty. In 2000, Tovar was charged with third-offense OWI, a class "D" felony under Iowa law. Again represented by counsel, Tovar pleaded not guilty to the felony charge. Counsel moved to preclude use of Tovar's first (1996) OWI conviction to enhance his 2000 offense from an aggravated misdemeanor to a third-offense felony. Tovar maintained that his 1996 waiver of counsel was invalid—not fully knowing, intelligent, and voluntary—because he was never made aware by the court of the dangers and disadvantages of self-representation. The trial court denied the motion, found Tovar guilty, and sentenced him on the OWI third-offense charge. The Iowa Court of Appeals affirmed, but the Supreme Court of Iowa reversed and remanded for entry of judgment without consideration of Tovar's first OWI conviction.

Syllabus

Holding that the colloquy preceding acceptance of Tovar's 1996 guilty plea had been constitutionally inadequate, Iowa's high court ruled, as here at issue, that two warnings not given to Tovar are essential to the "knowing and intelligent" waiver of the Sixth Amendment right to counsel at the plea stage: The defendant must be advised specifically that waiving counsel's assistance in deciding whether to plead guilty (1) entails the risk that a viable defense will be overlooked and (2) deprives him of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty.

Held: Neither warning ordered by the Iowa Supreme Court is mandated by the Sixth Amendment. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea. Pp. 87–94.

(a) The Sixth Amendment secures to a defendant facing incarceration the right to counsel at all "critical stages" of the criminal process, see, *e. g.*, *Maine* v. *Moulton*, 474 U. S. 159, 170, including a plea hearing, *White* v. *Maryland*, 373 U. S. 59, 60 *(per curiam)*. Because Tovar received a two-day prison term for his first OWI conviction, he had a right to counsel both at the plea stage and at trial had he elected to contest the charge. *Argersinger* v. *Hamlin*, 407 U. S. 25, 34, 37. Although an accused may choose to forgo representation, any waiver of the right to counsel must be knowing, voluntary, and intelligent, see *Johnson* v. *Zerbst*, 304 U. S. 458, 464. The information a defendant must possess in order to make an intelligent election depends on a range of case-specific factors, including his education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. See *ibid.* Although warnings of the pitfalls of proceeding to trial uncounseled must be "rigorous[ly]" conveyed, *Patterson* v. *Illinois*, 487 U. S. 285, 298; see *Faretta* v. *California*, 422 U. S. 806, 835, a less searching or formal colloquy may suffice at earlier stages of the criminal process, 487 U. S., at 299. In *Patterson*, this Court described a pragmatic approach to right-to-counsel waivers, one that asks "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance [counsel] could provide to an accused at that stage." *Id.*, at 298. Less rigorous warnings are required pretrial because, at that stage, "the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial." *Id.*, at 299. Pp. 87–90.

(b) The Sixth Amendment does not compel the two admonitions ordered by the Iowa Supreme Court. "[T]he law ordinarily considers a

waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances . . . ." *United States* v. *Ruiz*, 536 U. S. 622, 629. Even if the defendant lacked a full and complete appreciation of all of the consequences flowing from his waiver, the State may nevertheless prevail if it shows that the information provided to the defendant satisfied the constitutional minimum. *Patterson*, 487 U. S., at 294. The Iowa high court gave insufficient consideration to this Court's guiding decisions. In prescribing scripted admonitions and holding them necessary in every guilty plea instance, that court overlooked this Court's observations that the information a defendant must have to waive counsel intelligently will depend upon the particular facts and circumstances in each case, *Johnson*, 304 U. S., at 464. Moreover, as Tovar acknowledges, in a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to counsel. Tovar has never claimed that he did not fully understand the 1996 OWI charge or the range of punishment for that crime prior to pleading guilty. He has never "articulate[d] with precision" the additional information counsel could have provided, given the simplicity of the charge. See *Patterson*, 487 U. S., at 294. Nor does he assert that he *was* unaware of his right to be counseled prior to and at his arraignment. Before this Court, he suggests only that he *may have been* under the mistaken belief that he had a right to counsel at trial, but not if he was, instead, going to plead guilty. Given "the particular facts and circumstances surrounding [this] case," *Johnson*, 304 U. S., at 464, it is far from clear that warnings of the kind required by the Iowa Supreme Court would have enlightened Tovar's decision whether to seek counsel or to represent himself. In a case so straightforward, the two admonitions at issue might confuse or mislead a defendant more than they would inform him, *i. e.*, the warnings might be misconstrued to convey that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted. States are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful, but the Federal Constitution does not require the two admonitions here in controversy. Pp. 90–94.

656 N. W. 2d 112, reversed and remanded.

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

Thomas J. Miller, Attorney General of Iowa, argued the cause for petitioner. With him on the briefs were *Douglas R. Marek*, Deputy Attorney General, and *Darrel Mullins*, Assistant Attorney General.

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

Theresa R. Wilson, Iowa State Assistant Appellate Defender, argued the cause and filed a brief for respondent.*

JUSTICE GINSBURG delivered the opinion of the Court.

The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the

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*Briefs of *amici curiae* urging reversal were filed for the State of Colorado et al. by *Ken Salazar*, Attorney General of Colorado, *Alan Gilbert*, Solicitor General, *John D. Seidel*, Assistant Attorney General, *Gene C. Schaerr*, and *Robert Klinck*, by *Christopher L. Morano*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Gregg D. Renkes* of Alaska, *Bill Lockyer* of California, *Charles J. Crist* of Florida, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Richard P. Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *Michael C. Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Patricia A. Madrid* of New Mexico, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Jerry W. Kilgore* of Virginia, *Darrell V. McGraw, Jr.*, of West Virginia, and *Patrick J. Crank* of Wyoming; and for the National District Attorneys Association by *Stephanos Bibas* and *James D. Polley IV.*

Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *Steven Duke* and *Lisa Kemler;* and for the National Legal Aid & Defender Association et al. by *Andrea D. Lyon, Emily Hughes, Steven A. Greenberg*, and *Robert R. Rigg.*

criminal process. *Maine* v. *Moulton*, 474 U. S. 159, 170 (1985); *United States* v. *Wade*, 388 U. S. 218, 224 (1967). The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a "critical stage" at which the right to counsel adheres. *Argersinger* v. *Hamlin*, 407 U. S. 25, 34 (1972); *White* v. *Maryland*, 373 U. S. 59, 60 (1963) *(per curiam)*. Waiver of the right to counsel, as of constitutional rights in the criminal process generally, must be a "knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances." *Brady* v. *United States*, 397 U. S. 742, 748 (1970). This case concerns the extent to which a trial judge, before accepting a guilty plea from an uncounseled defendant, must elaborate on the right to representation.

Beyond affording the defendant the opportunity to consult with counsel prior to entry of a plea and to be assisted by counsel at the plea hearing, must the court, specifically: (1) advise the defendant that "waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked"; and (2) "admonis[h]" the defendant "that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty"? 656 N. W. 2d 112, 121 (Iowa 2003). The Iowa Supreme Court held both warnings essential to the "knowing and intelligent" waiver of the Sixth Amendment right to the assistance of counsel. *Ibid.*

We hold that neither warning is mandated by the Sixth Amendment. The constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.

I

On November 2, 1996, respondent Felipe Edgardo Tovar, then a 21-year-old college student, was arrested in Ames,

Iowa, for operating a motor vehicle while under the influence of alcohol (OWI). See Iowa Code § 321J.2 (1995).[1] An intoxilyzer test administered the night of Tovar's arrest showed he had a blood alcohol level of 0.194. App. 24. The arresting officer informed Tovar of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Tovar signed a form stating that he waived those rights and agreed to answer questions. Iowa State Univ. Dept. of Public Safety, OWI Supplemental Report 3 (Nov. 2, 1996), Lodging of Petitioner; Iowa State Univ. Dept. of Public Safety, Rights Warnings (Nov. 2, 1996), Lodging of Petitioner.

Some hours after his arrest, Tovar appeared before a judge in the Iowa District Court for Story County. The judge indicated on the initial appearance form that Tovar appeared without counsel and waived application for court-appointed counsel. Initial Appearance in No. OWCR 23989 (Nov. 2, 1996), Lodging of Petitioner. The judge also marked on the form's checklist that Tovar was "informed of the charge and his . . . rights and receive[d] a copy of the Complaint." *Ibid.* Arraignment was set for November 18, 1996. In the interim, Tovar was released from jail.

At the November 18 arraignment,[2] the court's inquiries of Tovar began: "Mr. Tovar appears without counsel and I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?" App. 8–9. Tovar replied: "Yes, sir." *Id.*, at 9. The court soon after asked: "[H]ow did you wish to plead?" Tovar answered: "Guilty." *Ibid.* Tovar affirmed that he

[1] "A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions: *a.* While under the influence of an alcoholic beverage . . . . *b.* While having an alcohol concentration . . . of .10 or more." Iowa Code § 321J.2(1) (1995).

[2] Tovar appeared in court along with four other individuals charged with misdemeanor offenses. App. 6–10. The presiding judge proposed to conduct the plea proceeding for the five cases jointly, and each of the individuals indicated he did not object to that course of action. *Id.*, at 11.

had not been promised anything or threatened in any way to induce him to plead guilty. *Id.*, at 13–14.

Conducting the guilty plea colloquy required by the Iowa Rules of Criminal Procedure, see Iowa Rule Crim. Proc. 8 (1992),[3] the court explained that, if Tovar pleaded not guilty, he would be entitled to a speedy and public trial by jury, App. 15, and would have the right to be represented at that trial by an attorney, who "could help [Tovar] select a jury, question and cross-examine the State's witnesses, present evidence, if any, in [his] behalf, and make arguments to the judge and jury on [his] behalf," *id.*, at 16. By pleading guilty, the court cautioned, "not only [would Tovar] give up [his] right to a trial [of any kind on the charge against him], [he would] give up [his] right to be represented by an attorney at that trial." *Ibid.* The court further advised Tovar that, if he entered a guilty plea, he would relinquish the right to remain silent at trial, the right to the presumption of innocence, and the right to subpoena witnesses and compel their testimony. *Id.*, at 16–19.

Turning to the particular offense with which Tovar had been charged, the court informed him that an OWI conviction carried a maximum penalty of a year in jail and a $1,000 fine, and a minimum penalty of two days in jail and a $500 fine. *Id.*, at 20. Tovar affirmed that he understood his exposure to those penalties. *Ibid.* The court next explained that, before accepting a guilty plea, the court had to assure itself that Tovar was in fact guilty of the charged offense. *Id.*, at 21–22. To that end, the court informed Tovar that the OWI charge had only two elements: first, on the date in question, Tovar was operating a motor vehicle in the State of Iowa; second, when he did so, he was intoxicated. *Id.*, at 23. Tovar confirmed that he had been driving in Ames, Iowa, on the night he was apprehended and that he did not dispute the results of the intoxilyzer test administered by

[3] The Rule has since been renumbered 2.8.

the police that night, which showed that his blood alcohol level exceeded the legal limit nearly twice over. *Id.*, at 23–24.

After the plea colloquy, the court asked Tovar if he still wished to plead guilty, and Tovar affirmed that he did. *Id.*, at 27–28. The court then accepted Tovar's plea, observing that there was "a factual basis" for it, and that Tovar had made the plea "voluntarily, with a full understanding of [his] rights, [and] . . . of the consequences of [pleading guilty]." *Id.*, at 28.

On December 30, 1996, Tovar appeared for sentencing on the OWI charge[4] and, simultaneously, for arraignment on a subsequent charge of driving with a suspended license. *Id.*, at 45–46; see Iowa Code § 321J.21 (1995).[5] Noting that Tovar was again in attendance without counsel, the court inquired: "Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?" App. 46.[6] Tovar replied that he would represent himself. *Ibid.* The court then engaged in essentially the same plea colloquy on the suspension charge as it had on the OWI charge the previous month. *Id.*, at 48–51. After accepting Tovar's guilty plea on the suspension charge, the court sentenced him on both counts: For the OWI conviction, the court imposed the minimum sentence of two days in jail and a $500 fine, plus a surcharge and

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[4] At that stage, it was still open to Tovar to request withdrawal of his guilty plea on the OWI charge and to substitute a plea of not guilty. See Iowa Rule Crim. Proc. 8(2)(a) (1992).

[5] In order to appear at the OWI arraignment, Tovar drove to the courthouse despite the suspension of his license; he was apprehended en route home. App. 50, 53.

[6] Prior to asking Tovar whether he wished to hire counsel, the court noted that Tovar had applied for a court-appointed attorney but that his application had been denied because he was financially dependent upon his parents. *Id.*, at 46. Tovar does not here challenge the absence of counsel at sentencing.

costs; for the suspension conviction, the court imposed a $250 fine, plus a surcharge and costs. *Id.*, at 55.

On March 16, 1998, Tovar was convicted of OWI for a second time. He was represented by counsel in that proceeding, in which he pleaded guilty. Record 60; see App. to Pet. for Cert. 24, n. 1.

On December 14, 2000, Tovar was again charged with OWI, this time as a third offense, see Iowa Code § 321J.2 (1999), and additionally with driving while license barred, see § 321.561. Iowa law classifies first-offense OWI as a serious misdemeanor and second-offense OWI as an aggravated misdemeanor. §§ 321J.2(2)*(a)*–*(b)*. Third-offense OWI, and any OWI offenses thereafter, rank as class "D" felonies. § 321J.2(2)*(c)*. Represented by an attorney, Tovar pleaded not guilty to both December 2000 charges. Record 55.

In March 2001, through counsel, Tovar filed a motion for adjudication of law points;[7] the motion urged that Tovar's first OWI conviction, in 1996, could not be used to enhance the December 2000 OWI charge from a second-offense aggravated misdemeanor to a third-offense felony. App. 3–5.[8] Significantly, Tovar did not allege that he was unaware at the November 1996 arraignment of his right to counsel prior to pleading guilty and at the plea hearing. Instead, he maintained that his 1996 waiver of counsel was invalid—not "full knowing, intelligent, and voluntary"—because he "was never made aware by the court . . . of the dangers and disadvantages of self-representation." *Id.*, at 3–4.

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[7] See Iowa Rule Crim. Proc. 10(2) (1992) ("Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion."); *State* v. *Wilt*, 333 N. W. 2d 457, 460 (Iowa 1983) (approving use of motions for adjudication of law points under Iowa Rule of Criminal Procedure 10(2) where material facts are undisputed).

[8] Tovar conceded that the 1998 OWI conviction could be used for enhancement purposes. Record 60.

The court denied Tovar's motion in May 2001, explaining: "Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of [the] right to counsel and a willingness to proceed without counsel in the face of such awareness." App. to Pet. for Cert. 36–37 (brackets in original). Tovar then waived his right to a jury trial and was found guilty by the court of both the OWI third-offense charge and driving while license barred. *Id.*, at 33. Four months after that adjudication, Tovar was sentenced. On the OWI third-offense charge, he received a 180-day jail term, with all but 30 days suspended, three years of probation, and a $2,500 fine plus surcharges and costs. App. 70–71. For driving while license barred, Tovar received a 30-day jail term, to run concurrently with the OWI sentence, and a suspended $500 fine. *Id.*, at 71.

The Iowa Court of Appeals affirmed, App. to Pet. for Cert. 23–30, but the Supreme Court of Iowa, by a 4-to-3 vote, reversed and remanded for entry of judgment without consideration of Tovar's first OWI conviction, 656 N. W. 2d 112 (2003). Iowa's highest court acknowledged that "the dangers of proceeding pro se at a guilty plea proceeding will be different than the dangers of proceeding pro se at a jury trial, [therefore] the inquiries made at these proceedings will also be different." *Id.*, at 119. The court nonetheless held that the colloquy preceding acceptance of Tovar's 1996 guilty plea had been constitutionally inadequate, and instructed dispositively:

> "[A] defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel. . . . [T]he trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known by

> laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked. The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. In addition, the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments." *Id.*, at 121.[9]

We granted certiorari, 539 U. S. 987 (2003), in view of the division of opinion on the requirements the Sixth Amendment imposes for waiver of counsel at a plea hearing, compare, *e. g., United States* v. *Akins*, 276 F. 3d 1141, 1146–1147 (CA9 2002), with *State* v. *Cashman*, 491 N. W. 2d 462, 465–466 (S. D. 1992), and we now reverse the judgment of the Iowa Supreme Court.

II

The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all "critical stages" of the criminal process. See, *e. g.*, *Maine* v. *Moulton*, 474 U. S., at 170; *United States* v. *Wade*, 388 U. S., at 224. A plea hearing qualifies as a "critical stage." *White* v. *Maryland*, 373 U. S., at 60. Because Tovar received a two-day prison term for his 1996 OWI conviction, he had a right to counsel both at the plea stage and at trial had he elected to contest the charge. *Argersinger* v. *Hamlin*, 407 U. S., at 34, 37.

A person accused of crime, however, may choose to forgo representation. While the Constitution "does not force a

[9] The dissenting justices criticized the majority's approach as "rigid" and out of line with the pragmatic approach this Court described in *Patterson* v. *Illinois*, 487 U. S. 285, 298 (1988). 656 N. W. 2d, at 122. They noted that, in addition to advice concerning the constitutional rights a guilty plea relinquishes, Tovar was "made fully aware of the penal consequences that might befall him if he went forward without counsel and pleaded guilty." *Ibid.*

lawyer upon a defendant," *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942), it does require that any waiver of the right to counsel be knowing, voluntary, and intelligent, see *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Tovar contends that his waiver of counsel in November 1996, at his first OWI plea hearing, was insufficiently informed, and therefore constitutionally invalid. In particular, he asserts that the trial judge did not elaborate on the value, at that stage of the case, of an attorney's advice and the dangers of self-representation in entering a plea. Brief for Respondent 15.[10]

We have described a waiver of counsel as intelligent when the defendant "knows what he is doing and his choice is made with eyes open." *Adams*, 317 U. S., at 279. We have not, however, prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel. The information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. See *Johnson*, 304 U. S., at 464.

As to waiver of trial counsel, we have said that before a defendant may be allowed to proceed *pro se*, he must be

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[10] The United States as *amicus curiae* reads our decision in *Scott* v. *Illinois*, 440 U. S. 367 (1979), to hold that a constitutionally defective waiver of counsel in a misdemeanor prosecution, although warranting vacation of any term of imprisonment, affords no ground for disturbing the underlying conviction. *Amicus* accordingly contends that the Constitution should not preclude use of an uncounseled misdemeanor conviction to enhance the penalty for a subsequent offense, regardless of the validity of the prior waiver. See Brief for United States as *Amicus Curiae* 11, n. 3. The State, however, does not contest the Iowa Supreme Court's determination that a conviction obtained without an effective waiver of counsel cannot be used to enhance a subsequent charge. See *ibid.* We therefore do not address arguments *amicus* advances questioning that premise. See also *id.*, at 29, n. 12.

warned specifically of the hazards ahead. *Faretta* v. *California*, 422 U. S. 806 (1975), is instructive. The defendant in *Faretta* resisted counsel's aid, preferring to represent himself. The Court held that he had a constitutional right to self-representation. In recognizing that right, however, we cautioned: "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing . . . ." *Id.*, at 835 (internal quotation marks omitted).

Later, in *Patterson* v. *Illinois*, 487 U. S. 285 (1988), we elaborated on "the dangers and disadvantages of self-representation" to which *Faretta* referred. "[A]t trial," we observed, "counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross-examine witnesses effectively . . . , object to improper prosecution questions, and much more." 487 U. S., at 299, n. 13. Warnings of the pitfalls of proceeding to trial without counsel, we therefore said, must be "rigorous[ly]" conveyed. *Id.*, at 298. We clarified, however, that at earlier stages of the criminal process, a less searching or formal colloquy may suffice. *Id.*, at 299.

Patterson concerned postindictment questioning by police and prosecutor. At that stage of the case, we held, the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), adequately informed the defendant not only of his Fifth Amendment rights, but of his Sixth Amendment right to counsel as well. 487 U. S., at 293. *Miranda* warnings, we said, effectively convey to a defendant his right to have counsel present during questioning. In addition, they inform him of the "ultimate adverse consequence" of making uncounseled admissions, *i. e.*, his statements may be used against him in any ensuing criminal proceeding. 487 U. S.,

at 293. The *Miranda* warnings, we added, "also sufficed . . . to let [the defendant] know what a lawyer could 'do for him,'" namely, advise him to refrain from making statements that could prove damaging to his defense. 487 U. S., at 294.

Patterson describes a "pragmatic approach to the waiver question," one that asks "what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage," in order "to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized." *Id.*, at 298. We require less rigorous warnings pretrial, *Patterson* explained, not because pretrial proceedings are "less important" than trial, but because, at that stage, "the full dangers and disadvantages of self-representation . . . are less substantial and more obvious to an accused than they are at trial." *Id.*, at 299 (citation and internal quotation marks omitted).

In Tovar's case, the State maintains that, like the *Miranda* warnings we found adequate in *Patterson*, Iowa's plea colloquy suffices both to advise a defendant of his right to counsel, and to assure that his guilty plea is informed and voluntary. Brief for Petitioner 20; Tr. of Oral Arg. 3. The plea colloquy, according to the State, "makes plain that an attorney's role would be to challenge the charge or sentence," and therefore adequately conveys to the defendant both the utility of counsel and the dangers of self-representation. Brief for Petitioner 25. Tovar, on the other hand, defends the precise instructions required by the Iowa Supreme Court, see *supra*, at 86–87, as essential to a knowing, voluntary, and intelligent plea stage waiver of counsel. Brief for Respondent 15.

To resolve this case, we need not endorse the State's position that nothing more than the plea colloquy was needed to safeguard Tovar's right to counsel. Preliminarily, we note that there were some things more in this case. Tovar first

indicated that he waived counsel at his initial appearance, see *supra*, at 82, affirmed that he wanted to represent himself at the plea hearing, see *supra*, at 82, and declined the court's offer of "time to hire an attorney" at sentencing, when it was still open to him to request withdrawal of his plea, see *supra*, at 84, and n. 4. Further, the State does not contest that a defendant must be alerted to his right to the assistance of counsel in entering a plea. See Brief for Petitioner 19 (acknowledging defendant's need to know "retained or appointed counsel can assist" at the plea stage by "work[ing] on the issues of guilt and sentencing"). Indeed, the Iowa Supreme Court appeared to assume that Tovar was informed of his entitlement to counsel's aid or, at least, to have pretermitted that issue. See 656 N. W. 2d, at 117. Accordingly, the State presents a narrower question: "Does the Sixth Amendment require a court to give a rigid and detailed admonishment to a *pro se* defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risks overlooking a defense?" Pet. for Cert. i.

Training on that question, we turn to, and reiterate, the particular language the Iowa Supreme Court employed in announcing the warnings it thought the Sixth Amendment required: "[T]he trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked," 656 N. W. 2d, at 121; in addition, "[t]he defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty," *ibid.* Tovar did not receive such advice, and the sole question before us is whether the Sixth Amendment

compels the two admonitions here in controversy.[11] We hold it does not.

This Court recently explained, in reversing a lower court determination that a guilty plea was not voluntary: "[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it." *United States* v. *Ruiz*, 536 U. S. 622, 629 (2002) (emphasis in original). We similarly observed in *Patterson:* "If [the defendant] . . . lacked a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum." 487 U. S., at 294 (internal quotation marks omitted). The Iowa Supreme Court gave insufficient consideration to these guiding decisions. In prescribing scripted admonitions and holding them necessary in every guilty plea instance, we further note, the Iowa high court overlooked our observations that the information a defendant must have to waive counsel intelligently will "depend, in each case, upon the particular facts and circumstances surrounding that case," *Johnson*, 304 U. S., at 464; *supra*, at 88.

Moreover, as Tovar acknowledges, in a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel. See *Watts* v. *State*, 257 N. W. 2d 70, 71 (Iowa 1977); Brief for Respondent 5, 26–27. In that light, we note that Tovar has never claimed that he did not fully understand the charge or the range of punishment for the crime prior to pleading guilty. Further, he has

[11] The Supreme Court of Iowa also held that "the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments." 656 N. W. 2d, at 121. The parties do not dispute that Tovar was so informed.

never "articulate[d] with precision" the additional information counsel could have provided, given the simplicity of the charge. See *Patterson*, 487 U. S., at 294; *supra*, at 83. Nor does he assert that he *was* unaware of his right to be counseled prior to and at his arraignment. Before this Court, he suggests only that he "*may have been* under the mistaken belief that he had a right to counsel at trial, but not if he was merely going to plead guilty." Brief for Respondent 16 (emphasis added).[12]

Given "the particular facts and circumstances surrounding [this] case," see *Johnson*, 304 U. S., at 464, it is far from clear that warnings of the kind required by the Iowa Supreme Court would have enlightened Tovar's decision whether to seek counsel or to represent himself. In a case so straightforward, the United States as *amicus curiae* suggests, the admonitions at issue might confuse or mislead a defendant more than they would inform him: The warnings the Iowa Supreme Court declared mandatory might be misconstrued as a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted. Brief for United States as *Amicus Curiae* 9, 28–29; Tr. of Oral Arg. 20–21.

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[12] The trial court's comment that Tovar appeared without counsel at the arraignment and the court's inquiry whether Tovar wanted to represent himself at that hearing, see App. 8–9, hardly lend support to Tovar's suggestion of what he "may have" believed. See also *id.*, at 46 (court's inquiry at sentencing whether Tovar "want[ed] to take some time to hire an attorney"); Iowa Rule Crim. Proc. 8(2)(a) (1992) ("[a]t any time before judgment," defendant may request withdrawal of guilty plea and substitution of not guilty plea).

We note, finally, that States are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful. See, *e. g.*, Alaska Rule Crim. Proc. 39(a) (2003); Fla. Rule Crim. Proc. 3.111(d) (2003); Md. Ct. Rule 4–215 (2002); Minn. Rule Crim. Proc. 5.02 (2003); Pa. Rule Crim. Proc. 121, *comment* (2003). We hold only that the two admonitions the Iowa Supreme Court ordered are not required by the Federal Constitution.

* * *

For the reasons stated, the judgment of the Supreme Court of Iowa is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

SOUTH FLORIDA WATER MANAGEMENT DISTRICT *v.* MICCOSUKEE TRIBE OF INDIANS ET AL.

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

No. 02–626. Argued January 14, 2004—Decided March 23, 2004

Congress established the Central and South Florida Flood Control Project (Project) to address drainage and flood control problems in reclaimed portions of the Everglades. Five Project elements are at issue here. The first, the "C–11" canal, collects ground water and rainwater from an area that includes urban, agricultural, and residential development. The second Project element, pump station "S–9," moves water from the canal to the third element, an undeveloped wetland, "WCA–3," which is a remnant of the original South Florida Everglades. Petitioner, the Project's day-to-day operator (hereinafter District), impounds the water there to keep it from flowing into the ocean and to preserve wetlands habitat. Absent such human intervention, the water would flow back to the canal and flood the C–11 basin's populated areas. Such flow is prevented by levees, including the "L–33" and "L–37" levees at issue here. The combined effect of L–33, L–37, C–11, and S–9 is artificially to separate the C–11 basin from WCA–3, which would otherwise be a single wetland. The Project has an environmental impact on wetland ecosystems. Rain on the western side of L–33 and L–37 falls into WCA–3's wetland ecosystem, but rain falling on the eastern side absorbs contaminants, including phosphorous from fertilizers, before entering the C–11 canal. When that water is pumped across the levees, the phosphorus alters the WCA–3 ecosystem's balance, stimulating the growth of algae and plants foreign to the Everglades. Respondents (hereinafter Tribe) filed suit under the Clean Water Act (Act), which prohibits "the discharge of any pollutant by any person" unless done in compliance with the Act, 33 U. S. C. § 1311(a). Under the Act's National Pollutant Discharge Elimination System (NPDES), dischargers must obtain permits limiting the type and quantity of pollutants they can release into the Nation's waters. § 1342. The Act defines "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source," § 1362(12), and defines "'point source'" as "any discernible, confined and discrete conveyance" "from which pollutants are or may be discharged," § 1362(14). The Tribe claims that S–9 requires an NPDES permit because it moves phosphorus-laden water from C–11 into WCA–3, but the District contends that S–9's operation

does not constitute the "discharge of [a] pollutant" under the Act. The District Court granted the Tribe summary judgment, and the Eleventh Circuit affirmed. Both rested their holdings on the predicate determination that C–11 and WCA–3 are two distinct water bodies.

Held: The case is remanded for further proceedings regarding the parties' factual dispute over whether C–11 and WCA–3 are meaningfully distinct water bodies. Pp. 104–112.

(a) Each of three arguments advanced by the District and the Federal Government as *amicus* would, if accepted, lead to the conclusion that S–9 does not require an NPDES permit. P. 104.

(b) The Court rejects the District's initial argument that the NPDES program covers a point source only when pollutants originate from that source and not when pollutants originating elsewhere merely pass through the point source. The definition of a point source as a "conveyance," § 1362(14), makes plain that the point source need only convey the pollutant to navigable waters. The Act's examples of point sources—pipes, ditches, tunnels, and conduits—are objects that transport, but do not generate, pollutants. And one of the Act's primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants, which treat and discharge pollutants added to water by others. Pp. 104–105.

(c) The Government contends that all water bodies that are navigable waters under the Act should be viewed unitarily for purposes of NPDES permitting. Because the Act requires NPDES permits only when a pollutant is added to navigable waters, the Government contends that such permits are not required when water from one navigable body is discharged, unaltered, into another navigable body. Despite the relevance of this "unitary waters" approach, neither the District nor the Government raised it before the Eleventh Circuit or in their briefs respecting certiorari, and this Court is unaware of any case that has examined the argument in its present form. Thus, the Court declines to resolve the argument here. However, because the judgment must be vacated in any event, the unitary waters argument will be open to the parties on remand. Pp. 105–109.

(d) The District and the Government believe that the C–11 canal and WCA–3 impoundment area are not distinct water bodies, but are two hydrologically indistinguishable parts of a single water body. The Tribe agrees that, if this is so, pumping water from one into the other cannot constitute an "addition" of pollutants within the meaning of the Act, but it disputes the District's factual premise that C–11 and WCA–3 are one. The parties also disagree about how the relationship between S–9 and WCA–3 should be assessed. This Court does not decide here whether the District Court's test is adequate for determining whether C–11 and WCA–3 are distinct, because that court applied its test prema-

turely. Summary judgment is appropriate only where there is no genuine issue of material fact, but some factual issues remain unresolved here. The District Court correctly characterized the flow through S–9 as nonnatural, and it appears that if S–9 were shut down, the water in the C–11 canal might for a brief time flow east, rather than west. But the record also suggests that if S–9 were shut down, the area drained by C–11 would flood, which might mean C–11 would no longer be a distinct body of navigable water, but instead part of a larger water body extending over WCA–3 and the C–11 basin. It also might call into question the Eleventh Circuit's conclusion that S–9 is the cause in fact of phosphorous addition to WCA–3. Nothing in the record suggests that the District Court considered these issues when it granted summary judgment. If, after further development of the record, that court concludes that C–11 and WCA–3 are not meaningfully distinct water bodies, S–9 will not need an NPDES permit. Pp. 109–112.

280 F. 3d 1364, vacated and remanded.

O'Connor, J., delivered the opinion of the Court, Parts I and II–A of which were unanimous, and Parts II–B and II–C of which were joined by Rehnquist, C. J., and Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ. Scalia, J., filed an opinion concurring in part and dissenting in part, *post*, p. 112.

Timothy S. Bishop argued the cause for petitioner. With him on the briefs were *Sheryl Grimm Wood* and *James E. Nutt.*

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Sansonetti*, *Deputy Solicitor General Hungar*, *Deputy Assistant Attorney General Clark*, *James C. Kilbourne*, *Ellen Durkee*, and *Sylvia Quast.*

Dexter W. Lehtinen argued the cause for respondents. With him on the brief for respondent Miccosukee Tribe of Indians were *Juan M. Vargas*, *Claudio Riedi*, *Sonia Escobio O'Donnell*, *Richard J. Ovelmen*, and *Dionè C. Carroll. John E. Childe* filed a brief for respondent Friends of the Everglades.*

*Briefs of *amici curiae* urging reversal were filed for the State of Colorado et al. by *Ken Salazar*, Attorney General of Colorado, *Alan J. Gilbert*, Solicitor General, *Felicity Hannay*, Deputy Attorney General, and *An-*

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner South Florida Water Management District operates a pumping facility that transfers water from a canal

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thony S. Trumbly, Senior Assistant Attorney General, by *Patricia A. Madrid*, Attorney General of New Mexico, *Glenn R. Smith*, Deputy Attorney General, and *Stephen R. Farris*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Mark J. Bennett* of Hawaii, *Lawrence Wasden* of Idaho, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Wayne Stenehjem* of North Dakota, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Patrick J. Crank* of Wyoming; for Idaho Governor Dirk Kempthorne by *L. Michael Bogert;* for the City of Weston, Florida, by *Susan L. Trevarthen* and *Nancy E. Stroud;* for the City of New York et al. by *Michael A. Cardozo*, *Leonard J. Koerner*, *Kenneth A. Rubin*, and *Alexandra Dapolito Dunn;* for the Florida Fruit and Vegetable Association et al. by *Terry Cole*, *John J. Rademacher*, and *John W. Costigan;* for the Lake Worth Drainage District et al. by *Kenneth G. Spillias* and *Michelle Diffenderfer;* for the National Association of Home Builders by *Virginia S. Albrecht*, *Andrew J. Turner*, *Duane J. Desiderio*, and *Thomas Jon Ward;* for the National Hydropower Association by *Sam Kalen* and *Michael A. Swiger;* for the National League of Cities et al. by *Richard Ruda* and *James I. Crowley;* for the National Water Resources Association et al. by *Robert V. Trout*, *Peggy E. Montaño*, *Jeffrey Kightlinger*, *Gregory K. Wilkinson*, *Guy R. Martin*, *W. Patrick Schiffer*, and *Gregg A. Houtz;* for the Nationwide Public Projects Coalition et al. by *Lawrence R. Liebesman;* for the Pacific Legal Foundation by *Robin L. Rivett* and *Frank A. Shepherd;* and for the Utility Water Act Group by *Kristy A. N. Bulleit.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Michelle Aronowitz*, Deputy Solicitor General, *Robert H. Easton*, Assistant Solicitor General, *Peter H. Lehner*, Chief Assistant Attorney General, and *James M. Tierney*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Lisa Madigan* of Illinois, *Albert B. Chandler III* of Kentucky, *G. Steven Rowe* of Maine, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Peter C. Harvey* of New Jersey, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington; for the Commonwealth of Pennsylvania Department of Environmental Protection by *Richard P. Mather, Sr.*, *Leslie Anne Miller*, *Peter G. Glenn*, and *K. Scott Roy;* for the

into a reservoir a short distance away. Respondents Miccosukee Tribe of Indians and the Friends of the Everglades brought a citizen suit under the Clean Water Act contending that the pumping facility is required to obtain a discharge permit under the National Pollutant Discharge Elimination System. The District Court agreed and granted summary judgment to respondents. A panel of the United States Court of Appeals for the Eleventh Circuit affirmed. Both the District Court and the Eleventh Circuit rested their holdings on the predicate determination that the canal and reservoir are two distinct water bodies. For the reasons explained below, we vacate and remand for further development of the factual record as to the accuracy of that determination.

I

A

The Central and South Florida Flood Control Project (Project) consists of a vast array of levees, canals, pumps, and water impoundment areas in the land between south Florida's coastal hills and the Everglades. Historically, that land was itself part of the Everglades, and its surface and ground water flowed south in a uniform and unchanneled sheet. Starting in the early 1900's, however, the State began to build canals to drain the wetlands and make them suitable for cultivation. These canals proved to be a source

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Association of State Wetland Managers et al. by *Patrick A. Parenteau* and *Julia LeMense Huff;* for the Coalition of Greater Minnesota Cities et al. by *Douglas L. Skor;* for the Florida Wildlife Federation et al. by *David G. Guest* and *Monica K. Reimer;* for the National Tribal Environmental Council et al. by *Tracy A. Labin*, *Robert T. Anderson*, and *William H. Rodgers, Jr.;* for the National Wildlife Federation et al. by *James Murphy* and *Howard I. Fox;* for the Tongue & Yellowstone River Irrigation District et al. by *Jack R. Tuholske* and *Elizabeth A. Brennan;* for Trout Unlimited, Inc., et al. by *Karl S. Coplan;* and for Former Administrator of the United States Environmental Protection Agency Carol M. Browner et al. by *Richard J. Lazarus.*

of trouble; they lowered the water table, allowing saltwater to intrude upon coastal wells, and they proved incapable of controlling flooding. Congress established the Project in 1948 to address these problems. It gave the United States Army Corps of Engineers the task of constructing a comprehensive network of levees, water storage areas, pumps, and canal improvements that would serve several simultaneous purposes, including flood protection, water conservation, and drainage. These improvements fundamentally altered the hydrology of the Everglades, changing the natural sheet flow of ground and surface water. The local sponsor and day-to-day operator of the Project is the South Florida Water Management District (District).

Five discrete elements of the Project are at issue in this case. One is a canal called "C–11." C–11 collects ground water and rainwater from a 104-square-mile area in south central Broward County. App. 110. The area drained by C–11 includes urban, agricultural, and residential development, and is home to 136,000 people. At the western terminus of C–11 is the second Project element at issue here: a large pump station known as "S–9." When the water level in C–11 rises above a set level, S–9 begins operating and pumps water out of the canal. The water does not travel far. Sixty feet away, the pump station empties the water into a large undeveloped wetland area called "WCA–3," the third element of the Project we consider here. WCA–3 is the largest of several "water conservation areas" that are remnants of the original South Florida Everglades. The District impounds water in these areas to conserve freshwater that might otherwise flow directly to the ocean, and to preserve wetlands habitat. *Id.*, at 112.

Using pump stations like S–9, the District maintains the water table in WCA–3 at a level significantly higher than that in the developed lands drained by the C–11 canal to the east. Absent human intervention, that water would simply flow back east, where it would rejoin the waters of the canal

and flood the populated areas of the C–11 basin. That return flow is prevented, or, more accurately, slowed, by levees that hold back the surface waters of WCA–3. Two of those levees, L–33 and L–37, are the final two elements of the Project at issue here. The combined effect of L–33 and L–37, C–11, and S–9 is artificially to separate the C–11 basin from WCA–3; left to nature, the two areas would be a single wetland covered in an undifferentiated body of surface and ground water flowing slowly southward.

B

As the above description illustrates, the Project has wrought large-scale hydrologic and environmental change in South Florida, some deliberate and some accidental. Its most obvious environmental impact has been the conversion of what were once wetlands into areas suitable for human use. But the Project also has affected those areas that remain wetland ecosystems.

Rain on the western side of the L–33 and L–37 levees falls into the wetland ecosystem of WCA–3. Rain on the eastern side of the levees, on the other hand, falls on agricultural, urban, and residential land. Before it enters the C–11 canal, whether directly as surface runoff or indirectly as ground water, that rainwater absorbs contaminants produced by human activities. The water in C–11 therefore differs chemically from that in WCA–3. Of particular interest here, C–11 water contains elevated levels of phosphorous, which is found in fertilizers used by farmers in the C–11 basin. When water from C–11 is pumped across the levees, the phosphorous it contains alters the balance of WCA–3's ecosystem (which is naturally low in phosphorous) and stimulates the growth of algae and plants foreign to the Everglades ecosystem.

The phosphorous-related impacts of the Project are well known and have received a great deal of attention from state and federal authorities for more than 20 years. A number

of initiatives are currently under way to reduce these impacts and thereby restore the ecological integrity of the Everglades. Respondents Miccosukee Tribe of Indians and the Friends of the Everglades (hereinafter simply Tribe), impatient with the pace of this progress, brought this Clean Water Act suit in the United States District Court for the Southern District of Florida. They sought, among other things, to enjoin the operation of S–9 and, in turn, the conveyance of water from C–11 into WCA–3.

C

Congress enacted the Clean Water Act (Act) in 1972. Its stated objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 86 Stat. 816, 33 U. S. C. § 1251. To serve those ends, the Act prohibits "the discharge of any pollutant by any person" unless done in compliance with some provision of the Act. § 1311(a). The provision relevant to this case, § 1342, establishes the National Pollutant Discharge Elimination System, or NPDES. Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters. The Act defines the phrase "'discharge of a pollutant'" to mean "any addition of any pollutant to navigable waters from any point source." § 1362(12). A "'point source,'" in turn, is defined as "any discernible, confined and discrete conveyance," such as a pipe, ditch, channel, or tunnel, "from which pollutants are or may be discharged." § 1362(14).

According to the Tribe, the District cannot operate S–9 without an NPDES permit because the pump station moves phosphorous-laden water from C–11 into WCA–3. The District does not dispute that phosphorous is a pollutant, or that C–11 and WCA–3 are "navigable waters" within the meaning of the Act. The question, it contends, is whether the

operation of the S–9 pump constitutes the "discharge of [a] pollutant" within the meaning of the Act.

The parties filed cross-motions for summary judgment on the issue of whether S–9 requires an NPDES permit. The District Court granted the Tribe's motion, reasoning as follows:

> "In this case an addition of pollutants exists because undisputedly water containing pollutants is being discharged through S–9 from C–11 waters into the Everglades, both of which are separate bodies of United States water with . . . different quality levels. They are two separate bodies of water because the transfer of water or its contents from C–11 into the Everglades would not occur naturally." App. to Pet. for Cert. 28a–29a.

The Court of Appeals affirmed. It reasoned first that "in determining whether pollutants are added to navigable waters for purposes of the [Act], the receiving body of water is the relevant body of navigable water." 280 F. 3d 1364, 1368 (CA11 2002). After concluding that pollutants were indeed being added to WCA–3, the court then asked whether that addition of pollutants was from a "point source," so as to trigger the NPDES permitting requirement. To answer that question, it explained:

> "[F]or an addition of pollutants to be from a point source, the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water. We, therefore, conclude that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters.
>
> "When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed,

> that point source is the cause-in-fact of the discharge of pollutants." *Ibid.* (footnote omitted).

Because it believed that the water in the C–11 canal would not flow into WCA–3 without the operation of the S–9 pump station, the Court of Appeals concluded that S–9 was the cause-in-fact of the addition of pollutants to WCA–3. It accordingly affirmed the District Court's grant of summary judgment, and held that the S–9 pump station requires an NPDES permit. We granted certiorari. 539 U. S. 957 (2003).

II

The District and the Federal Government, as *amicus*, advance three separate arguments, any of which would, if accepted, lead to the conclusion that the S–9 pump station does not require a point source discharge permit under the NPDES program. Two of these arguments involve the application of disputed contentions of law to agreed-upon facts, while the third involves the application of agreed-upon law to disputed facts. For reasons explained below, we decline at this time to resolve all of the parties' legal disagreements, and instead remand for further proceedings regarding their factual dispute.

A

In its opening brief on the merits, the District argued that the NPDES program applies to a point source "only when a pollutant originates from the point source," and not when pollutants originating elsewhere merely pass through the point source. Brief for Petitioner 20. This argument mirrors the question presented in the District's petition for certiorari: "Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act." Pet. for Cert. i. Although the Government rejects

the District's legal position, Brief for United States as *Amicus Curiae* 21, it and the Tribe agree with the factual proposition that S–9 does not itself add any pollutants to the water it conveys into WCA–3.

This initial argument is untenable, and even the District appears to have abandoned it in its reply brief. Reply Brief for Petitioner 2. A point source is, by definition, a "discernible, confined, and discrete *conveyance.*" § 1362(14) (emphasis added). That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to "navigable waters," which are, in turn, defined as "the waters of the United States." § 1362(7). Tellingly, the examples of "point sources" listed by the Act include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them. § 1362(14). In addition, one of the Act's primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants. See, *e. g.*, § 1311(b)(1)(B) (establishing a compliance schedule for publicly owned treatment works). But under the District's interpretation of the Act, the NPDES program would not cover such plants, because they treat and discharge pollutants added to water by others. We therefore reject the District's proposed reading of the definition of "'discharge of a pollutant'" contained in § 1362(12). That definition includes within its reach point sources that do not themselves generate pollutants.

B

Having answered the precise question on which we granted certiorari, we turn to a second argument, advanced primarily by the Government as *amicus curiae* in merits briefing and at oral argument. For purposes of determining whether there has been "any addition of any pollutant to navigable waters from any point source," *ibid.*, the Government contends that all the water bodies that fall within the Act's definition of "'navigable waters'" (that is, all "the

waters of the United States, including the territorial seas," § 1362(7)) should be viewed unitarily for purposes of NPDES permitting requirements. Because the Act requires NPDES permits only when there is an addition of a pollutant "to navigable waters," the Government's approach would lead to the conclusion that such permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body. That would be true even if one water body were polluted and the other pristine, and the two would not otherwise mix. See *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *New York*, 273 F. 3d 481, 492 (CA2 2001); *Dubois* v. *United States Dept. of Agriculture*, 102 F. 3d 1273 (CA1 1996). Under this "unitary waters" approach, the S–9 pump station would not need an NPDES permit.

1

The "unitary waters" argument focuses on the Act's definition of a pollutant discharge as "any addition of any pollutant to navigable waters from any point source." § 1362(12). The Government contends that the absence of the word "any" prior to the phrase "navigable waters" in § 1362(12) signals Congress' understanding that NPDES permits would not be required for pollution caused by the engineered transfer of one "navigable water" into another. It argues that Congress intended that such pollution instead would be addressed through local nonpoint source pollution programs. Section 1314(f)(2)(F), which concerns nonpoint sources, directs the Environmental Protection Agency (EPA) to give States information on the evaluation and control of "pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities."

We note, however, that § 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the "point source" definition.

And several NPDES provisions might be read to suggest a view contrary to the unitary waters approach. For example, under the Act, a State may set individualized ambient water quality standards by taking into consideration "the designated uses of the navigable waters involved." 33 U. S. C. § 1313(c)(2)(A). Those water quality standards, in turn, directly affect local NPDES permits; if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit holders who discharge to the water body. § 1313(d). This approach suggests that the Act protects individual water bodies as well as the "waters of the United States" as a whole.

The Government also suggests that we adopt the "unitary waters" approach out of deference to a longstanding EPA view that the process of "transporting, impounding, and releasing navigable waters" cannot constitute an "'addition'" of pollutants to "'the waters of the United States.'" Brief for United States as *Amicus Curiae* 16. But the Government does not identify any administrative documents in which EPA has espoused that position. Indeed, an *amicus* brief filed by several former EPA officials argues that the agency once reached the opposite conclusion. See Brief for Former Administrator Carol M. Browner et al. as *Amici Curiae* 17 (citing *In re Riverside Irrigation Dist.*, 1975 WL 23864 (Ofc. Gen. Coun., June 27, 1975) (irrigation ditches that discharge to navigable waters require NPDES permits even if they themselves qualify as navigable waters)). The "unitary waters" approach could also conflict with current NPDES regulations. For example, 40 CFR § 122.45(g)(4) (2003) allows an industrial water user to obtain "intake credit" for pollutants present in water that it withdraws from navigable waters. When the permit holder discharges the water after use, it does not have to remove pollutants that were in the water before it was withdrawn. There is a

caveat, however: EPA extends such credit "only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made." The NPDES program thus appears to address the movement of pollutants among water bodies, at least at times.

Finally, the Government and numerous *amici* warn that affirming the Court of Appeals in this case would have significant practical consequences. If we read the Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. See Brief for Colorado et al. as *Amici Curiae* 2–4. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. § 1251(g). On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs. See 40 CFR §§ 122.28, 123.25 (2003).*

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*An applicant for an individual NPDES permit must provide information about, among other things, the point source itself, the nature of the pollutants to be discharged, and any water treatment system that will be used. General permits greatly reduce that administrative burden by authorizing discharges from a category of point sources within a specified geographic area. Once EPA or a state agency issues such a permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions. See 40 CFR § 122.28(b)(2)(v) (2003).

Indeed, that is the position of the one State that *has* interpreted the Act to cover interbasin water transfers. See Brief for Pennsylvania Department of Environmental Protection as *Amicus Curiae* 11–18.

2

Because WCA–3 and C–11 are both "navigable waters," adopting the "unitary waters" approach would lead to the conclusion that the District may operate S–9 without an NPDES permit. But despite its relevance here, neither the District nor the Government raised the unitary waters approach before the Court of Appeals or in their briefs respecting the petition for certiorari. (The District adopted the position as its own in its reply brief on the merits.) Indeed, we are not aware of any reported case that examines the unitary waters argument in precisely the form that the Government now presents it. As a result, we decline to resolve it here. Because we find it necessary to vacate the judgment of the Court of Appeals with respect to a third argument presented by the District, the unitary waters argument will be open to the parties on remand.

C

In the courts below, as here, the District contended that the C–11 canal and WCA–3 impoundment area are not distinct water bodies at all, but instead are two hydrologically indistinguishable parts of a single water body. The Government agrees with the District on this point, claiming that because the C–11 canal and WCA–3 "share a unique, intimately related, hydrological association," they "can appropriately be viewed, for purposes of Section 402 of the Clean Water Act, as parts of a single body of water." Brief for United States in Opposition 13. The Tribe does not dispute that if C–11 and WCA–3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants. As the Second Cir-

cuit put it in *Trout Unlimited*, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." 273 F. 3d, at 492. What the Tribe disputes is the accuracy of the District's factual premise; according to the Tribe, C–11 and WCA–3 are two pots of soup, not one.

The record does contain information supporting the District's view of the facts. Although C–11 and WCA–3 are divided from one another by the L–33 and L–37 levees, that line appears to be an uncertain one. Because Everglades soil is extremely porous, water flows easily between ground and surface waters, so much so that "[g]round and surface waters are essentially the same thing." App. 111, 117. C–11 and WCA–3, of course, share a common underlying aquifer. Tr. of Oral Arg. 42. Moreover, the L–33 and L–37 levees continually leak, allowing water to escape from WCA–3. This means not only that any boundary between C–11 and WCA–3 is indistinct, but also that there is some significant mingling of the two waters; the record reveals that even without use of the S–9 pump station, water travels as both seepage and ground water flow between the water conservation area and the C–11 basin. App. 172; see also *id.*, at 37 (describing flow between C–11 and WCA–3 as "cyclical").

The parties also disagree about how the relationship between S–9 and WCA–3 should be assessed. At oral argument, counsel for the Tribe focused on the differing "biological or ecosystem characteristics" of the respective waters, Tr. of Oral Arg. 43; see also Brief for Respondent Miccosukee Tribe of Indians 6–7; Brief for Respondent Friends of the Everglades 18–22, while counsel for the District emphasizes the close hydrological connections between the two. See, *e. g.*, Brief for Petitioner 47. Despite these disputes, the District Court granted summary judgment to the Tribe. It applied a test that neither party defends; it determined

that C–11 and WCA–3 are distinct "because the transfer of water or its contents from C–11 into the Everglades would not occur naturally." App. to Pet. for Cert. 28a. The Court of Appeals for the Eleventh Circuit endorsed this test. 280 F. 3d, at 1368.

We do not decide here whether the District Court's test is adequate for determining whether C–11 and WCA–3 are distinct. Instead, we hold only that the District Court applied its test prematurely. Summary judgment is appropriate only where there is no genuine issue of material fact. See *Celotex Corp.* v. *Catrett*, 477 U. S. 317 (1986). The record before us leads us to believe that some factual issues remain unresolved. The District Court certainly was correct to characterize the flow through the S–9 pump station as a nonnatural one, propelled as it is by diesel-fired motors against the pull of gravity. And it also appears true that if S–9 were shut down, the water in the C–11 canal might for a brief time flow *east*, rather than west, as it now does. But the effects of shutting down the pump might extend beyond that. The limited record before us suggests that if S–9 were shut down, the area drained by C–11 would flood quite quickly. See 280 F. 3d, at 1366 ("Without the operation of the S–9 pump station, the populated western portion of Broward County would flood within days"). That flooding might mean that C–11 would no longer be a "distinct body of navigable water," *id.*, at 1368, but part of a larger water body extending over WCA–3 and the C–11 basin. It also might call into question the Eleventh Circuit's conclusion that S–9 is the cause in fact of phosphorous addition to WCA–3. Nothing in the record suggests that the District Court considered these issues when it granted summary judgment. Indeed, in ordering later emergency relief from its own injunction against the operation of the S–9 pump station, the court admitted that it had not previously understood that shutting down S–9 would "'literally ope[n] the flood gates.'" *Id.*, at 1371.

We find that further development of the record is necessary to resolve the dispute over the validity of the distinction between C–11 and WCA–3. After reviewing the full record, it is possible that the District Court will conclude that C–11 and WCA–3 are not meaningfully distinct water bodies. If it does so, then the S–9 pump station will not need an NPDES permit. In addition, the Government's broader "unitary waters" argument is open to the District on remand. Accordingly, the judgment of the United States Court of Appeals for the Eleventh Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in part and dissenting in part.

I join Parts I and II–A of the Court's opinion, which hold that a point source is not exempt from the National Pollutant Discharge Elimination System permit requirement merely because it does not itself add pollutants to the water it pumps. I dissent, however, from its decision to vacate the judgment below on another ground, Part II–C, *ante*, and to invite consideration of yet another legal theory, Part II–B, *ante*. Neither of those actions is taken in response to the question presented. I would affirm the Court of Appeals' disposition of the question presented without reaching other issues.

Parts II–B and II–C are problematic for other reasons as well. In Part II–B, the Court declines to resolve the Government's unitary-waters argument on the ground that it was not raised or decided below. See *ante*, at 109. In my judgment, a fair reading of the opinion and briefs does not support that contention. See, *e. g.*, 280 F. 3d 1364, 1368, n. 5 (CA11 2002) ("We reject the Water District's argument that no addition of pollutants can occur unless pollutants are added from the outside world *insofar as the Water District contends the outside world cannot include another body of*

navigable waters" (emphasis added)); Brief for Appellant in No. 00–15703–CC (CA11), p. 10 ("The S–9 pump station merely moves navigable waters from one side of the Levee to another"). That the argument was not phrased in the same terms or argued with the same clarity does not mean it was not made. I see no point in directing the Court of Appeals to consider an argument it has already rejected.

I also question the Court's holding in Part II–C that summary judgment was precluded by the possibility that, if the pumping station were shut down, flooding in the C–11 basin might ultimately cause pollutants to flow from C–11 to WCA–3. *Ante*, at 111. To my knowledge, that argument has not previously been made. Petitioner argued that WCA–3 and C–11 were historically part of the same ecosystem and that they remain hydrologically related, see Brief for Petitioner 46–49, but that is quite different from arguing that, absent S–9, pollutants would flow from C–11 to WCA–3 (a journey that, at the moment, is *uphill*). Nothing in *Celotex Corp.* v. *Catrett*, 477 U. S. 317 (1986), requires a district court to speculate *sua sponte* about possibilities even the parties have not contemplated. Cf. Fed. Rule Civ. Proc. 56(e) (opponent of summary judgment must "set forth specific facts showing that there is a genuine issue for trial").

I would affirm the judgment below as to the question presented, leaving the Government's unitary-waters theory to be considered in another case.

Syllabus

UNITED STATES *v.* GALLETTI ET AL.

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

No. 02–1389. Argued January 12, 2004—Decided March 23, 2004

"[T]he amount of any tax imposed [by the Internal Revenue Code] shall be assessed within three years after the return was filed." 26 U. S. C. § 6501(a). If a tax is properly so assessed, the statute of limitations for collecting it is extended by 10 years from the assessment date. § 6502(a). Respondents were general partners of a partnership (hereinafter Partnership) that failed to pay significant federal employment taxes from 1992 to 1995. The Internal Revenue Service (IRS) timely assessed the Partnership, but the taxes were never paid. Respondents later filed for Chapter 13 bankruptcy protection, and the IRS then filed proof of claims against them for the Partnership's unpaid employment taxes. Respondents objected, arguing that the timely assessment of the Partnership did not extend the 3-year limitations period against the general partners, who had not been separately assessed within that period. The Bankruptcy Court and the District Court agreed and sustained respondents' objections. The Ninth Circuit affirmed, holding that since respondents are "taxpayers" under § 7701, which defines "taxpayer" to mean "any person subject to any internal revenue tax," they are also "taxpayers" under §§ 6203 and 6501. As such, the court held that the assessment against the Partnership extended the limitations period only with respect to the Partnership.

Held: The proper tax assessment against the Partnership suffices to extend the statute of limitations to collect the tax in a judicial proceeding from the general partners who are liable for the payment of the Partnership's debts. Pp. 119–124.

(a) Respondents argue that a valid assessment triggering the 10-year increase in the limitations period must name them individually, as they are primarily liable for the tax debt. They claim, first, that they are the relevant taxpayers under § 6203, which requires the assessment to be made by "recording the liability of the taxpayer." Although the Ninth Circuit correctly concluded that an individual partner can be a "taxpayer," § 6203 speaks of the taxpayer's "liability," which indicates that the relevant taxpayer must be determined. Here, the liability arose from the Partnership's failure to comply with § 3402(a)(1)'s requirement that an "employer [paying] wages" deduct and withhold employment taxes. And § 3403 makes clear that the "employer" that fails

to withhold and submit the requisite employment taxes is the "liable" taxpayer. In this case, the Partnership is the "employer." Second, respondents claim that they are primarily liable for the tax debt because California law makes them jointly and severally liable for the Partnership's debts. However, to be primarily liable for this debt, respondents must show that they are the "employer." And, under California law, a partnership and its general partners are separate entities. Thus respondents cannot argue that, for all intents and purposes, imposing a tax directly on the Partnership is equivalent to imposing a tax directly on the general partners, but must instead prove that the tax liability was imposed both on the Partnership and on respondents as separate "employers." That respondents are jointly and severally liable for the Partnership's debts is irrelevant to this determination. Pp. 120–121.

(b) The Code does not require the Government to make separate assessments of a single tax debt against persons or entities secondarily liable for that debt in order for § 6502's extended limitations period to apply to judicial collection actions against those persons or entities. It is clear that "assessment" refers to little more than the calculation or recording of a tax liability, see, *e. g.*, § 6201, and that it is *the tax* that is assessed, not the taxpayer, see, *e. g.*, § 6501. The limitations period resulting from a proper assessment governs the time extension for enforcing the tax liability. *United States* v. *Updike*, 281 U. S. 489, 495. Once a tax has been properly assessed, nothing in the Code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are, by reason of state law, liable for the taxpayer's debt. The assessment's consequences—the extension of the limitations period for collecting the debt—attach to the debt without reference to the special circumstances of the secondarily liable parties. Here, the tax was properly assessed against the Partnership, thereby extending the limitations period for collecting the debt. The United States now timely seeks to collect that debt in judicial proceedings against respondents. Pp. 121–124.

314 F. 3d 336, reversed and remanded.

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

Kent L. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Olson, Assistant Attorney General O'Connor, Deputy Solicitor General Hungar, Thomas J. Clark*, and *Andrea R. Tebbets.*

David R. Haberbush argued the cause for respondents. With him on the brief were *Joel Barry Feinberg*, *A. Lavar Taylor*, and *Charles F. Rosen*.

JUSTICE THOMAS delivered the opinion of the Court.

Section 6501(a) of the Internal Revenue Code states that, except as otherwise provided, "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . . and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period." 26 U. S. C. § 6501(a). If a tax is properly assessed within three years, however, the statute of limitations for the collection of the tax is extended by 10 years from the date of assessment. § 6502(a). We must decide in this case whether, in order for the United States to avail itself of the 10-year increase in the statute of limitations for collection of a tax debt, it must assess the taxes not only against a partnership that is directly liable for the debt, but also against each individual partner who might be jointly and severally liable for the debts of the partnership. Under California law a partnership maintains a separate identity from its general partners, and the partners are only secondarily liable for the tax debts of the partnership, as they are for any debt of the partnership. Because, in this case, the only relevant "taxpayer" for purposes of §§ 6501–6502 is the partnership, we hold that the proper assessment of the tax against the partnership suffices to extend the statute of limitations for collection of the tax from the general partners who are liable for the payment of the partnership's debts. The Government's timely assessment of the tax against the partnership was sufficient to extend the statute of limitations to collect the tax in a judicial proceeding, whether from the partnership itself or from those liable for its debts.

I

Respondents, Abel Cosmo Galletti, Sarah Galletti, Francesco Briguglio, and Angela Briguglio, were general partners of Marina Cabrillo Company (Partnership). From 1992 to 1995, the Partnership failed to pay significant federal employment tax liabilities that it had incurred. Although the Internal Revenue Service (IRS) timely assessed those taxes against the Partnership in 1994, 1995, and 1996, the Partnership never satisfied the debt.

Respondents Abel and Sarah Galletti and respondents Francesco and Angela Briguglio filed joint petitions for relief under Chapter 13 of the Bankruptcy Code on October 20, 1999, and February 4, 2000, respectively. In the Gallettis' proceedings, the IRS filed a proof of claim in the amount of $395,179.89 for unpaid employment taxes assessed between January 1994 and July 1995 against the Partnership. In the Briguglios' proceedings, the IRS filed a proof of claim in the amount of $427,402.74. The proof of claim included secured claims totaling $403,264.06 for unpaid employment taxes assessed between January 1994 and November 1996 against the Partnership.

Respondents objected to the claims on the ground that they were not proven against the estates. Respondents did not dispute that under California law they are jointly and severally liable for the debts of the Partnership. Nor did they dispute that the IRS had properly assessed the taxes against the Partnership within the 3-year statute of limitations, thereby extending the limitations period for collection of the taxes by 10 years. Rather, respondents argued that the timely assessment of the Partnership extended the statute of limitations only against the Partnership. To extend the 3-year statute of limitations against the general partners, respondents argued, the IRS had to separately assess the general partners within the 3-year limitations period. Because it did not, and because the 3-year limitations period

had expired, respondents argued that the IRS could no longer collect the debt from them. The Bankruptcy Court and the District Court agreed and sustained respondents' objections to the claims.

The Court of Appeals for the Ninth Circuit affirmed. The Government argued that the Code does not require that the individual partners be assessed within the 3-year period prescribed by § 6501 and that the IRS made a valid assessment of the taxpayer here because the Partnership is the only relevant "taxpayer." The Court of Appeals held that since respondents are "taxpayers" under § 7701(a)(14), which defines "taxpayer" to mean "any person subject to any internal revenue tax," they are also "taxpayers" under §§ 6203 and 6501. As such, the Court of Appeals held that "[t]he assessment against the Partnership extended the statute of limitations only with respect to the Partnership." 314 F. 3d 336, 340 (2002).

The Government argued in the alternative that because respondents conceded that they were liable for the Partnership's employment tax debts as a matter of California law, the Government had a right to payment, which suffices to prove a valid claim in bankruptcy. See 11 U. S. C. § 101(5)(A) (defining "claim" as including a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"). The Court of Appeals rejected this argument because, under California law, a creditor must obtain a judgment against a partner before holding that partner liable for the partnership's debt. Cal. Corp. Code Ann. § 16307(c) (West Supp. 2004). At the time the United States filed its proof of claim, it had not obtained a separate judgment against respondents, and the time for obtaining a judgment under the Internal Revenue Code against respondents had expired.

We granted certiorari, 539 U. S. 940 (2003), and now reverse.

II

Section 6501(a) of the Internal Revenue Code provides that "the amount of any tax imposed [by the Code] shall be assessed within 3 years after the return was filed." 26 U. S. C. § 6501(a). "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary [of the Treasury] in accordance with rules or regulations prescribed by the Secretary." § 6203. Within 60 days of the assessment, the Secretary is required to "give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." § 6303(a). If the tax is properly assessed within 3 years, the limitations period for collection of the tax is extended by 10 years from the date of the assessment. § 6502.

The dispute in this case centers on whether the United States can collect the Partnership's unpaid employment taxes from respondents in a judicial proceeding occurring more than three years after the tax return was filed but within the 10-year extension to the 3-year limitations period that attached when the tax was timely assessed against the Partnership.[1] Respondents insist that a valid assessment (that is, one that would trigger the 10-year increase in the statute of limitations) must name them individually. This is so, according to respondents, because they are primarily liable for the tax debt, both because they are "the [relevant] taxpayer[s]" under § 6203 and because they are jointly and

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[1] Because the Government is attempting to enforce the Partnership's tax liabilities against respondents in a judicial proceeding, we do not address whether an assessment only against the Partnership is sufficient for the IRS to commence administrative collection of the Partnership's tax debts by lien or levy against respondents' property.

We also decline to address whether an assessment against the partnership suffices to trigger liability against the partners for interest and penalties without separate notice and demand to them.

severally liable for the tax debts of the Partnership.[2] We reject both arguments in turn.

A

Respondents argue, and the Court of Appeals agreed, that each partner is primarily liable for the debt and must be individually assessed because each partner is a separate "taxpayer" under 26 U. S. C. § 6203. The statutory definition of "taxpayer" includes "any person subject to any internal revenue tax," and "person" includes both "an individual" and a "partnership," §§ 7701(a)(14), (a)(1). The Court of Appeals observed that although the Partnership is a "taxpayer," each individual partner is also a separate "taxpayer." As such, the Court of Appeals interpreted § 6203's requirement that the Secretary of the Treasury record "the liability of the taxpayer" to require a separate assessment against each of the general partners.

Although the Court of Appeals correctly concluded that an individual partner can be a "taxpayer," the inquiry does not end there. Section 6203 speaks of "*the liability* of the taxpayer" (emphasis added), which indicates that the relevant taxpayer must be determined. The liability in this case arose from the Partnership's failure to comply with § 3402(a)(1) of the Code, which requires "every employer

[2] Respondents argue that even if we were to hold that the partners are secondarily liable, the IRS would still be barred from collecting the taxes. Respondents contend that if partners are not "taxpayers" under § 6203, then their liability arises only under state law, and the state 3-year statute of limitations therefore applies. Brief for Respondents 30–34. Respondents have forfeited this argument by failing to raise it in the courts below. Indeed, the closest respondents have come to arguing that the state limitations period applies was in the Court of Appeals, when respondents argued that "under California law, any collections suit filed against a partner to collect a partnership debt is subject to the statute limitation provision which applies to the underlying debt of the partnership." Appellee's Opening Brief in Nos. 01–55953, 01–55954 (CA9), p. 14. This argument, of course, is contrary to respondents' position in this Court.

making payment of wages" to deduct and withhold employment taxes. Moreover, "[t]he employer shall be liable for the payment of the tax required to be deducted and withheld." § 3403. When an employer fails to withhold and submit the requisite amount of employment taxes, § 3403 makes clear that the liable taxpayer is the employer. In this case, the "employer" was the Partnership.[3]

B

Respondents also argue that they are primarily liable for the Partnership's tax debt because, under California law, general partners are jointly and severally liable for the debts of their partnership, Cal. Corp. Code Ann. § 16306 (West Supp. 2004). Brief for Respondents 8–16. As our prior discussion demonstrates, however, respondents cannot show that they are primarily liable for the payment of the Partnership's employment taxes unless they can show that they are the "employer." However, under California's partnership principles, a partnership and its general partners are separate entities. See § 16201. Thus respondents cannot argue that, for all intents and purposes, imposing a tax directly on the Partnership is equivalent to imposing a tax directly on the general partners. Respondents must instead prove that the tax liability was imposed both on the Partnership and respondents as separate "employers." The fact that respondents are jointly and severally liable for the debts of the Partnership is irrelevant to this determination.

III

We now turn to the question whether the Government must make separate assessments of a single tax debt against persons or entities secondarily liable for that debt in order

[3] Our decision is consistent with this Court's holding in *United States* v. *Williams*, 514 U. S. 527, 532–536 (1995), where we interpreted "taxpayer" under 26 U. S. C. § 6511 more broadly. Here, it is clear that we must interpret "the taxpayer" under § 6203 with reference to the underlying liability.

for § 6502's extended statute of limitations to apply to those persons or entities.[4] We hold that the Code contains no such requirement. Respondents' argument that they must be separately assessed turns on a mistaken understanding of the function and nature of an assessment as identical to the initiation of a formal collection action against any person or entity who might be liable for payment of a debt. In its numerous uses throughout the Code, it is clear that the term "assessment" refers to little more than the calculation or recording of a tax liability. See, *e. g.*, 26 U. S. C. § 6201 (assessment authority); § 6203 (method of assessment); § 6204 (supplemental assessments); 26 CFR § 601.103 (2003). See also Black's Law Dictionary 111 (7th ed. 1999) (defining "assessment" as the "[d]etermination of the [tax] rate or amount of something, such as a tax or damages"). "The Federal tax system is basically one of self-assessment," whereby each taxpayer computes the tax due and then files the appropriate form of return along with the requisite payment. 26 CFR § 601.103(a) (2003). In most cases, the Secretary accepts the self-assessment and simply records the liability of the taxpayer. Where the taxpayer fails to file the form of return or miscalculates the tax due, as in this case, the Secretary can assess "all taxes (including interest, additional amounts, additions to the tax, and assessable penalties)," 26 U. S. C. § 6201(a), by "recording the liability of the taxpayer in the office of the Secretary," § 6203. In other words, where the Secretary rejects the self-assessment of the taxpayer or discovers that the taxpayer has failed to file a return, the Secretary calculates the proper amount of liability and records it in the Government's books.

To be sure, the assessment of a tax triggers certain consequences. After the amount of liability has been established and recorded, the IRS can employ administrative enforcement methods to collect the tax. §§ 6321–6327, 6331–6334.

[4] We use the term "secondary liability" to mean liability that is derived from the original or primary liability.

The assessment of a tax liability also extends the period during which the Government can collect the tax. But the fact that the act of assessment has consequences does not change the function of the assessment: to calculate and record a tax liability.

Under a proper understanding of the function and nature of an assessment, it is clear that it is *the tax* that is assessed, not the taxpayer. See § 6501(a) ("the amount of any tax . . . shall be assessed"); § 6502(a) ("[w]here the assessment of any tax"). And in *United States* v. *Updike*, 281 U. S. 489 (1930), the Court, interpreting a predecessor to § 6502, held that the limitations period resulting from a proper assessment governs "the extent of time for the enforcement of the tax liability," *id.*, at 495. In other words, the Court held that the statute of limitations attached to the debt as a whole. The basis of the liability in *Updike* was a tax imposed on the corporation, and the Court held that the same limitations period applied in a suit to collect the tax from the corporation as in a suit to collect the tax from the derivatively liable transferee. *Id.*, at 494–496. See also *United States* v. *Wright*, 57 F. 3d 561, 563 (CA7 1995) (holding that, based on *Updike*'s principle of "all-for-one, one-for-all," the statute of limitations governs the debt as a whole).

Once a tax has been properly assessed, nothing in the Code requires the IRS to duplicate its efforts by separately assessing the same tax against individuals or entities who are not the actual taxpayers but are, by reason of state law, liable for payment of the taxpayer's debt. The consequences of the assessment—in this case the extension of the statute of limitations for collection of the debt—attach to the tax debt without reference to the special circumstances of the secondarily liable parties.

In this case, the tax was properly assessed against the Partnership, thereby extending the statute of limitations for collection of the debt. The United States now timely seeks to collect that debt in judicial proceedings against respond-

ents.[5] We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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[5] The Court of Appeals also held that the claims were barred by California partnership law, which requires a creditor first to obtain a judgment against a partnership before holding the partners liable for the partnership's debt. 314 F. 3d 336, 344 (CA9 2002). When respondents filed for bankruptcy, an automatic stay barred the Government from bringing suit outside the Bankruptcy Court to enforce respondents' secondary liability. 11 U. S. C. § 362(a)(1). Respondents do not dispute, however, that the adjudication of a disputed claim satisfies California's requirement that there be a "judgment against a partner." Cal. Corp. Code Ann. § 16307(c) (West Supp. 2004). Moreover, a claim is allowable in bankruptcy "whether or not such right is reduced to judgment." 11 U. S. C. § 101(5)(A).

Syllabus

NIXON, ATTORNEY GENERAL OF MISSOURI *v.* MISSOURI MUNICIPAL LEAGUE ET AL.

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

No. 02–1238. Argued January 12, 2004—Decided March 24, 2004*

After Missouri enacted a statute forbidding its "political subdivision[s to] provide or offer for sale . . . a telecommunications service or . . . facility," the municipal respondents, including municipally owned utilities, petitioned the Federal Communications Commission (FCC) for an order declaring the statute unlawful under 47 U. S. C. § 253, which authorizes preemption of state and local laws and regulations "that prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services. Relying on its earlier order resolving a challenge to a comparable Texas law and the affirming opinion of the District of Columbia Circuit, the FCC refused to declare the Missouri statute preempted, concluding that "any entity" in § 253(a) does not include state political subdivisions, but applies only to independent entities subject to state regulation. The FCC also adverted to the principle of *Gregory* v. *Ashcroft*, 501 U. S. 452, that Congress needs to be clear before it constrains traditional state authority to order its government. The Eighth Circuit panel unanimously reversed, explaining that § 253(a)'s word "entity," especially when modified by "any," manifested sufficiently clear congressional attention to governmental entities to get past *Gregory*.

Held: The class of entities contemplated by § 253 does not include the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of telecommunications services. Pp. 131–141.

(a) Two considerations fall short of supporting the municipal respondents. First, they argue that fencing governmental entities out of the telecommunications business flouts the public interest in promoting competition. It does not follow, however, that preempting state or local barriers to governmental entry into the market would be an effective way to draw municipalities into the business, and in any event the issue here does not turn on the merits of municipal telecommunications serv-

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*Together with No. 02–1386, *Federal Communications Commission et al.* v. *Missouri Municipal League et al.*, and No. 02–1405, *Southwestern Bell Telephone, L. P., fka Southwestern Bell Telephone Co.* v. *Missouri Municipal League et al.*, also on certiorari to the same court.

ices. Second, concentrating on the undefined statutory phrase "any entity" does not produce a persuasive answer here. While an "entity" can be either public or private, there is no convention of omitting the modifiers "public and private" when both are meant to be covered. Nor is coverage of public entities reliably signaled by speaking of "any" entity; "any" can and does mean different things depending upon the setting. To get at Congress's understanding requires a broader frame of reference, and in this litigation it helps to ask how Congress could have envisioned the preemption clause actually working if the FCC applied it at the municipal respondents' urging. See, *e. g.*, *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals of N. J.*, 338 U. S. 665, 673. The strange and indeterminate results of using federal preemption to free public entities from state or local limitations is the key to understanding that Congress used "any entity" with a limited reference to any private entity. Pp. 131–133.

(b) The municipal respondents' position holds sufficient promise of futility and uncertainty to keep this Court from accepting it. Pp. 133–141.

(1) In familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation of economic conduct by a private party simply leaves that party free to do anything it chooses consistent with the prevailing federal law. See, *e. g.*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 540–553. But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations. Such a government's capacity to enter an economic market turns not only on the effect of straightforward economic regulation below the national level (including outright bans), but on the authority and potential will of state or local governments to support entry into the market. Preempting a ban on government utilities would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place. And preemption would make no difference to anyone if the state regulator were left with control over funding needed for any utility operation and declined to pay for it. In other words, when a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what the government itself (including its subdivisions) may do will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command. Thus, preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that it is highly unlikely that Congress intended to set off on such uncertain adventures. Pp. 133–134.

Syllabus

(2) Several hypothetical examples illustrate the implausibility of the municipal respondents' reading that Congress intended § 253 to preempt state or local governmental self-regulation. Whether a law prohibiting an entity's "ability" to provide telecommunications under § 253 means denying the entity a capacity or authority to act in the first place, or whether it means limiting or cutting back on some preexisting authority to go into the telecommunications business (under a different law), the hypotheticals demonstrate that § 253 would not work like a normal preemptive statute if it applied to a governmental unit. It would often accomplish nothing, it would treat States differently depending on the formal structures of their laws authorizing municipalities to function, and it would hold out no promise of a national consistency. That Congress meant § 253 to start down such a road in the absence of any clearer signal than the phrase "ability of any entity" is farfetched. See, *e. g.*, *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543. Pp. 134–138.

(3) The practical implication of the dissent's reading of § 253 to forbid States to withdraw municipalities' preexisting authority expressly to enter the telecommunications business, but not withdrawals of authority that are competitively neutral in the sense of being couched in general terms that do not expressly target telecommunications, is to read out of § 253 the words "or has the effect of prohibiting." Those words signal Congress's willingness to preempt laws that produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces. The dissent's reading therefore disregards § 253's plain language and entails a policy consequence that Congress could not possibly have intended. Pp. 138–140.

(c) A complementary principle would bring the Court to the same conclusion even on the assumption that preemption might operate straightforwardly to provide local choice. Section 253(a) is hardly forthright enough to pass *Gregory:* "ability of any entity" is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any "unmistakably clear" statement to that effect, 501 U. S., at 460, would be fatal to respondents' reading. Pp. 140–141.

299 F. 3d 949, reversed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 141. STEVENS, J., filed a dissenting opinion, *post*, p. 142.

Ronald Molteni, Assistant Attorney General of Missouri, argued the cause for petitioner in No. 02–1238. With him on the briefs were *Jeremiah W. (Jay) Nixon*, Attorney General, *pro se*, and *James R. Layton*, State Solicitor. *James A. Feldman* argued the cause for the federal petitioners in No. 02–1386. With him on the briefs were *Solicitor General Olson*, *Assistant Attorney General Pate*, *Deputy Solicitor General Hungar*, *Catherine G. O'Sullivan*, *Andrea Limmer*, *John A. Rogovin*, and *Richard K. Welch*. *Michael K. Kellogg*, *Geoffrey M. Klineberg*, and *Sean A. Lev* filed briefs for Southwestern Bell Telephone, L. P., petitioner in No. 02–1405.

David A. Strauss argued the cause for Missouri Municipal League et al., respondents in all cases. With him on the brief were *James Baller* and *Richard B. Geltman.*†

JUSTICE SOUTER delivered the opinion of the Court.

Section 101(a) of the Telecommunications Act of 1996, 110 Stat. 70, 47 U. S. C. § 253, authorizes preemption of state and local laws and regulations expressly or effectively "prohibiting the ability of any entity" to provide telecommunications services. The question is whether the class of entities in-

†A brief of *amici curiae* urging reversal was filed for the United States Telecom Association et al. by *Andrew G. McBride*, *Helgi C. Walker*, *Michael E. Glover*, *Edward H. Shakin*, *Michael T. McMenamin*, *Carrick B. Inabnett*, *Marc Gary*, and *Dorian S. Denburg*.

Briefs of *amici curiae* urging affirmance were filed for Congressman Rick Boucher, for the town of Abingdon, Virginia, et al., and for Educause by *Steven R. Minor;* for the City of Abilene, Texas, et al. by *Steven A. Porter;* for the Consumer Federation of America by *James N. Horwood* and *Scott H. Strauss;* for the High Tech Broadband Coalition et al. by *Deborah Brand Baum;* for Knology, Inc., by *David O. Stewart* and *Thomas B. Smith;* for Lincoln Electric System by *Scott Gregory Knudson*, *Douglas L. Curry*, and *William F. Austin;* and for the United Telecom Council by *Jill M. Lyon* and *Brett Kilbourne*.

Briefs of *amici curiae* were filed for the International Municipal Lawyers Association et al. by *Henry W. Underhill, Jr.;* and for Sprint Corp. by *David P. Murray* and *John G. Short*.

cludes the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of such services. We hold it does not.

I

In 1997, the General Assembly of Missouri enacted the statute codified as § 392.410(7) of the State's Revised Statutes:

> "No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section."[1]

On July 8, 1998, the municipal respondents, including municipalities, municipal organizations, and municipally owned utilities, petitioned the Federal Communications Commission (FCC or Commission) for an order declaring the state statute unlawful and preempted under 47 U. S. C. § 253:

> "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." § 253(a).
>
> "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to

[1] The provision is subject to some exceptions not pertinent here, and as originally enacted the law was set to expire in 2002. The assembly later pushed the expiration date ahead to 2007. Mo. Rev. Stat. § 392.410(7) (Supp. 2003).

the extent necessary to correct such violation or inconsistency." § 253(d).

After notice and comment, the FCC refused to declare the Missouri statute preempted, *In re Missouri Municipal League*, 16 FCC Rcd. 1157 (2001), relying on its own earlier order resolving a challenge to a comparable Texas law, *In re Public Utility Comm'n of Texas*, 13 FCC Rcd. 3460 (1997), as well as the affirming opinion of the United States Court of Appeals for the District of Columbia Circuit, *Abilene* v. *FCC*, 164 F. 3d 49 (1999). The agency concluded that "the term 'any entity' in section 253(a) . . . was not intended to include political subdivisions of the state, but rather appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation."[2] 16 FCC Rcd., at 1162. Like the District of Columbia Circuit in *Abilene*, the FCC also adverted to the principle of *Gregory* v. *Ashcroft*, 501 U. S. 452 (1991), that Congress needs to be clear before it constrains traditional state authority to order its government. 16 FCC Rcd., at 1169. But at the same time the Commission rejected preemption, it also denounced the policy behind the Missouri statute, *id.*, at 1162–1163, and the Commission's order carried two appended statements (one by Chairman William E. Kennard and Commissioner Gloria Tristani, *id.*, at 1172, and one by Commissioner Susan Ness, *id.*, at 1173) to the effect that barring municipalities

[2] The line between "political subdivision" and "independent entity" the FCC located by reference to state law. By its terms, the FCC order declined to preempt the statute as it applied to municipally owned utilities not chartered as independent corporations, on the theory that under controlling Missouri law, they were subdivisions of the State. 16 FCC Rcd., at 1158. The Commission implied an opposite view, however, regarding the status, under § 253, of municipal utilities that had been separately chartered. *Ibid.* The question whether § 253 preempts state and municipal regulation of these types of entities is not before us, and we express no view as to its proper resolution.

from providing telecommunications substantially disserved the policy behind the Telecommunications Act.

The municipal respondents appealed to the Eighth Circuit, where a panel unanimously reversed the agency disposition, 299 F. 3d 949 (2002), with the explanation that the plain-vanilla "entity," especially when modified by "any," manifested sufficiently clear congressional attention to governmental entities to get past *Gregory*. 299 F. 3d, at 953–955. The decision put the Eighth Circuit at odds with the District of Columbia Circuit's *Abilene* opinion, and we granted certiorari to resolve the conflict. 539 U. S. 941 (2003). We now reverse.

II

At the outset, it is well to put aside two considerations that appear in this litigation but fall short of supporting the municipal respondents' hopes for prevailing on their generous conception of preemption under § 253. The first is public policy, on which the respondents have at the least a respectable position, that fencing governmental entities out of the telecommunications business flouts the public interest. There are, of course, arguments on the other side, against government participation: in a business substantially regulated at the state level, regulation can turn into a public provider's weapon against private competitors, see, *e. g.*, Brief for Petitioner Southwestern Bell Telephone, L. P., in No. 02–1405 et al., pp. 17–18; and (if things turn out bad) government utilities that fail leave the taxpayers with the bills. Still, the Chairman of the FCC and Commissioner Tristani minced no words in saying that participation of municipally owned entities in the telecommunications business would "further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential." 16 FCC Rcd., at 1172. Commissioner Ness said much the same, and a number of *amicus* briefs in this litigation argue the competitive

advantages of letting municipalities furnish telecommunications services, drawing on the role of government operators in extending the electric power lines early in the last century. Brief for City of Abilene, Texas, et al. as *Amici Curiae* 14–18; Brief for Consumer Federation of America as *Amicus Curiae* 7. As we will try to explain, however, *infra*, at 133–138, it does not follow that preempting state or local barriers to governmental entry into the market would be an effective way to draw municipalities into the business, and in any event the issue here does not turn on the merits of municipal telecommunications services.

The second consideration that fails to answer the question posed in this litigation is the portion of the text that has received great emphasis. The Eighth Circuit trained its analysis on the words "any entity," left undefined by the statute, with much weight being placed on the modifier "any." But concentration on the writing on the page does not produce a persuasive answer here. While an "entity" can be either public or private, compare, *e. g.*, 42 U. S. C. § 9604(k)(1) (2000 ed., Supp. I) (defining "eligible entity" as a state or local government body or its agent) with 26 U. S. C. § 269B(c)(1) (defining "entity" as "any corporation, partnership, trust, association, estate, or other form of carrying on a business or activity"), there is no convention of omitting the modifiers "public and private" when both are meant to be covered. See, *e. g.*, 42 U. S. C. § 2000d–7(a)(2) (exposing States to remedies in antidiscrimination suits comparable to those available "against any public or private entity other than a State"). Nor is coverage of public entities reliably signaled by speaking of "any" entity; "any" can and does mean different things depending upon the setting. Compare, *e. g.*, *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997) (suggesting an expansive meaning of the term "'any other term of imprisonment'" to include state as well as federal sentences), with *Raygor* v. *Regents of Univ. of Minn.*, 534 U. S. 533, 542–546 (2002) (implying a narrow interpretation

of the phrase "'any claim asserted'" so as to exclude certain claims dismissed on Eleventh Amendment grounds). To get at Congress's understanding, what is needed is a broader frame of reference, and in this litigation it helps if we ask how Congress could have envisioned the preemption clause actually working if the FCC applied it at the municipal respondents' urging. See, *e. g.*, *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals of N. J.*, 338 U. S. 665, 673 (1950) (enquiring into "the practical operation and effect" of a state tax on federal bonds). We think that the strange and indeterminate results of using federal preemption to free public entities from state or local limitations is the key to understanding that Congress used "any entity" with a limited reference to any private entity when it cast the preemption net.

III

A

In familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation in some precinct of economic conduct carried on by a private person or corporation simply leaves the private party free to do anything it chooses consistent with the prevailing federal law. If federal law, say, preempts state regulation of cigarette advertising, a cigarette seller is left free from advertising restrictions imposed by a State, which is left without the power to control on that matter. See, *e. g.*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 540–553 (2001). On the subject covered, state law just drops out.

But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations. The trouble is that a local government's capacity to enter an economic market turns not only on the effect of straightforward economic regulation below the national level (including outright bans), but on the authority and potential will of governments at the state or local

level to support entry into the market. Preemption of the state advertising restriction freed a seller who otherwise had the legal authority to advertise and the money to do it if that made economic sense. But preempting a ban on government utilities would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place. And preemption would make no difference to anyone if the state regulator were left with control over funding needed for any utility operation and declined to pay for it. In other words, when a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command. That is why preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that we think it highly unlikely that Congress intended to set off on such uncertain adventures. A few hypotheticals may bring the point home.

B

Hypotheticals have to rest on some understanding of what § 253 means when it describes subjects of its preemption as laws or regulations that prohibit, expressly or in effect, "the ability of any entity" to provide telecommunications. The reference to "ability" complicates things. In customary usage, we speak simply of prohibiting a natural or legal person from doing something. To speak in terms of prohibiting their ability to provide a service may mean something different: it may mean denying the entity a capacity or authority to act in the first place. But this is not clear, and it is possible that a law prohibiting the ability to provide telecommunications means a law that limits or cuts back on some pre-

existing authority (under a different law) to go into the telecommunications business.

If the scope of law subject to preemption under § 253 has the former, broader, meaning, consider how preemption would apply to a state statute authorizing municipalities to operate specified utilities, to provide water and electricity but nothing else.[3] The enumeration would certainly have the effect of prohibiting a municipally owned and operated electric utility from entering the telecommunications business (as Congress clearly meant private electric companies to be able to do, see S. Rep. No. 103–367, p. 55 (1994)), and its implicit prohibition would thus be open to FCC preemption. But what if the FCC did preempt the restriction? The municipality would be free of the statute, but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business. There is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not.

Now assume that § 253 has the narrower construction (preempting only laws that restrict authority derived from a different legal source). Consider a State with plenary authority itself, under its constitution, to operate any variety of utility.[4] Assume that its statutes authorized a state-run

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[3] The hypothetical city, in other words, is "general law" rather than "home rule." See *City of Lockhart* v. *United States*, 460 U. S. 125, 127 (1983) (In contrast to a general law city, a home rule city has state constitutional authority to do whatever is not specifically prohibited by state legislation).

[4] The Court granted certiorari solely to consider whether municipalities are subsumed under the rubric "any entity," and our holding reaches only that question. There is, nevertheless, a logical affinity between the question presented and the hypothetical situation in which a State were to decide, directly or effectively, against its own delivery of telecommunications services.

utility to deliver electric and water services, but drew the line at telecommunications. The restrictive element of that limited authorization would run afoul of § 253 as respondents would construe it. But if, owing to preemption, the state operating utility authority were suddenly free to provide telecommunications and its administrators were raring to enter this new field, where would the necessary capital come from? Surely there is no contention that the Telecommunications Act of 1996 by its own force entails a state agency's entitlement to unappropriated funds from the state treasury, or to the exercise of state bonding authority.

Or take the application of § 253 preemption to municipalities empowered by state law to furnish services generally, but forbidden by a special statute to exercise that power for the purpose of providing telecommunications services. If the special statute were preempted, a municipality in that State would have a real option to enter the telecommunications business if its own legislative arm so chose and funded the venture. But in a State next door where municipalities lacked such general authority, a local authority would not be able to, and the result would be a national crazy quilt. We will presumably get a crazy quilt, of course, as a consequence of state and local political choices arrived at in the absence of any preemption under § 253, but the crazy quilt of this hypothetical would result not from free political choices but from the fortuitous interaction of a federal preemption law with the forms of municipal authorization law.

Finally, consider the result if a State that previously authorized municipalities to operate a number of utilities including telecommunications changed its law by narrowing the range of authorization. Assume that a State once authorized municipalities to furnish water, electric, and communications services, but sometime after the passage of § 253 narrowed the authorization so as to leave municipalities authorized to enter only the water business. The repealing statute would have a prohibitory effect on the prior ability

to deliver telecommunications service and would be subject to preemption. But that would mean that a State that once chose to provide broad municipal authority could not reverse course. A State next door, however, starting with a legal system devoid of any authorization for municipal utility operation, would at the least be free to change its own course by authorizing its municipalities to venture forth. The result, in other words, would be the federal creation of a one-way ratchet. A State or municipality could give the power, but it could not take it away later. Private counterparts could come and go from the market at will, for after any federal preemption they would have a free choice to compete or not to compete in telecommunications; governmental providers could never leave (or, at least, could not leave by a forthright choice to change policy), for the law expressing the government's decision to get out would be preempted.

The municipal respondents' answer to the one-way ratchet, and indeed to a host of the incongruities that would follow from preempting governmental restriction on the exercise of its own power, is to rely on § 253(b), which insulates certain state actions taken "on a competitively neutral basis." Respondents contend that a State or municipality would be able to make a competitively neutral change of mind to leave the telecommunications market after deciding earlier to enter it or authorize entry. Tr. of Oral Arg. 32–33.

But we think this is not much of an answer. The FCC has understood § 253(b) neutrality to require a statute or regulation affecting all types of utilities in like fashion, as a law removing only governmental entities from telecommunications could not be. See, *e. g.*, *In re Federal-State Joint Board on Universal Service*, 15 FCC Rcd. 15168, 15175–15178, ¶¶ 19–24 (2000) (declaratory ruling). An even more fundamental weakness in respondents' answer is shown in briefs filed by *amici* City of Abilene and Consumer Federation of America. We have no reason to doubt them when they explain how highly unlikely it is that a state decision to

withdraw would be "neutral" in any sense of the word. There is every reason to expect just the contrary, that legislative choices in this arena would reflect the intent behind the intense lobbying directed to those choices, manifestly intended to impede, not enhance, competition. See, *e. g.*, Chen, Legal Process and Political Economy of Telecommunications Reform, 97 Colum. L. Rev. 835, 866–868 (1997). After all, the notion that the legislative process addressing governmental utility authority is susceptible to capture by competition-averse private utilities is fully consistent with (and one reason for) the FCC's position that statutes like Missouri's disserve the policy objects of the Telecommunications Act of 1996. Given the unlikely application of § 253(b) to state or local choices driven by policy, not business failure, the fair conclusion is that § 253(a), if read respondents' way, would allow governments to move solely toward authorizing telecommunications operation, with no alternative to reverse course deliberately later on.

In sum, § 253 would not work like a normal preemptive statute if it applied to a governmental unit. It would often accomplish nothing, it would treat States differently depending on the formal structures of their laws authorizing municipalities to function, and it would hold out no promise of a national consistency. We think it farfetched that Congress meant § 253 to start down such a road in the absence of any clearer signal than the phrase "ability of any entity." See, *e. g.*, *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543 (1940) (Court will not construe a statute in a manner that leads to absurd or futile results).

C

JUSTICE STEVENS contends that in our use of the hypothetical examples to illustrate the implausibility of the municipal respondents' reading of § 253, we read the statute in a way that produces anomalous results unnecessarily, whereas a simpler interpretation carrying fewer unhappy

consequences is available. The dissent emphasizes the word "ability" in the phrase "prohibit or has the effect of prohibiting the ability of any entity" to furnish telecommunications. With its focus on this word, the dissent concludes that "§ 253 prohibits States from withdrawing municipalities' preexisting authority to enter the telecommunications business, but does not command that States affirmatively grant either that authority or the means with which to carry it out." *Post*, at 145. Thus, if a State leaves an earlier grant of authority on the books while limiting it with a legislative ban on telecommunications, the new statute would be preempted, and presumably preemption would also defeat a State's attempted withdrawal of municipalities' authority by repealing the preexisting authorization itself.

But on the very next page, JUSTICE STEVENS allows (in the course of disagreeing about the one-way ratchet) that "[a] State may withdraw comprehensive authorization in favor of enumerating specific municipal powers . . . ." *Post*, at 146. It turns out, in other words, that withdrawals of preexisting authority are not (or not inevitably, at any rate) subject to preemption. The dissent goes on to clarify that it means to distinguish between withdrawals of authority that are competitively neutral in the sense of being couched in general terms (and therefore not properly the subject of preemption), and those in which the repealing law expressly targets telecommunications (and therefore properly preempted). "[T]he one thing a State may not do," the dissent explains, "is enact a statute or regulation specifically aimed at preventing municipalities or other entities from providing telecommunications services." *Ibid.* But the practical implication of that interpretation is to read out of § 253 the words "or ha[s] the effect of prohibiting," by which Congress signaled its willingness to preempt laws that produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces. Even if § 253 permitted such a formalistic distinction between implicit and explicit repeals of

authority, the result would be incoherence of policy; whether the issue is viewed through the lens of preventing anticompetitive action or the lens of state autonomy from federal interference, there is no justification for preempting only those laws that self-consciously interfere with the delivery of telecommunications services. In short, instead of supplying a more straightforward interpretation of § 253, the dissent ends up reading it in a way that disregards its plain language and entails a policy consequence that Congress could not possibly have intended.

IV

The municipal respondents' position holds sufficient promise of futility and uncertainty to keep us from accepting it, but a complementary principle would bring us to the same conclusion even on the assumption that preemption could operate straightforwardly to provide local choice, as in some instances it might. Preemption would, for example, leave a municipality with a genuine choice to enter the telecommunications business when state law provided general authority and a newly unfettered municipality wished to fund the effort. But the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 607–608 (1991) (internal quotation marks, citations, and alterations omitted); *Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U. S. 424, 433 (2002). Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires. What we have said al-

ready is enough to show that § 253(a) is hardly forthright enough to pass *Gregory:* "ability of any entity" is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any "unmistakably clear" statement to that effect, 501 U. S., at 460, would be fatal to respondents' reading.

The judgment of the Court of Appeals for the Eighth Circuit is, accordingly, reversed.

It is so ordered.

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

I agree with much of the Court's analysis in Parts II and III of its opinion, which demonstrates that reading "any entity" in 47 U. S. C. § 253(a) to include political subdivisions of States would have several unhappy consequences. I do not think, however, that the avoidance of unhappy consequences is adequate basis for interpreting a text. Cf. *ante*, at 140 ("The municipal respondents' position holds sufficient promise of futility and uncertainty to keep us from accepting it"). I would instead reverse the Court of Appeals on the ground discussed in Part IV of the Court's opinion: Section 253(a) simply does not provide the clear statement which would be required by *Gregory* v. *Ashcroft*, 501 U. S. 452 (1991), for a statute to limit the power of States to restrict the delivery of telecommunications services by their political subdivisions.

I would not address the additional question whether the statute affects the "power of . . . *localities* to restrict their own (or their political inferiors') delivery" of telecommunications services, *ante*, at 129 (emphasis added), an issue considered and apparently answered negatively by the Court. That question is neither presented by this litigation nor contained within the question on which we granted certiorari.

JUSTICE STEVENS, dissenting.

In the Telecommunications Act of 1996 (1996 Act), Congress created "a new telecommunications regime designed to foster competition in local telephone markets." *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 638 (2002). Reasonable minds have differed as to whether municipalities' participation in telecommunications markets serves or disserves the statute's procompetitive goals. On the one hand, some have argued that municipally owned utilities enjoy unfair competitive advantages that will deter entry by private firms and impair the normal development of healthy, competitive markets.[1] On the other hand, members of the Federal Communications Commission (FCC), the regulatory agency charged with implementation of the 1996 Act, have taken the view that municipal entry "would further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential."[2] The answer to the question presented in these cases does not, of course, turn on which side has the better view in this policy debate. It turns on whether Congress itself intended to take sides when it passed the 1996 Act.

In § 253 of the Communications Act of 1934, as added by § 101 of the 1996 Act, Congress provided that "[n]o State or

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[1] See, *e. g.*, Note, Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly against Private Providers, 95 Nw. U. L. Rev. 1099 (2001).

[2] *In re Missouri Municipal League*, 16 FCC Rcd. 1157, 1172 (2001). Three Commissioners wrote separately to underscore this point. *Ibid.* (statement of Chairman Kennard and Commissioner Tristani) (describing municipally owned utilities as a "promising class of local telecommunications competitors"); *id.*, at 1173 (statement of Commissioner Ness) (noting that "municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas").

local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," unless the State or local law is "competitively neutral" and "necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U. S. C. §§ 253(a), (b). It is common ground among the parties that Congress intended to include utilities in the category of "entities" protected by § 253. See, *e. g.*, Reply Brief for Federal Petitioners in No. 02–1238 et al., p. 16 ("Congress clearly did intend to preempt state laws that closed the telecommunications market, including those that closed the market to electric or other utilities"). The legislative history of § 253 confirms the point: Congress clearly meant for § 253 to pre-empt "explicit prohibitions on entry by a utility into telecommunications." S. Rep. No. 104–230, p. 127 (1996).

But while petitioners acknowledge the unmistakable clarity of Congress' intent to protect utilities' ability to enter local telephone markets, they contend that Congress' intent to protect the subset of utilities that are owned and operated by municipalities is somehow less than clear. The assertion that Congress could have used the term "any entity" to include utilities generally, but not *municipally owned* utilities, must rest on one of two assumptions: Either Congress was unaware that such utilities exist, or it deliberately ignored their existence when drafting § 253. Both propositions are manifestly implausible, given the sheer number of public utilities in the United States.[3] Indeed, elsewhere in the 1996 Act, Congress narrowed the definition of the word "utility," as used in the Pole Attachments Act, 47 U. S. C. § 224, to

[3] For example, as of 2001, there were more than 2,000 publicly owned electric utilities in the United States, compared to just over 230 investor-owned utilities. Am. Public Power Assn., 2003 Annual Directory & Statistical Report 13.

exclude utilities "owned by . . . any State," including its political subdivisions—a clear indication that Congress was aware that many utilities are in fact owned by States and their political subdivisions. §§ 224(a)(1), (a)(3). Moreover, the question of municipal participation in local telephone markets was clearly brought to Congress' attention. In hearings on a predecessor bill, Congress heard from a representative of the American Public Power Association who described public utilities' unique potential to promote competition, particularly in small cities, towns, and rural communities underserved by private companies. Hearings on S. 1822 before the Senate Committee on Commerce, Science, and Transportation, 103d Cong., 2d Sess., 351–360 (1994) (statement of William J. Ray, General Manager, Glasgow Electric Plant Board).[4] In short, there is every reason to suppose that Congress meant precisely what it said: No State or local law shall prohibit or have the effect of prohibiting the ability of *any* entity, public or private, from entering the telecommunications market.

The question that remains is whether reading the statute to give effect to Congress' intent necessarily will produce the absurd results that the Court suggests. *Ante,* at 134–138. "As in all cases[,] our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization,* 441 U. S. 600, 608 (1979). Before nullifying Congress' evident purpose in an effort to avoid hypothetical absurd results, I would first decide whether the statute can reasonably be read so as to avoid such absurdities, without casting aside congressional intent.

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[4] This testimony prompted the Senate manager of the bill to remark: "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here." Hearings, at 379 (statement of Sen. Lott).

The Court begins its analysis by asking us to imagine how § 253 might apply to "a state statute authorizing municipalities to operate specified utilities, to provide water and electricity but nothing else," or to a State's failure to provide the necessary capital to a state-run utility "raring" to enter the telecommunications market. *Ante*, at 135. Certainly one might plausibly interpret § 253, as the Court does, to forbid States' refusals to provide broader authorization or to provide necessary capital as impermissible prohibitions on entry. And as the Court observes, such an interpretation would undeniably produce absurd results; it would leave covered entities in a kind of legal limbo, armed with a federal-law freedom to enter the market but lacking the state-law power to do so. But we need not—and in my opinion, should not—interpret § 253 in this fashion. We should instead read the statute's reference to state and local laws that "prohibit or have the effect of prohibiting the *ability* of any entity," § 253(a), to enter the telecommunications business to embody an implicit understanding that the only "entities" covered by § 253 are entities otherwise able to enter the business—*i. e.*, entities both authorized to provide telecommunications services and capable of providing such services without the State's direct assistance. In other words, § 253 prohibits States from withdrawing municipalities' pre-existing authority to enter the telecommunications business, but does not command that States affirmatively grant either that authority or the means with which to carry it out.

Of course, the Court asserts that still other absurd results would follow from application of § 253 pre-emption to state laws that withdraw a municipality's pre-existing authority to enter the telecommunications business. But these results are, on closer examination, perhaps not so absurd after all. The Court first contends that reading § 253 in this manner will produce a "national crazy quilt" of public telecommunications authority, where the possibility of municipal participation in the telecommunications market turns on the scope of

the authority each State has already granted to its subdivisions. *Ante*, at 136. But as the Court acknowledges, permitting States such as Missouri to prohibit municipalities from providing telecommunications services hardly will help the cause of national consistency. *Ibid.* That the "crazy quilt" the Court describes is the product of political choices made by Congress rather than state legislatures, see *ibid.*, renders it no more absurd than the "crazy quilt" that will result from leaving the matter of municipal entry entirely to individual States' discretion.

The Court also contends that applying § 253 pre-emption to bar withdrawal of authority to enter the telecommunications market will result in "the federal creation of a one-way ratchet": "A State or municipality could give the power, but it could not take it away later." *Ante*, at 137. But nothing in § 253 prohibits States from scaling back municipalities' authority in a general way. A State may withdraw comprehensive authorization in favor of enumerating specific municipal powers, or even abolish municipalities altogether. Such general withdrawals of authority may very well "have the effect of prohibiting" municipalities' ability to enter the telecommunications market, see *ante*, at 139, just as enforcement of corporate governance and tax laws might "have the effect of prohibiting" other entities' ability to enter. § 253(a). But § 253 clearly does not pre-empt every state law that "has the effect" of restraining entry. It pre-empts only those that constitute *nonneutral* restraints on entry. § 253(b). A general redefinition of municipal authority no more constitutes a prohibited nonneutral restraint on entry than enforcement of other laws of general applicability that, practically speaking, may make it more difficult for certain entities to enter the telecommunications business.

As I read the statute, the one thing a State may not do is enact a statute or regulation specifically aimed at preventing municipalities or other entities from providing telecommunications services. This prohibition would certainly apply to

a law like Missouri's, which "advertise[s] [its] prohibitory agenda on [its] fac[e]." *Ante*, at 139. But it would also apply to a law that accomplished a similar result by other means—for example, a law that permitted only private telecommunications carriers to receive federal universal service support or access to unbundled network elements.[5] As the Court notes, there is little reason to think that legislation that targets municipalities' ability to provide telecommunications services is "'neutral' in any sense of the word," or that it is designed to do anything other than impede competition, rather than enhance it. *Ante*, at 138. To the extent that reading § 253 to forbid such protectionist legislation creates a "one-way ratchet," it is one perfectly consistent with the goal of promoting competition in the telecommunications market, while otherwise preserving States' ability to define the scope of authority held by their political subdivisions.[6]

The Court's concern about hypothetical absurd results is particularly inappropriate because the pre-emptive effect of § 253 is not automatic, but requires the FCC's intervention. § 253(d). Rather than assume that the FCC will apply the

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[5] The operative distinction for § 253 purposes is thus not between implicit and explicit repeals of authority. See *ante*, at 139–140. It is, rather, the distinction between laws that generally redefine the scope of municipal authority and laws that specifically target municipal authority to enter the telecommunications business, whether by direct prohibition or indirect barriers to entry.

[6] The goal of striking a balance between promoting competition and preserving States' general regulatory authority surely supplies a sufficient justification for "preempting only those laws that self-consciously interfere with the delivery of telecommunications services," rather than all generally applicable laws that might have the practical effect of restraining entry. *Ante*, at 140. But even if, as the Court asserts, there were "no justification" for drawing the line at laws that "self-consciously" interfere with entities' ability to provide telecommunications services, *ibid.*, that surely would not be a valid reason for refusing to allow the FCC to preempt those that do create such an interference. We generally do not refuse to give effect to a statute simply because it "might have gone farther than it did." *Roschen* v. *Ward*, 279 U. S. 337, 339 (1929).

statute improperly, and rather than stretch our imaginations to identify possible problems in cases not before the Court, we should confront the problem presented by the cases at hand and endorse the most reasonable interpretation of the statute that both fulfills Congress' purpose and avoids unnecessary infringement on state prerogatives. I would accordingly affirm the judgment of the Court of Appeals.

Syllabus

UNITED STATES *v.* FLORES-MONTANO

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

No. 02–1794. Argued February 25, 2004—Decided March 30, 2004

At the international border in southern California, customs officials seized 37 kilograms of marijuana from respondent's gas tank by removing and disassembling the tank. After respondent was indicted on federal drug charges, he moved to suppress the drugs recovered from the gas tank, relying on a Ninth Circuit panel decision holding that a gas tank's removal requires reasonable suspicion under the Fourth Amendment. The District Court granted the motion, and the Ninth Circuit summarily affirmed.

Held: The search did not require reasonable suspicion. In the decision relied on below, the Ninth Circuit panel seized on language from *United States* v. *Montoya de Hernandez*, 473 U. S. 531, 538, that used "routine" as a descriptive term in discussing border searches. The panel took "routine," fashioned a new balancing test, and extended it to vehicle searches. But the reasons that might support a suspicion requirement in the case of highly intrusive searches of persons simply do not carry over to vehicles. Complex balancing tests to determine what is a "routine" vehicle search, as opposed to a more "intrusive" search of a person, have no place in border searches of vehicles. The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. *United States* v. *Ramsey*, 431 U. S. 606, 616. Congress has always granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. *Montoya de Hernandez*, 473 U. S., at 537. Respondent's assertion that he has a privacy interest in his fuel tank, and that the suspicionless disassembly of his tank is an invasion of his privacy, is rejected, as the privacy expectation is less at the border than it is in the interior, *id.*, at 538, and this Court has long recognized that automobiles seeking entry into this country may be searched, see *Carroll* v. *United States*, 267 U. S. 132, 154. And while the Fourth Amendment "protects property as well as privacy," *Soldal* v. *Cook County*, 506 U. S. 56, 62, the interference with a motorist's possessory interest in his gas tank is justified by the Government's paramount interest in protecting the border. Thus, the Government's authority to conduct suspicionless inspections at the border

includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. Pp. 152–156.

Reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court. BREYER, J., filed a concurring opinion, *post*, p. 156.

Lisa S. Blatt argued the cause for the United States. With her on the briefs were *Solicitor General Olson*, *Assistant Attorney General Wray*, *Deputy Solicitor General Dreeben*, *Daniel S. Goodman*, and *Alfonso Robles*.

Steven F. Hubachek, by appointment of the Court, 540 U. S. 1043, argued the cause for respondent. With him on the brief were *Vincent J. Brunkow* and *John C. Lemon*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Customs officials seized 37 kilograms—a little more than 81 pounds—of marijuana from respondent Manuel Flores-Montano's gas tank at the international border. The Court of Appeals for the Ninth Circuit, relying on an earlier decision by a divided panel of that court, *United States* v. *Molina-Tarazon*, 279 F. 3d 709 (2002), held that the Fourth Amendment forbade the fuel tank search absent reasonable suspicion. No. 02–50306, 2003 WL 22410705 (Mar. 14, 2003). We hold that the search in question did not require reasonable suspicion.

Respondent, driving a 1987 Ford Taurus station wagon, attempted to enter the United States at the Otay Mesa Port of Entry in southern California. A customs inspector conducted an inspection of the station wagon, and requested respondent to leave the vehicle. The vehicle was then taken to a secondary inspection station.

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

John Wesley Hall, Jr., *David M. Siegel*, and *Lisa B. Kemler* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

At the secondary station, a second customs inspector inspected the gas tank by tapping it, and noted that the tank sounded solid. Subsequently, the inspector requested a mechanic under contract with Customs to come to the border station to remove the tank. Within 20 to 30 minutes, the mechanic arrived. He raised the car on a hydraulic lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections. After the gas tank was removed, the inspector hammered off bondo (a putty-like hardening substance that is used to seal openings) from the top of the gas tank. The inspector opened an access plate underneath the bondo and found 37 kilograms of marijuana bricks. The process took 15 to 25 minutes.

A grand jury for the Southern District of California indicted respondent on one count of unlawfully importing marijuana, in violation of 21 U. S. C. § 952, and one count of possession of marijuana with intent to distribute, in violation of § 841(a)(1). Relying on *Molina-Tarazon*, respondent filed a motion to suppress the marijuana recovered from the gas tank. In *Molina-Tarazon*, a divided panel of the Court of Appeals held, *inter alia*, that removal of a gas tank requires reasonable suspicion in order to be consistent with the Fourth Amendment. 279 F. 3d, at 717.

The Government advised the District Court that it was not relying on reasonable suspicion as a basis for denying respondent's suppression motion, but that it believed *Molina-Tarazon* was wrongly decided. The District Court, relying on *Molina-Tarazon*, held that reasonable suspicion was required to justify the search and, accordingly, granted respondent's motion to suppress. The Court of Appeals, citing *Molina-Tarazon*, summarily affirmed the District Court's judgment. No. 02–50306, 2003 WL 22410705 (CA9, Mar. 14, 2003). We granted certiorari, 540 U. S. 945 (2003), and now reverse.

In *Molina-Tarazon*, the Court of Appeals decided a case presenting similar facts to the one at bar. It asked "whether [the removal and dismantling of the defendant's fuel tank] is a 'routine' border search for which no suspicion whatsoever is required." 279 F. 3d, at 711. The Court of Appeals stated that "[i]n order to conduct a search that goes beyond the routine, an inspector must have reasonable suspicion," and the "critical factor" in determining whether a search is "routine" is the "degree of intrusiveness." *Id.*, at 712–713.

The Court of Appeals seized on language from our opinion in *United States* v. *Montoya de Hernandez*, 473 U. S. 531 (1985), in which we used the word "routine" as a descriptive term in discussing border searches. *Id.*, at 538 ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant"); *id.*, at 541, n. 4 ("Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches"). The Court of Appeals took the term "routine," fashioned a new balancing test, and extended it to searches of vehicles. But the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles. Complex balancing tests to determine what is a "routine" search of a vehicle, as opposed to a more "intrusive" search of a person, have no place in border searches of vehicles.

The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the

border." *United States* v. *Ramsey*, 431 U. S. 606, 616 (1977). Congress, since the beginning of our Government, "has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya de Hernandez*, *supra*, at 537 (citing *Ramsey*, *supra*, at 616–617 (citing Act of July 31, 1789, ch. 5, 1 Stat. 29)). The modern statute that authorized the search in this case, 46 Stat. 747, 19 U. S. C. § 1581(a),[1] derived from a statute passed by the First Congress, the Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 164, see *United States* v. *Villamonte-Marquez*, 462 U. S. 579, 584 (1983), and reflects the "impressive historical pedigree" of the Government's power and interest, *id.*, at 585. It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.

That interest in protecting the borders is illustrated in this case by the evidence that smugglers frequently attempt to penetrate our borders with contraband secreted in their automobiles' fuel tank. Over the past 5½ fiscal years, there have been 18,788 vehicle drug seizures at the southern California ports of entry. App. to Pet. for Cert. 12a. Of those 18,788, gas tank drug seizures have accounted for 4,619 of the vehicle drug seizures, or approximately 25%. *Ibid.* In addition, instances of persons smuggled in and around gas tank compartments are discovered at the ports of entry of

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[1] Section 1581(a) provides:

"Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

San Ysidro and Otay Mesa at a rate averaging 1 approximately every 10 days. *Id.*, at 16a.

Respondent asserts two main arguments with respect to his Fourth Amendment interests. First, he urges that he has a privacy interest in his fuel tank, and that the suspicionless disassembly of his tank is an invasion of his privacy. But on many occasions, we have noted that the expectation of privacy is less at the border than it is in the interior. *Montoya de Hernandez*, *supra*, at 538. We have long recognized that automobiles seeking entry into this country may be searched. See *Carroll* v. *United States*, 267 U. S. 132, 154 (1925) ("Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in"). It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile's passenger compartment.

Second, respondent argues that the Fourth Amendment "protects property as well as privacy," *Soldal* v. *Cook County*, 506 U. S. 56, 62 (1992), and that the disassembly and reassembly of his gas tank is a significant deprivation of his property interest because it may damage the vehicle. He does not, and on the record cannot, truly contend that the procedure of removal, disassembly, and reassembly of the fuel tank in this case or any other has resulted in serious damage to, or destruction of, the property.[2] According to

[2] Respondent's reliance on cases involving exploratory drilling searches is misplaced. See *United States* v. *Rivas*, 157 F. 3d 364 (CA5 1998) (drilling into body of trailer required reasonable suspicion); *United States* v. *Robles*, 45 F. 3d 1 (CA1 1995) (drilling into machine part required reasonable suspicion); *United States* v. *Carreon*, 872 F. 2d 1436 (CA10 1989) (drilling into camper required reasonable suspicion). We have no reason at this time to pass on the reasonableness of drilling, but simply note the obvious factual difference that this case involves the procedure of removal, disassembly, and reassembly of a fuel tank, rather than potentially de-

the Government, for example, in fiscal year 2003, 348 gas tank searches conducted along the southern border were negative (*i. e.*, no contraband was found), the gas tanks were reassembled, and the vehicles continued their entry into the United States without incident. Brief for United States 31.

Respondent cites not a single accident involving the vehicle or motorist in the many thousands of gas tank disassemblies that have occurred at the border. A gas tank search involves a brief procedure that can be reversed without damaging the safety or operation of the vehicle. If damage to a vehicle were to occur, the motorist might be entitled to recovery. See, *e. g.*, 31 U. S. C. § 3723; 19 U. S. C. § 1630. While the interference with a motorist's possessory interest is not insignificant when the Government removes, disassembles, and reassembles his gas tank, it nevertheless is justified by the Government's paramount interest in protecting the border.[3]

For the reasons stated, we conclude that the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank. While it may be true that some

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structive drilling. We again leave open the question "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out." *United States* v. *Ramsey*, 431 U. S. 606, 618, n. 13 (1977).

[3] Respondent also argued that he has some sort of Fourth Amendment right not to be subject to delay at the international border and that the need for the use of specialized labor, as well as the hour actual delay here and the potential for even greater delay for reassembly are an invasion of that right. Respondent points to no cases indicating the Fourth Amendment shields entrants from inconvenience or delay at the international border.

The procedure in this case took about an hour (including the wait for the mechanic). At oral argument, the Government advised us that, depending on the type of car, a search involving the disassembly and reassembly of a gas tank may take one to two hours. Tr. of Oral Arg. 10. We think it clear that delays of one to two hours at international borders are to be expected.

searches of property are so destructive as to require a different result, this was not one of them. The judgment of the United States Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, concurring.

I join the Court's opinion in full. I also note that Customs keeps track of the border searches its agents conduct, including the reasons for the searches. Tr. of Oral Arg. 53–54. This administrative process should help minimize concerns that gas tank searches might be undertaken in an abusive manner.

Syllabus

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION *v.* FAVISH ET AL.

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

No. 02–954. Argued December 3, 2003—Decided March 30, 2004

Skeptical about five Government investigations' conclusions that Vincent Foster, Jr., deputy counsel to President Clinton, committed suicide, respondent Favish filed a Freedom of Information Act (FOIA) request for, among other things, 10 death-scene photographs of Foster's body. The Office of Independent Counsel (OIC) refused the request, invoking FOIA Exemption 7(C), which excuses from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U. S. C. § 552(b)(7)(C). Favish sued to compel production. In upholding OIC's exemption claim, the District Court balanced the Foster family's privacy interest against any public interest in disclosure, holding that the former could be infringed by disclosure and that Favish had not shown how disclosure would advance his investigation, especially in light of the exhaustive investigation that had already occurred. The Ninth Circuit reversed, finding that Favish need not show knowledge of agency misfeasance to support his request, and remanded the case for the interests to be balanced consistent with its opinion. On remand, the District Court ordered the release of five of the photographs. The Ninth Circuit affirmed as to the release of four.

Held:

1. FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images. Favish's contention that Exemption 7(C)'s personal privacy right is confined to the right to control information about oneself is too narrow an interpretation of *Department of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U. S. 749, which held that the personal privacy concept must encompass an individual's control of information about himself, but had no occasion to consider whether those whose personal data are not in the requested materials also have a recognized privacy interest under the exemption. It did explain, however, that Exemption 7(C)'s concept of privacy is not a limited or cramped notion. The exemption is in marked contrast to Exemption 6, which requires withholding of personnel and medical files only if disclosure "would constitute a clearly unwarranted invasion of personal privacy." Exemption 7(C)'s comparative

breadth—it does not include "clearly" and uses "could reasonably be expected to constitute" instead of "would constitute"—is no drafting accident, but is the result of specific amendments to an existing statute. Because law enforcement documents often have information about persons whose link to the official inquiry may be the result of mere happenstance, there is special reason to protect intimate personal data, to which the public does not have a general right of access in the ordinary course. The modifier "personal" before "privacy" does not bolster Favish's view that the family has no privacy interest in a decedent's pictures. Foster's relatives invoke that interest to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of Foster's reputation or some other interest personal to him. It is proper to conclude that Congress intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and cultural traditions. This does not mean that the family is in the same position as the individual who is the disclosure's subject. However, this Court has little difficulty in finding in case law and traditions the right of family members to direct and control disposition of a deceased's body and to limit attempts to exploit pictures of the deceased's remains for public purposes. The well-established cultural tradition of acknowledging a family's control over the body and the deceased's death images has long been recognized at common law. In enacting FOIA and amending Exemption 7(C) to extend its terms, Congress legislated against this background and the Attorney General's consistent interpretation of the exemption. The exemption protects a statutory privacy right that goes beyond the common law and the Constitution, see *id.*, at 762, n. 13. It would be anomalous to hold in this case that the statute provides less protection than does the common law. The statute must also be understood in light of the consequences that would follow from Favish's position. Since FOIA withholding cannot be predicated on the requester's identity, violent criminals, who often make FOIA requests, would be able to obtain autopsies, photographs, and records of their deceased victims at the expense of surviving family members' personal privacy. Pp. 164–171.

2. The Foster family's privacy interest outweighs the public interest in disclosure. As a general rule, citizens seeking documents subject to FOIA disclosure are not required to explain why they seek the information. However, when Exemption 7(C)'s privacy concerns are present, the requester must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and that the information is likely to advance that interest. The Court does not in this single decision attempt to define the

Syllabus

reasons that will suffice, or the necessary nexus between the requested information and the public interest served by disclosure, but there must be some stability with respect to both the specific category of privacy interests protected and the specific category of public interests that could outweigh the privacy claim. Here, the Ninth Circuit correctly ruled that the family has a privacy interest protected by the statute and recognized as significant the asserted public interest in uncovering deficiencies or misfeasance in the Government's investigations into Foster's death, but it erred in defining the showing Favish must make to establish his public interest claim. By requiring no particular evidence of some actual misfeasance or other impropriety, that court's holding leaves Exemption 7(C) with little force or content. Under its rationale, the invasion of privacy would be extensive, since once disclosed, information belongs to the general public. Thus, where there is a privacy interest protected by Exemption 7(C) and the public interest asserted is to show that responsible officials acted negligently or otherwise improperly in performing their duties, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred. When the presumption of legitimacy accorded to the Government's official conduct is applicable, clear evidence is usually required to displace it. Given FOIA's prodisclosure purpose, however, a less stringent standard is more faithful to the statutory scheme. Only when the FOIA requester has produced evidence sufficient to warrant a belief by a reasonable person that the alleged Government impropriety might have occurred will there be a counterweight on the FOIA scale for a court to balance against the cognizable privacy interests in the requested documents. Favish has produced no evidence to put that balance into play. The District Court's first order—before it was set aside by the Ninth Circuit and superseded by the District Court's remand order—followed the correct approach. Pp. 171–175.

37 Fed. Appx. 863, reversed and remanded.

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

Patricia A. Millett argued the cause for petitioner. With her on the briefs were *Solicitor General Olson*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Kneedler*, *Leonard Schaitman*, and *Robert M. Loeb*. *James Hamilton* argued the cause for Anthony et al., respondents under this Court's Rule 12.6 in support of petitioner. With him on the briefs was *Robert V. Zener*.

Respondent *Allan J. Favish* argued the cause and filed a brief *pro se.**

JUSTICE KENNEDY delivered the opinion of the Court.

This case requires us to interpret the Freedom of Information Act (FOIA), 5 U. S. C. § 552. FOIA does not apply if the requested data fall within one or more exemptions. Exemption 7(C) excuses from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." § 552(b)(7)(C).

In *Department of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U. S. 749 (1989), we considered the scope of Exemption 7(C) and held that release of the document at issue would be a prohibited invasion of the personal privacy of the person to whom the document referred. The principal document involved was the criminal record, or rap sheet, of the person who himself objected to the disclosure. Here, the information pertains to an official investigation into the circumstances surrounding an apparent suicide. The initial question is whether the exemption extends to the decedent's family when the family objects to the release of photographs showing the condition of the body at the scene of death. If we find the decedent's family does have a personal privacy interest recognized by the statute, we must then consider whether that privacy claim is outweighed by the public interest in disclosure.

I

Vincent Foster, Jr., deputy counsel to President Clinton, was found dead in Fort Marcy Park, located just outside

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*Briefs of *amici curiae* urging affirmance were filed for the Reporters Committee for Freedom of the Press et al. by *Deanne E. Maynard, Elaine J. Goldenberg, Lucy A. Dalglish, Richard M. Schmidt, Jr., Bruce W. Sanford, David B. Smallman,* and *Alice Neff Lucan;* and for the Silha Center for the Study of Media Ethics and Law by *Jane E. Kirtley.*

Karen B. Tripp filed a brief for the Association of American Physicians & Surgeons, Inc., et al. as *amici curiae.*

Washington, D. C. The United States Park Police conducted the initial investigation and took color photographs of the death scene, including 10 pictures of Foster's body. The investigation concluded that Foster committed suicide by shooting himself with a revolver. Subsequent investigations by the Federal Bureau of Investigation, committees of the Senate and the House of Representatives, and independent counsels Robert Fiske and Kenneth Starr reached the same conclusion. Despite the unanimous finding of these five investigations, a citizen interested in the matter, Allan Favish, remained skeptical. Favish is now a respondent in this proceeding. In an earlier proceeding, Favish was the associate counsel for Accuracy in Media (AIM), which applied under FOIA for Foster's death-scene photographs. After the National Park Service, which then maintained custody of the pictures, resisted disclosure, Favish filed suit on behalf of AIM in the District Court for the District of Columbia to compel production. The District Court granted summary judgment against AIM. The Court of Appeals for the District of Columbia unanimously affirmed. *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F. 3d 120 (1999).

Still convinced that the Government's investigations were "'grossly incomplete and untrustworthy,'" App. to Pet. for Cert. 57a, Favish filed the present FOIA request in his own name, seeking, among other things, 11 pictures, 1 showing Foster's eyeglasses and 10 depicting various parts of Foster's body. Like the National Park Service, the Office of Independent Counsel (OIC) refused the request under Exemption 7(C).

Again, Favish sued to compel production, this time in the United States District Court for the Central District of California. As a preliminary matter, the District Court held that the decision of the Court of Appeals for the District of Columbia did not have collateral estoppel effect on Favish's California lawsuit brought in his personal capacity. On the merits, the court granted partial summary judgment to OIC. With the exception of the picture showing Foster's eye-

glasses, the court upheld OIC's claim of exemption. Relying on the so-called *Vaughn* index provided by the Government—a narrative description of the withheld photos, see *Vaughn* v. *Rosen*, 484 F. 2d 820 (CADC 1973)—the court held, first, that Foster's surviving family members enjoy personal privacy interests that could be infringed by disclosure of the photographs. App. to Pet. for Cert. 56a. It then found, with respect to the asserted public interest, that "[Favish] has not sufficiently explained how disclosure of these photographs will advance his investigation into Foster's death." *Id.*, at 59a. Any purported public interest in disclosure, moreover, "is lessened because of the exhaustive investigation that has already occurred regarding Foster's death." *Id.*, at 58a. Balancing the competing interests, the court concluded that "the privacy interests of the Foster family members outweigh the public interest in disclosure." *Id.*, at 59a.

On the first appeal to the Court of Appeals for the Ninth Circuit, the majority reversed and remanded, over Judge Pregerson's dissent. 217 F. 3d 1168 (2000). In the majority's view, although evidence or knowledge of misfeasance by the investigative agency may "enhanc[e] the urgency of the [FOIA] request," "[n]othing in the statutory command conditions [disclosure] on the requesting party showing that he has knowledge of misfeasance by the agency." *Id.*, at 1172–1173. Furthermore, because "Favish, in fact, tenders evidence and argument which, if believed, would justify his doubts," the FOIA request "is in complete conformity with the statutory purpose that the public know what its government is up to." *Ibid.* This was so, the Court of Appeals held, even in the face of five previous investigations into Foster's death: "Nothing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations. . . . [I]t is a feature of famous cases that they generate controversy, suspicion, and the desire to second guess the authorities." *Id.*, at 1173. As the majority read the statute, there is "a right to look, a

right to speculate and argue again, a right of public scrutiny." *Ibid.*

The Court of Appeals, however, agreed with the District Court that the exemption recognizes the Foster family members' right to personal privacy. Although the pictures contain no information about Foster's relatives, the statute's protection "extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Ibid.* Nevertheless, the majority held that the District Court erred in balancing the relevant interests based only on the *Vaughn* index. While "the [D]istrict [C]ourt has discretion to decide a FOIA case on the basis of affidavits, and affidavits are in some cases sufficient," "the agency affidavits are insufficiently detailed." 217 F. 3d, at 1174. It remanded the case to the District Court to examine the photos *in camera* and, "consistent with [the Court of Appeals'] opinion," "balance the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." *Ibid.*

On remand, the District Court ordered release of the following five photographs:

> "• The photograph identified as '3—VF's [Vincent Foster's] body looking down from top of berm' must be released, as the photograph is not so explicit as to overcome the public interest.
>
> . . . . .
>
> "• The photograph entitled '5—VF's body—focusing on Rt. side of shoulder/arm' is again of such a nature as to be discoverable in that it is not focused in such a manner as to unnecessarily impact the privacy interests of the family.
>
> . . . . .
>
> "• The photograph entitled '1—Right hand showing gun & thumb in guard' is discoverable as it may be probative of the public's right to know.
>
> . . . . .

"• The photograph entitled '4—VF's body focusing on right side and arm' is discoverable.

"• The photograph entitled '5—VF's body—focus on top of head thru heavy foliage' is discoverable." App. to Pet. for Cert. 45a.

On the second appeal to the same panel, the majority, again over Judge Pregerson's dissent, affirmed in part. 37 Fed. Appx. 863 (2002). Without providing any explanation, it upheld the release of all the pictures, "except that photo 3—VF's body looking down from top of berm is to be withheld." *Id.*, at 864.

We granted OIC's petition for a writ of certiorari to resolve a conflict in the Courts of Appeals over the proper interpretation of Exemption 7(C). 538 U. S. 1012 (2003). The only documents at issue in this case are the four photographs the Court of Appeals ordered released in its 2002 unpublished opinion. We reverse.

The OIC terminated its operations on March 23, 2004, see 28 U. S. C. § 596(b)(2), and transferred all records—including the photographs that are the subject of Favish's FOIA request—to the National Archives and Records Administration, see § 594(k)(1). The National Archives and Records Administration has been substituted as petitioner in the caption of this case. As all the actions relevant to our disposition of the case took place before March 23, 2004, we continue to refer to petitioner as OIC in this opinion.

II

It is common ground among the parties that the death-scene photographs in OIC's possession are records or information "compiled for law enforcement purposes" as that phrase is used in Exemption 7(C). App. 87. This leads to the question whether disclosure of the four photographs "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Favish contends the family has no personal privacy interest covered by Exemption 7(C). His argument rests on the proposition that the information is only about the decedent, not his family. FOIA's right to personal privacy, in his view, means only "the right to control information about oneself." Brief for Respondent Favish 4. He quotes from our decision in *Reporters Committee*, where, in holding that a person has a privacy interest sufficient to prevent disclosure of his own rap sheet, we said "the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person." 489 U. S., at 763. This means, Favish says, that the individual who is the subject of the information is the only one with a privacy interest.

We disagree. The right to personal privacy is not confined, as Favish argues, to the "right to control information about oneself." Brief for Respondent Favish 4. Favish misreads the quoted sentence in *Reporters Committee* and adopts too narrow an interpretation of the case's holding. To say that the concept of personal privacy must "encompass" the individual's control of information about himself does not mean it cannot encompass other personal privacy interests as well. *Reporters Committee* had no occasion to consider whether individuals whose personal data are not contained in the requested materials also have a recognized privacy interest under Exemption 7(C).

Reporters Committee explained, however, that the concept of personal privacy under Exemption 7(C) is not some limited or "cramped notion" of that idea. 489 U. S., at 763. Records or information are not to be released under FOIA if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U. S. C. § 552(b)(7). This provision is in marked contrast to the language in Exemption 6, pertaining to "personnel and medical files," where withholding is required only if disclosure "would constitute a clearly unwarranted invasion of personal privacy." § 552(b)(6). The adverb "clearly," found in Ex-

emption 6, is not used in Exemption 7(C). In addition, "whereas Exemption 6 refers to disclosures that 'would constitute' an invasion of privacy, Exemption 7(C) encompasses any disclosure that 'could reasonably be expected to constitute' such an invasion." *Reporters Committee*, 489 U. S., at 756. Exemption 7(C)'s comparative breadth is no mere accident in drafting. We know Congress gave special consideration to the language in Exemption 7(C) because it was the result of specific amendments to an existing statute. See *id.*, at 756, n. 9, 777, n. 22.

Law enforcement documents obtained by Government investigators often contain information about persons interviewed as witnesses or initial suspects but whose link to the official inquiry may be the result of mere happenstance. There is special reason, therefore, to give protection to this intimate personal data, to which the public does not have a general right of access in the ordinary course. *Id.*, at 773. In this class of cases where the subject of the documents "is a private citizen," "the privacy interest . . . is at its apex." *Id.*, at 780.

Certain *amici* in support of Favish rely on the modifier "personal" before the word "privacy" to bolster their view that the family has no privacy interest in the pictures of the decedent. This, too, misapprehends the family's position and the scope of protection the exemption provides. The family does not invoke Exemption 7(C) on behalf of Vincent Foster in its capacity as his next friend for fear that the pictures may reveal private information about Foster to the detriment of his own posthumous reputation or some other interest personal to him. If that were the case, a different set of considerations would control. Foster's relatives instead invoke their own right and interest to personal privacy. They seek to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased.

In a sworn declaration filed with the District Court, Foster's sister, Sheila Foster Anthony, stated that the family had been harassed by, and deluged with requests from, "[p]olitical and commercial opportunists" who sought to profit from Foster's suicide. App. 94. In particular, she was "horrified and devastated by [a] photograph [already] leaked to the press." *Ibid.* "[E]very time I see it," Sheila Foster Anthony wrote, "I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life." *Ibid.* She opposed the disclosure of the disputed pictures because "I fear that the release of [additional] photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably unsavory and distasteful media coverage." *Id.*, at 95. "[R]eleasing any photographs," Sheila Foster Anthony continued, "would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's privacy, and the privacy of Lisa Foster Moody (Vince's widow), her three children, and other members of the Foster family." *Id.*, at 93.

As we shall explain below, we think it proper to conclude from Congress' use of the term "personal privacy" that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions. This does not mean that the family is in the same position as the individual who is the subject of the disclosure. We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes.

Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. See gener-

ally 26 Encyclopaedia Britannica 851 (15th ed. 1985) (noting that "[t]he ritual burial of the dead" has been practiced "from the very dawn of human culture and . . . in most parts of the world"); 5 Encyclopedia of Religion 450 (1987) ("[F]uneral rites . . . are the conscious cultural forms of one of our most ancient, universal, and unconscious impulses"). They are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother. See Antigone of Sophocles, 8 Harvard Classics: Nine Greek Dramas 255 (C. Eliot ed. 1909). The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is but a modern instance of the same understanding of the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.

In addition this well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law. Indeed, this right to privacy has much deeper roots in the common law than the rap sheets held to be protected from disclosure in *Reporters Committee.* An early decision by the New York Court of Appeals is typical:

> "It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feel-

> ings, and to prevent a violation of their own rights in the character and memory of the deceased." *Schuyler* v. *Curtis*, 147 N. Y. 434, 447, 42 N. E. 22, 25 (1895).

See also *Reid* v. *Pierce County*, 136 Wash. 2d 195, 212, 961 P. 2d 333, 342 (1998) ("[T]he immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent"); *McCambridge* v. *Little Rock*, 298 Ark. 219, 231–232, 766 S. W. 2d 909, 915 (1989) (recognizing the privacy interest of the murder victim's mother in crime scene photographs); *Bazemore* v. *Savannah Hospital*, 171 Ga. 257, 155 S. E. 194 (1930) *(per curiam)* (recognizing parents' right of privacy in photographs of their deceased child's body); Restatement (Second) of Torts § 652D, p. 387 (1977) (recognizing that publication of a photograph of a deceased infant—a hypothetical "child with two heads"—over the objection of the mother would result in an "inva[sion]" of the mother's "privacy").

We can assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and when it amended Exemption 7(C) to extend its terms. Those enactments were also against the background of the Attorney General's consistent interpretation of the exemption to protect "members of the family of the person to whom the information pertains," U. S. Dept. of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 36 (June 1967), and to require consideration of the privacy of "relatives or descendants" and the "possible adverse effects [from disclosure] upon [the individual] or his family," U. S. Dept. of Justice Memorandum on the 1974 Amendments to the Freedom of Information Act 9–10 (Feb. 1975), reprinted in House Committee on Government Operations and Senate Committee on the Judiciary, Freedom of Information Act and Amendments of 1974 (Pub. L. 93–502), Source Book, App. 5, pp. 519–520, 94th Cong., 1st Sess. (Joint Comm. Print 1975).

We have observed that the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution. See *Reporters Committee*, 489 U. S., at 762, n. 13 (contrasting the scope of the privacy protection under FOIA with the analogous protection under the common law and the Constitution); see also *Marzen* v. *Department of Health and Human Servs.*, 825 F. 2d 1148, 1152 (CA7 1987) ("[T]he privacy interest protected under FOIA extends beyond the common law"). It would be anomalous to hold in the instant case that the statute provides even less protection than does the common law.

The statutory scheme must be understood, moreover, in light of the consequences that would follow were we to adopt Favish's position. As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester. See *Reporters Committee*, *supra*, at 771. We are advised by the Government that child molesters, rapists, murderers, and other violent criminals often make FOIA requests for autopsies, photographs, and records of their deceased victims. Our holding ensures that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases. We find it inconceivable that Congress could have intended a definition of "personal privacy" so narrow that it would allow convicted felons to obtain these materials without limitations at the expense of surviving family members' personal privacy.

For these reasons, in agreement with the Courts of Appeals for both the District of Columbia and the Ninth Circuit, see *Accuracy in Media* v. *National Park Serv.*, 194 F. 3d 120 (CADC 1999); 217 F. 3d 1168 (CA9 2000), we hold that FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images. Our holding is consistent with the unanimous view of the Courts of Appeals and other lower courts that have addressed the question. See, *e. g.*, *New York Times Co.* v.

National Aeronautics and Space Admin., 782 F. Supp. 628, 631, 632 (CADC 1991) (sustaining a privacy claim under the narrower Exemption 6 with respect to an audiotape of the Space Shuttle Challenger astronauts' last words, because "[e]xposure to the voice of a beloved family member immediately prior to that family member's death . . . would cause the Challenger families pain" and inflict "a disruption [to] their peace of mind every time a portion of the tape is played within their hearing"), on remand from 920 F. 2d 1002 (CADC 1990); *Katz* v. *National Archives and Records Admin.*, 862 F. Supp. 476, 485 (DC 1994) (exempting from FOIA disclosure autopsy X-rays and photographs of President Kennedy on the ground that their release would cause "additional anguish" to the surviving family), aff'd on other grounds, 68 F. 3d 1438 (CADC 1995); *Lesar* v. *Department of Justice*, 636 F. 2d 472, 487 (CADC 1980) (recognizing, with respect to the assassination of Dr. Martin Luther King, Jr., his survivors' privacy interests in avoiding "annoyance or harassment"). Neither the deceased's former status as a public official, nor the fact that other pictures had been made public, detracts from the weighty privacy interests involved.

III

Our ruling that the personal privacy protected by Exemption 7(C) extends to family members who object to the disclosure of graphic details surrounding their relative's death does not end the case. Although this privacy interest is within the terms of the exemption, the statute directs nondisclosure only where the information "could reasonably be expected to constitute an unwarranted invasion" of the family's personal privacy. The term "unwarranted" requires us to balance the family's privacy interest against the public interest in disclosure. See *Reporters Committee*, 489 U. S., at 762.

FOIA is often explained as a means for citizens to know "'what their Government is up to.'" *Id.*, at 773. This

phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. The statement confirms that, as a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, as we have noted, the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.

When disclosure touches upon certain areas defined in the exemptions, however, the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it. In the case of Exemption 7(C), the statute requires us to protect, in the proper degree, the personal privacy of citizens against the uncontrolled release of information compiled through the power of the State. The statutory direction that the information not be released if the invasion of personal privacy could reasonably be expected to be unwarranted requires the courts to balance the competing interests in privacy and disclosure. To effect this balance and to give practical meaning to the exemption, the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable.

Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.

We do not in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the

requested information and the asserted public interest that would be advanced by disclosure. On the other hand, there must be some stability with respect to both the specific category of personal privacy interests protected by the statute and the specific category of public interests that could outweigh the privacy claim. Otherwise, courts will be left to balance in an ad hoc manner with little or no real guidance. *Id.*, at 776. In the case of photographic images and other data pertaining to an individual who died under mysterious circumstances, the justification most likely to satisfy Exemption 7(C)'s public interest requirement is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties.

The Court of Appeals was correct to rule that the family has a privacy interest protected by the statute and to recognize as significant the asserted public interest in uncovering deficiencies or misfeasance in the Government's investigations into Foster's death. It erred, however, in defining the showing Favish must make to substantiate his public interest claim. It stated that "[n]othing in the statutory command conditions [disclosure] on the requesting party showing that he has knowledge of misfeasance by the agency" and that "[n]othing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations." 217 F. 3d, at 1172–1173. The court went on to hold that, because Favish has "tender[ed] evidence and argument which, if believed, would justify his doubts," the FOIA request "is in complete conformity with the statutory purpose that the public know what its government is up to." *Id.*, at 1173. This was insufficient. The Court of Appeals required no particular showing that any evidence points with credibility to some actual misfeasance or other impropriety. The court's holding leaves Exemption 7(C) with little force or content. By requiring courts to engage in a state of suspended disbelief

with regard to even the most incredible allegations, the panel transformed Exemption 7(C) into nothing more than a rule of pleading. The invasion of privacy under its rationale would be extensive. It must be remembered that once there is disclosure, the information belongs to the general public. There is no mechanism under FOIA for a protective order allowing only the requester to see whether the information bears out his theory, or for proscribing its general dissemination.

We hold that, where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred. In *Department of State* v. *Ray*, 502 U. S. 164 (1991), we held there is a presumption of legitimacy accorded to the Government's official conduct. *Id.*, at 178–179. The presumption perhaps is less a rule of evidence than a general working principle. However the rule is characterized, where the presumption is applicable, clear evidence is usually required to displace it. Cf. *United States* v. *Armstrong*, 517 U. S. 456, 464 (1996) ("'[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties'"); *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"). Given FOIA's prodisclosure purpose, however, the less stringent standard we adopt today is more faithful to the statutory scheme. Only when the FOIA requester has produced evidence sufficient to satisfy this standard will there exist a counterweight on the FOIA scale

for the court to balance against the cognizable privacy interests in the requested records. Allegations of government misconduct are "'easy to allege and hard to disprove,'" *Crawford-El* v. *Britton*, 523 U. S. 574, 585 (1998), so courts must insist on a meaningful evidentiary showing. It would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion. As we have noted, the balancing exercise in some other case might require us to make a somewhat more precise determination regarding the significance of the public interest and the historical importance of the events in question. We might need to consider the nexus required between the requested documents and the purported public interest served by disclosure. We need not do so here, however. Favish has not produced any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred to put the balance into play.

The Court of Appeals erred in its interpretation of Exemption 7(C). The District Court's first order in March 1998—before its decision was set aside by the Court of Appeals and superseded by the District Court's own order on remand—followed the correct approach. The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to grant OIC's motion for summary judgment with respect to the four photographs in dispute.

It is so ordered.

Syllabus

BEDROC LIMITED, LLC, ET AL. *v.* UNITED STATES ET AL.

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

No. 02–1593. Argued January 20, 2004—Decided March 31, 2004

The Pittman Underground Water Act of 1919 authorized the Secretary of the Interior to designate certain "nonmineral" Nevada lands on which settlers could obtain permits to drill for water. Under § 8 of the Pittman Act, each land grant, or patent, reserved to the United States all coal and other "valuable minerals" in the lands, and the right to remove the same. When one of petitioners' predecessors-in-interest began extracting sand and gravel from land patented under the Pittman Act, the Bureau of Land Management ruled that he had trespassed against the Government's reserved interest in the property's "valuable minerals," and the Interior Board of Land Appeals affirmed. Petitioner BedRoc Limited, LLC, which subsequently acquired the property and continued to remove the sand and gravel under an interim agreement with the Department of the Interior, and petitioner Western Elite, Inc., filed a quiet title action in Federal District Court. The court granted the Government summary judgment, holding that the contested sand and gravel are "valuable minerals" reserved to the United States by the Pittman Act. The Ninth Circuit affirmed.

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

314 F. 3d 1080, reversed and remanded.

THE CHIEF JUSTICE, joined by JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded that sand and gravel are not "valuable minerals" reserved to the United States in land grants issued under the Pittman Act. In construing the mineral reservation of the Stock-Raising Homestead Act of 1916 (SRHA)—which was identical to the Pittman Act's except insofar as it reserved to the United States "all the coal and other minerals," whereas the Pittman Act reserved "*valuable* minerals"—this Court determined that neither the dictionary nor the legal understanding of "minerals" prevailing in 1916 was conclusive, but that the SRHA's purpose and history demonstrated that gravel was a "mineral" reserved to the United States. *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 55–60. This Court will not extend that holding to conclude that sand and gravel are "valuable minerals." The *Western Nuclear* Court had no choice but to speculate about congressional intent with respect to the scope of the amorphous term "minerals," but here

Congress has textually narrowed the term's scope by using the modifier "valuable." The inquiry begins with the statutory text, and ends there as the text is unambiguous. The proper inquiry in interpreting mineral reservations focuses on the reservation's ordinary meaning when it was enacted. *Amoco Production Co.* v. *Southern Ute Tribe*, 526 U. S. 865, 874. Because the Pittman Act applied only to Nevada, the ultimate question is whether the State's sand and gravel were commonly regarded as "valuable minerals" in 1919. Common sense says no: They were, and are, abundant throughout Nevada; they have no intrinsic value; and they were commercially worthless in 1919. Thus, even if they were regarded as minerals, no one would have mistaken them for *valuable* minerals. The statutory context of the Pittman Act's mineral reservation further confirms its ordinary meaning, as Congress explicitly cross-referenced the General Mining Act of 1872, and it is beyond dispute that when the Pittman Act became law, common sand and gravel could not constitute a locatable "valuable mineral deposit" under the General Mining Act. Because the statutory reservation's text clearly excludes sand and gravel, there is no occasion to resort to legislative history here. Pp. 181–187.

JUSTICE THOMAS, joined by JUSTICE BREYER, concluded that the Pittman Underground Water Act of 1919's mineral reservation cannot be meaningfully distinguished from the analogous provision in the Stock-Raising Homestead Act of 1916 (SRHA), and that the mineral reservations pursuant to both do not include sand and gravel. Emphasizing "valuable" in the Pittman Act ignores the fact that the Act uses "valuable minerals" and "minerals" interchangeably. And it implies that the Court erred in *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, not by interpreting "minerals" too broadly to include sand and gravel, but by interpreting "minerals" too narrowly by reading into the term a requirement that the minerals can be used for commercial purposes. If "valuable" were the textual source of a commercial purpose requirement, then the SRHA's lack of that modifier would imply that the SRHA contains no such requirement. Because the SRHA and the Pittman Act should be construed similarly, the plurality's reasoning with respect to the Pittman Act cannot be confined to that Act and naturally carries over to the SRHA. If sand and gravel are not included within the Pittman Act's mineral reservations because they were not considered "valuable minerals" at the time the Act was passed, they, with respect to SRHA lands, were not considered to be susceptible of commercial use when Congress passed the SRHA. Although the *Western Nuclear* Court incorrectly defined "minerals" to include sand and gravel, significant reliance interests would be upset if *Western Nuclear* were overruled. The Pittman Act, however, involves substantially less land than

the SRHA, and the Government does not identify any significant reliance interest that would be unsettled by this Court's failing to extend *Western Nuclear*'s reasoning. Pp. 187–189.

REHNQUIST, C. J., announced the judgment of the Court and delivered an opinion, in which O'CONNOR, SCALIA, and KENNEDY, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which BREYER, J., joined, *post*, p. 187. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 189.

R. Timothy McCrum argued the cause for petitioners. With him on the briefs were *Clifton S. Elgarten* and *Ellen B. Steen.*

Assistant Attorney General Sansonetti argued the cause for respondents. With him on the brief were *Solicitor General Olson*, *Deputy Solicitor General Kneedler*, *Dan Himmelfarb*, *William B. Lazarus*, *Elizabeth Ann Peterson*, and *Blaine T. Welsh.**

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

The question here is whether sand and gravel are "valuable minerals" reserved to the United States in land grants issued under the Pittman Underground Water Act of 1919 (Pittman Act or Act), ch. 77, 41 Stat. 293. We hold they are not.

Beginning with the Homestead Act of 1862, ch. 75, 12 Stat. 392, and stretching into the early 20th century, Congress enacted a series of land-grant statutes aimed at settling the American frontier. One of these was the Pittman Act. That Act sought to succeed where earlier homestead laws had failed: promoting development and population growth in the State of Nevada. H. R. Rep. No. 286, 66th Cong., 1st

*Briefs of *amici curiae* urging reversal were filed for Associated General Contractors of America et al. by *Ross E. Davies;* and for the National Stone, Sand & Gravel Association by *Laura Lindley* and *Christopher G. Hayes.*

Sess., 2 (1919).[1] It was thought that Nevada's lack of surface water resources was hindering its agricultural progress. *Ibid.* After rejecting various proposals to directly fund exploration for underground water, Congress enacted the Pittman Act to encourage private citizens to prospect for water in Nevada. *Id.*, at 1.

Nevada lies in the heart of the Great Basin, that part of the United States lying roughly between the Sierra Nevada Range on the west and the Wasatch and other mountain ranges on the east. The western face of the Sierra Nevada blocks rain-bearing winds off the Pacific Ocean from reaching the Great Basin, forming a rain shadow over the entire region. Nevada has, on the average, less precipitation than any other State in the Union. This is one reason why most of its rivers, instead of eventually flowing into the sea, disappear into "sinks." 5 The New Encyclopaedia Britannica 442 (15th ed. 1985); Department of Agriculture Yearbook, Climate and Man 987–988 (1941) (cited in *Nevada* v. *United States*, 463 U. S. 110, 114 (1983)).

The Pittman Act authorized the Secretary of the Interior to designate certain "nonmineral" lands[2] in Nevada, on which settlers could obtain permits to drill for water. §§ 1–2, 41 Stat. 293–294. Any settler who could demonstrate successful irrigation of at least 20 acres of crops was eligible for a land grant, or patent, of up to 640 acres. § 5, *id.*, at 294. Of central importance here, each patent issued under the Act was required to contain "a reservation to the United States of all the coal and other valuable minerals in the lands . . . , together with the right to prospect for, mine, and remove the same." § 8, *id.*, at 295. By virtue of this

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[1] The population of Nevada in 1910 was only 81,875; by 1920, it had fallen to 77,407. Less than 11% of Nevada's 112,000 square miles of land was privately owned. H. R. Rep. No. 286, at 2.

[2] "Nonmineral" lands are "more valuable for agricultural or other purposes than for the minerals [they] contai[n]." *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 48, n. 9 (1983).

reservation, the United States was free to dispose of the "coal and other valuable mineral deposits in such lands" in accordance with "the provisions of the coal and mineral land laws in force at the time of such disposal." *Ibid.*

The Pittman Act failed to significantly advance agricultural development in Nevada, S. Rep. No. 1282, 88th Cong., 2d Sess., 1 (1964), and Congress repealed it in 1964, Pub. L. 88–417, 78 Stat. 389. The repealing legislation, however, expressly reserved the rights of existing patentees. *Ibid.*

Two such patentees, Newton and Mabel Butler, were the predecessors-in-interest of the petitioners in this case. In 1940, the Butlers obtained a patent for 560 acres of land in Lincoln County, some 65 miles north of Las Vegas. As required by the Act, the patent reserved the "coal and other valuable minerals" to the United States. Common sand and gravel were plentiful and visible on the surface of the Butlers' land, but there was no commercial market for them due to Nevada's sparse population and the land's remote location. App. 10, 11.

Earl Williams acquired the Butler property in 1993. By that time, the expansion of Las Vegas had created a commercial market for the sand and gravel on the land. Shortly after Williams began extracting the sand and gravel, however, the Bureau of Land Management (BLM) served him with trespass notices pursuant to 43 CFR § 9239.0–7 (1993) (providing that any unauthorized removal of "mineral materials" from public lands is "an act of trespass"). When Williams challenged the notices, the BLM ruled that by removing sand and gravel Williams had trespassed against the Government's reserved interest in the "valuable minerals" on the property. The Interior Board of Land Appeals affirmed that decision. *Earl Williams*, 140 I. B. L. A. 295 (1997). Meanwhile, petitioner BedRoc Limited, LLC (BedRoc), acquired the Butler property from Williams in 1995.[3]

[3] In 1996, BedRoc conveyed 40 of its 560 acres to petitioner Western Elite, Inc.

BedRoc continued to remove sand and gravel under an interim agreement with the Department of the Interior, pending final resolution of the ownership dispute.

Petitioners filed an action in the United States District Court seeking to quiet title to the sand and gravel on the Butler property. The District Court granted summary judgment to the Government, holding that the contested sand and gravel are "valuable minerals" reserved to the United States by the Pittman Act. 50 F. Supp. 2d 1001 (Nev. 1999). The United States Court of Appeals for the Ninth Circuit affirmed, relying primarily on the legislative history of the Pittman Act and our decision in *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36 (1983). 314 F. 3d 1080 (2002). We granted certiorari, 539 U. S. 986 (2003), and now reverse.

In *Western Nuclear, supra*, we construed the mineral reservation in the Stock-Raising Homestead Act of 1916 (SRHA), 39 Stat. 862, 43 U. S. C. § 291 *et seq.*—"the most important . . . land-grant statut[e] enacted in the early 1900's." 462 U. S., at 47. Unlike the Pittman Act, the SRHA was not limited to Nevada; it applied to any "public lands" the Secretary of the Interior designated as "'stock-raising lands.'" 43 U. S. C. § 291 (1976 ed.) (repealed by Pub. L. 94–579, 90 Stat. 2787). A person could obtain a patent under the SRHA if he resided on stockraising lands for three years, §291, and "ma[de] permanent improvements upon the land . . . tending to increase the value of the [land] for stock-raising purposes," § 293 (repealed by Pub. L. 94–579, 90 Stat. 2787). The SRHA's mineral reservation was identical to the Pittman Act's in every respect, save one: Whereas the SRHA reserved to the United States "all the coal and other minerals," § 299 (2000 ed.), the Pittman Act reserved "all the coal and other *valuable* minerals," § 8, 41 Stat. 295 (emphasis added).

The question before us in *Western Nuclear* was "whether gravel found on lands patented under the [SRHA] is a mineral reserved to the United States." 462 U. S., at 38. A

closely divided Court held that it is. *Id.*, at 60. After determining that "neither the dictionary nor the legal understanding of the term 'minerals' that prevailed in 1916 sheds much light on the question before us," we turned to the purpose and history of the SRHA. *Id.*, at 46–47. We observed that the SRHA, like other land-grant Acts containing mineral reservations, sought to "facilitate development of both surface and subsurface resources." *Id.*, at 49–52. We therefore reasoned that "the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated." *Id.*, at 52. Accordingly, we interpreted the SRHA's mineral reservation to include "substances that are mineral in character (*i. e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate." *Id.*, at 53. Because we thought it unlikely that Congress would have made the exploitation of gravel deposits dependent on farmers and ranchers "whose interests were known to lie elsewhere," and because gravel met our other criteria, we concluded that it is indeed a "mineral" reserved to the United States. *Id.*, at 55–60.[4]

The Government argues that our rationale in *Western Nuclear* compels the outcome in this case, notwithstanding the Pittman Act's seemingly narrower reservation of "valuable" minerals. Petitioners, for their part, argue that *Western*

[4] Four Justices vigorously disagreed with the Court's approach. *Id.*, at 60–72 (Powell, J., joined by REHNQUIST, STEVENS, and O'CONNOR, JJ., dissenting). The dissenters pointed out that at the time the SRHA was enacted the Department of the Interior "had ruled consistently that gravel was not a mineral under the general mining laws." *Id.*, at 62–67. Furthermore, the ultimate congressional purpose behind the SRHA was settling the West, not stockraising, the dissenters argued, and this purpose would have been thwarted if potential settlers thought the Government had reserved "commonplace substances that actually constitute much of the soil." *Id.*, at 71–72.

Nuclear should be distinguished on this ground or, in the alternative, overruled altogether. While we share the concerns expressed in the *Western Nuclear* dissent, see n. 4, *supra*, we decline to overrule our recent precedent. By the same token, we will not extend *Western Nuclear*'s holding to conclude that sand and gravel are "*valuable* minerals."

Whatever the correctness of *Western Nuclear*'s broad construction of the term "minerals," we are not free to so expansively interpret the Pittman Act's reservation. In *Western Nuclear*, we had no choice but to speculate about congressional intent with respect to the scope of the amorphous term "minerals." Here, by contrast, Congress has textually narrowed the scope of the term by using the modifier "valuable."[5]

The preeminent canon of statutory interpretation requires us to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992). Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous. *Lamie* v. *United States Trustee*, 540 U. S. 526, 534 (2004); *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000); *Hughes Aircraft Co.* v. *Jacobson*, 525 U. S. 432, 438 (1999); *Connecticut Nat. Bank*, *supra*, at 254. We think the term "valuable" makes clear that Congress did not intend

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[5] Despite the textual difference, JUSTICE STEVENS nonetheless finds *Western Nuclear* dispositive because, according to him, "the Court's interpretation of the term 'mineral' in the SRHA included the requirement that the material be valuable." *Post*, at 190–191 (dissenting opinion). That is not quite correct. *Western Nuclear* defined "minerals," in part, as substances "that can be used for commercial purposes" and that "have separate value" from the soil. 462 U. S., at 53–54. However, as the remainder of our opinion explains, the minimal inquiry into whether a substance might at some point have separate value from the soil and might, in the abstract, be susceptible of commercial use is a far different inquiry from whether the substance is a "valuable mineral" as Congress used the term in 1919.

to include sand and gravel in the Pittman Act's mineral reservation.

"In interpreting statutory mineral reservations like the one at issue here, we have emphasized that Congress 'was dealing with a practical subject in a practical way' and that it intended the terms of the reservation to be understood in 'their ordinary and popular sense.'" *Amoco Production Co.* v. *Southern Ute Tribe*, 526 U. S. 865, 873 (1999) (quoting *Burke* v. *Southern Pacific R. Co.*, 234 U. S. 669, 679 (1914)). Importantly, the proper inquiry focuses on the ordinary meaning of the reservation at the time Congress enacted it. *Amoco Production Co.*, *supra*, at 874; *Leo Sheep Co.* v. *United States*, 440 U. S. 668, 682 (1979) (land-grant statutes should be interpreted in light of "the condition of the country when the acts were passed" (internal quotation marks omitted)); see also *Perrin* v. *United States*, 444 U. S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning" at the time Congress enacted the statute). Because the Pittman Act applied only to Nevada, the ultimate question is whether the sand and gravel found in Nevada were commonly regarded as "valuable minerals" in 1919.

Common sense tells us, and the Government does not contest, that the answer to that question is an emphatic "No." Sand and gravel were, and are, abundant throughout Nevada; they have no intrinsic value; and they were commercially worthless in 1919 due to Nevada's sparse population and lack of development.[6] Thus, even if Nevada's sand and gravel were regarded as minerals, no one would have mistaken them for *valuable* minerals. The Government argues only that sand and gravel were commercially marketable in other parts of the United States during World War I and that there is now a market for sand and gravel in some parts of Nevada. As we have explained, this evidence is simply

[6] Indeed, as petitioners aptly point out, "[e]ven the most enterprising settler could not have sold sand in the desert." Brief for Petitioners 6.

irrelevant to the proper inquiry into the meaning of the statutory mineral reservation. Cf. *Amoco Production Co.*, 526 U. S., at 873–880 (relying on the popular meaning of "coal" in 1909 and 1910 to hold that a reservation of "coal" does not include coalbed methane gas). Because we readily conclude that the "most natural interpretation" of the mineral reservation does not encompass sand and gravel, we "need not consider the applicability of the canon that ambiguities in land grants are construed in favor of the sovereign." *Id.*, at 880.

The statutory context of the Pittman Act's mineral reservation further confirms its ordinary meaning. The sentence directly following the reservation provides that the reserved "valuable mineral deposits . . . shall be subject to disposal by the United States in accordance with the provisions of the . . . mineral land laws in force at the time of such disposal." § 8, 41 Stat. 295. Here, Congress was explicitly cross-referencing the General Mining Act of 1872, currently codified at Rev. Stat. § 2319, 30 U. S. C. § 22. Then, as now, the General Mining Act provided that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase . . . under regulations prescribed by law." *Ibid.* We can therefore infer that the reserved "valuable minerals" in Pittman Act lands were the same class of minerals that could be located and disposed of under the General Mining Act. Cf. *Western Nuclear*, 462 U. S., at 59 (drawing same inference from nearly identical mineral reservation).

It is beyond dispute that when the Pittman Act became law in 1919, common sand and gravel could not constitute a locatable "valuable mineral deposit" under the General Mining Act. The Secretary of the Interior had held as much in *Zimmerman* v. *Brunson*, 39 L. D. 310 (1910), see *Western Nuclear*, *supra*, at 45 (discussing *Zimmerman*); 462 U. S., at 63–65 (Powell, J., dissenting) (same), and this remained the Department's position until 1929, when it overruled *Zimmer-*

man in *Layman* v. *Ellis*, 52 L. D. 714, see, *e. g.*, *Western Nuclear*, *supra*, at 65–69 (Powell, J., dissenting); *Robert L. Beery*, 83 I. D. 249, 253 (1976) ("Prior to 1929 sand and gravel were not considered locatable under the general mining law").[7] Thus, in the unlikely event that some ambitious prospector had sought a patent from the United States in 1919 to extract sand and gravel from Pittman Act lands, the Secretary of the Interior would have flatly refused him.

The Government is correct that the *Western Nuclear* Court sidestepped the impact of this line of reasoning by relying on the ambiguity of the term "minerals" and the possibility that Congress was not aware of Interior's *Zimmerman* decision, see 462 U. S., at 45–47. But we decline to extend that approach beyond the SRHA. In our analysis, the statutory structure of the Pittman Act convincingly reinforces the unambiguous meaning of the term "valuable minerals."

Notwithstanding the contemporaneous plain meaning of the Pittman Act's mineral reservation, the Government argues that the Act's legislative history counsels us to give "valuable minerals" precisely the same meaning we ascribed to "minerals" in *Western Nuclear*. Because we have held that the text of the statutory reservation clearly excludes sand and gravel, we have no occasion to resort to legislative history. See, *e. g.*, *Lamie*, 540 U. S., at 534, 536; *Hartford Underwriters*, 530 U. S., at 6; *Hughes Aircraft Co.*, 525 U. S., at 438; *Connecticut Nat. Bank*, 503 U. S., at 254. Having declined to extend *Western Nuclear*'s rationale to a statute where the plain meaning will not support it, we will not allow it in through the back door by presuming that "the legislature was ignorant of the meaning of the language

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[7] Congress restored the *Zimmerman* rule in 1955 when it enacted the Surface Resources Act, § 3, 69 Stat. 368, 30 U. S. C. § 611 ("No deposit of common varieties of sand [and] gravel . . . shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States . . .").

it employed." *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883).[8]

The judgment of the United States Court of Appeals for the Ninth Circuit is therefore reversed, and the case is remanded for further proceedings.

It is so ordered.

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

I agree with JUSTICE STEVENS that the mineral reservation provision in the Pittman Underground Water Act of 1919 (Pittman Act or Act) cannot be meaningfully distinguished from the analogous provision in the Stock-Raising Homestead Act of 1916 (SRHA). As JUSTICE STEVENS points out, the term "minerals" in the Pittman Act provision is only twice modified by the adjective "valuable," which "suggest[s] that the terms 'valuable minerals' and 'minerals' were intended to be synonymous." *Post*, at 191 (dissenting

[8] While JUSTICE STEVENS does not contest the plain meaning of the Pittman Act's mineral reservation, he nonetheless takes us to task for "refusing to examine" the legislative history proffered by the Government and thereby engaging in a "deliberately uninformed" and "unconstrained" method of statutory interpretation. *Post*, at 190–192. Of course, accepting JUSTICE STEVENS' approach would require a radical abandonment of our longstanding precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text. Chief Justice Marshall in 1805 stated the principle that definitively resolves this case nearly 200 years later: "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." *United States* v. *Fisher*, 2 Cranch 358, 399. We thus cannot accept JUSTICE STEVENS' invitation to presume that Congress expressed itself in a single House Committee Report rather than in the unambiguous statutory text approved by both Houses and signed by the President. We fail to see, moreover, how a court exercises unconstrained discretion when it carries out its "sole function" with respect to an unambiguous statute, namely, to "enforce it according to its terms." *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917).

opinion). I concur in the judgment, however, because I believe that mineral reservations pursuant to both the Pittman Act and the SRHA do not include sand and gravel.

To reach its result without reconsidering *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36 (1983), the plurality relies heavily on the Pittman Act's use of the term "valuable minerals," contrasting this with the SRHA's use of the term "minerals." This difference, the plurality holds, makes the scope of the Pittman Act's mineral reservation provision both more clear and more narrow than that of the SRHA. See *ante*, at 183. Placing so much emphasis on the modifier "valuable" in the Pittman Act, however, ignores the fact that the Act uses the terms "valuable minerals" and "minerals" interchangeably. It also implies that the Court erred in *Western Nuclear*, not by interpreting the term "minerals" too broadly to include sand and gravel (as the plurality suggests here, see *ante*, at 183), but by interpreting "minerals" too narrowly by reading into the term a requirement that the minerals can be used for commercial purposes.* If the word "valuable" were the textual source of a commercial purpose requirement, then the SRHA's lack of that modifier would strongly imply that the SRHA contains no commercial purpose requirement. Because the Court in *Western Nuclear* properly interpreted the term "minerals" to contain a commercial purpose requirement, I would not put so much emphasis on the modifier "valuable."

I disagree, however, with the Court's conclusion in *Western Nuclear* that sand and gravel are "minerals" under the

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*Indeed, the Court in *Western Nuclear* at times suggested an even narrower definition of "mineral," stating that "Congress plainly contemplated that mineral deposits on SRHA lands would be subject to location under the mining laws." 462 U. S., at 51. Those laws allowed individuals "to locate claims to federal land containing '*valuable mineral deposits.*'" *Id.*, at 50–51 (emphasis added). Hence, even minerals indisputably considered "valuable" might fall outside a mineral reservation under the SRHA if the *deposit* itself was not substantial enough to be "valuable."

SRHA merely because, hypothetically, at the time of the passage of the SRHA, they *could* have been used for commercial purposes, 462 U. S., at 55. Because the SRHA and the Pittman Act should be construed similarly, the plurality's reasoning with respect to the Pittman Act cannot be confined to that Act and naturally carries over to the SRHA. As the plurality points out, both common sense and the "statutory context" of the Pittman Act's enactment confirm the view that sand and gravel are not included within the Pittman Act's mineral reservations, since sand and gravel were not understood to be "valuable minerals" at the time of the passage of the Act. See *ante*, at 184–185. Likewise, sand and gravel, with respect to SRHA lands, were not considered to be susceptible of commercial use at the time Congress passed the SRHA.

Although the Court in *Western Nuclear* incorrectly applied its definition of "minerals" to include sand and gravel, the Court is typically reluctant to overrule decisions involving statute interpretation because "*stare decisis* concerns are at their acme in cases involving property and contract rights." *State Oil Co.* v. *Khan*, 522 U. S. 3, 20 (1997). Because the Government identifies significant reliance interests that would be upset by overruling *Western Nuclear*, I do not advocate doing so. The Pittman Act, however, involves substantially less land than the SRHA, and the Government does not identify any significant reliance interests that would be unsettled by our failing to extend *Western Nuclear*'s reasoning. I would therefore reverse the judgment of the Court of Appeals and decline to extend *Western Nuclear*'s faulty reasoning beyond the SRHA.

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

The Stock-Raising Homestead Act of 1916 (SRHA or Act) authorized the settlement of homesteads on "lands the surface of which" was "chiefly valuable for grazing and raising

forage crops" and "not susceptible of irrigation from any known source of water supply." 43 U. S. C. § 292 (1976 ed.). Congress included in the statute "a reservation to the United States of all the coal and other minerals in the lands . . . entered and patented" under the Act. 43 U. S. C. § 299 (2000 ed.). Two decades ago, in a closely divided decision, we held that gravel found on lands patented under the Act is a mineral reserved to the United States. *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 55 (1983).

The Pittman Underground Water Act of 1919 (Pittman Act), 41 Stat. 293, enacted just three years after the SRHA, was designed to encourage the reclamation of lands in the State of Nevada that were "not known to be susceptible of successful irrigation at a reasonable cost from any known source of water supply." H. R. Rep. No. 286, 66th Cong., 1st Sess., 1 (1919). Today the Court decides that the reservation of minerals in § 8 of the Pittman Act does not include gravel. I think it highly unlikely that Congress would reserve its ownership of sand and gravel in the millions of acres of land in the West that were covered by the SRHA and not do so for the land in Nevada covered by the Pittman Act. Indeed, the House Committee Report describing the scope of the mineral reservation in § 8 of the Pittman Act plainly states: "Section 8 of the bill contains the same reservations of minerals, with the facility for prospecting for and developing and mining such minerals as was provided in the [SRHA]." *Ibid.* A clearer expression of Congress' intent would be hard to find.

The plurality opinion rests entirely on the textual difference between the SRHA's reservation of "'all the coal and other minerals'" and the Pittman Act's reservation of "'all the coal and other *valuable* minerals.'" *Ante*, at 181. But that holding ignores the fact that in *Western Nuclear* the Court's interpretation of the term "mineral" in the SRHA

included the requirement that the material be valuable.* Moreover, the term "mineral" or "minerals" appears eight times in § 8 of the Pittman Act, and only twice is it modified by the adjective "valuable," strongly suggesting that the terms "valuable minerals" and "minerals" were intended to be synonymous. Thus, the text of § 8 and its legislative history, as well as both the reasoning and the result in *Western Nuclear*, all support the conclusion that Congress intended the mineral reservation in these two statutes to be the same. The single word "valuable," in short, cannot support the weight THE CHIEF JUSTICE places on it.

As a matter of public policy, there is no reason why Congress would enact a broader reservation in either statute. The policy of including sand and gravel in the reservation may well be unwise, and, indeed, the majority in *Western Nuclear* may have misinterpreted Congress' intent in 1916.

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*"Given Congress' understanding that the surface of SRHA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (*i. e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate. See 1 American Law of Mining § 3.26 [(1982)] ('A reservation of minerals should be considered to sever from the surface all mineral substances which can be taken from the soil and which have a separate value'). Cf. *Northern Pacific R. Co.* v. *Soderberg*, 188 U. S. [526, 536–537 (1903)] ('mineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture'); *United States* v. *Isbell Construction Co.*, [78 I. D. 385, 390 (1971)] ('the reservation of minerals should be considered to sever from the surface all mineral substances *which can be taken from the soil and have a separate value*') (emphasis in original). This interpretation of the mineral reservation best serves the congressional purpose of encouraging the concurrent development of both surface and subsurface resources, for ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value." *Western Nuclear*, 462 U. S., at 53–54.

Neither of those possibilities, however, provides an adequate justification for substituting the plurality's appraisal today of Congress' judgment for the view that prevailed in a decision that has been settled law for two decades. This conclusion is fortified by the well-recognized "need for certainty and predictability where land titles are concerned." *Leo Sheep Co.* v. *United States*, 440 U. S. 668, 687 (1979).

In refusing to examine the legislative history that provides a clear answer to the question whether Congress intended the scope of the mineral reservations in these two statutes to be identical, the plurality abandons one of the most valuable tools of judicial decisionmaking. As Justice Aharon Barak of the Israel Supreme Court perceptively has explained, the "minimalist" judge "who holds that the purpose of the statute may be learned only from its language" retains greater discretion than the judge who "will seek guidance from every reliable source." Judicial Discretion 62 (Y. Kaufmann transl. 1989). A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, increases the risk that the judge's own policy preferences will affect the decisional process. The policy choice at issue in this case is surely one that should be made either by Congress itself or by the executive agency administering the Pittman Act. Congress' acceptance of the holding in *Western Nuclear* for the past two decades should control our decision, and any residual doubt should be eliminated by the deference owed to the executive agency that has consistently construed the mineral reservations in land-grant statutes as including sand and gravel. See 462 U. S., at 56–57 (citing rulings of the Department of the Interior).

Accordingly, I respectfully dissent.

Syllabus

UNITED STATES *v.* LARA

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

No. 03–107. Argued January 21, 2004—Decided April 19, 2004

After respondent Lara, an Indian who is not a member of the Spirit Lake Tribe (Tribe), ignored the Tribe's order excluding him from its reservation, he struck one of the federal officers arresting him. He pleaded guilty in Tribal Court to the crime of violence to a policeman. The Federal Government then charged him with the federal crime of assaulting a federal officer. Lara claimed that, because key elements of that crime mirrored elements of his tribal crime, he was protected by the Double Jeopardy Clause. The Government countered that the Clause does not bar successive prosecutions by *separate sovereigns*, and that this "dual sovereignty" doctrine determined the outcome. The Government noted that this Court has held that a tribe acts as a separate sovereign in prosecuting its own members, *United States* v. *Wheeler*, 435 U. S. 313, 318, 322–323; that, after this Court ruled that a tribe lacks sovereign authority to prosecute nonmember Indians, see *Duro* v. *Reina*, 495 U. S. 676, 679, Congress specifically authorized such prosecutions; and that, because this statute enlarges the tribes' self-government powers to include "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians," 25 U. S. C. § 1301(2), the Tribe here had exercised its own tribal authority, not delegated federal authority. Accepting this argument, the Magistrate Judge rejected Lara's double jeopardy claim. The en banc Eighth Circuit reversed, holding that the "dual sovereignty" doctrine did not apply because the Tribal Court was exercising a federal prosecutorial power, and, thus, the Double Jeopardy Clause barred the second prosecution.

Held: Because the Tribe acted in its capacity as a sovereign authority, the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete federal offense. Pp. 199–210.

(a) Congress has the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians. Pp. 199–207.

(1) Section 1301(2) "recognize[s] and affirm[s]" in each tribe the "inherent power" to prosecute nonmember Indians, and its legislative history confirms that such was Congress' intent. Thus, it seeks to adjust the tribes' status, relaxing restrictions, recognized in *Duro*, that the

political branches had imposed on the tribes' exercise of inherent prosecutorial power. Pp. 199–200.

(2) Several considerations lead to the conclusion that Congress has the constitutional power to lift these restrictions. First, the Constitution, through the Indian Commerce and Treaty Clauses, grants Congress "plenary and exclusive" powers to legislate in respect to Indian tribes. *E. g., Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 470–471. Second, Congress, with this Court's approval, has interpreted these plenary grants of power as authorizing it to enact legislation that both restricts tribal powers and, in turn, relaxes those restrictions. Third, Congress' statutory goal—to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State—is not an unusual legislative objective. Fourth, Lara points to no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to relax tribal sovereignty restrictions previously imposed by the political branches. Fifth, the change at issue is limited, concerning a power similar to the power to prosecute a tribe's own members, which this Court has called inherent. Sixth, concluding that Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority is consistent with this Court's earlier cases. The holdings in *Wheeler*, *supra*, at 326; *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 209–210; and *Duro*, *supra*, at 686, that the tribes' power to prosecute nonmembers was divested by treaties and Congress, reflected the Court's view of the tribes' retained sovereign status at the time of those decisions; but they did not set forth constitutional limits prohibiting Congress from taking actions to modify or adjust that status. The Court there based its descriptions of inherent tribal authority on the sources as they existed at the time. Congressional legislation was one such important source, but it is a source subject to change. When *Duro*, *supra*, at 686, like other cases, referred to a statute that "delegated" power to the tribes, it simply did not consider whether a statute could constitutionally achieve the same end by removing restrictions on the tribes' inherent authority. Thus, none of those cases can be read to hold that the Constitution forbids Congress to change judicially made federal Indian law through an amendment to § 1301(2). *Wheeler*, *Oliphant*, and *Duro*, then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority the United States recognizes. Pp. 200–207.

(b) Lara's additional arguments cannot help him win his double jeopardy claim. This Court will not consider the merits of his due process claim that his prosecution was invalid because the Indian Civil Rights Act of 1968 does not guarantee counsel to an indigent criminal defend-

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ant. Proving that claim does not show that the source of the tribal prosecution was federal power, something Lara must do to win his double jeopardy claim. Like the due process claim, Lara's argument that the phrase "all Indians" in "inherent power . . . to exercise criminal jurisdiction over all Indians" violates the Equal Protection Clause is beside the point. And Lara simply repeats these due process and equal protection arguments in a different form when he argues that the *Duro* Court found the absence of certain constitutional safeguards, such as an indigent defendant's right to counsel, an important reason for concluding that tribes lacked the "inherent power" to try nonmember Indians. Pp. 207–209.

324 F. 3d 635, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 210. KENNEDY, J., *post,* p. 211, and THOMAS, J., *post,* p. 214, filed opinions concurring in the judgment. SOUTER, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 226.

Deputy Solicitor General Kneedler argued the cause for the United States. On the briefs were *Solicitor General Olson*, *Assistant Attorney General Wray*, *Deputy Solicitor General Dreeben*, *Barbara McDowell*, and *Richard A. Friedman.*

Alexander F. Reichert, by appointment of the Court, 540 U. S. 980, argued the cause for respondent. With him on the brief were *Ronald A. Reichert* and *James E. Smith.**

*Briefs of *amici curiae* urging reversal were filed for the State of Idaho et al. by *Lawrence G. Wasden*, Attorney General of Idaho, and *Clay R. Smith*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Richard P. Ieyoub* of Louisiana, *Jon Bruning* of Nebraska, *Larry Long* of South Dakota, and *Mark L. Shurtleff* of Utah; for the State of Washington et al. by *Christine O. Gregoire*, Attorney General of Washington, *Robert K. Costello*, Deputy Attorney General, and *William Berggren Collins*, Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Michael A. Cox* of Michigan, *Mike McGrath* of Montana, *Patricia A. Madrid* of New Mexico, and *Hardy Myers* of Oregon; for the Spirit Lake Sioux Tribe of North Dakota et al. by *Tracy Labin*, *Richard Guest*, and *Charles A. Hobbs;* and for the National Con-

JUSTICE BREYER delivered the opinion of the Court.

This case concerns a congressional statute "recogniz[ing] and affirm[ing]" the "inherent" authority of a tribe to bring a criminal misdemeanor prosecution against an Indian who is not a member of that tribe—authority that this Court previously held a tribe did not possess. Compare 25 U. S. C. § 1301(2) with *Duro* v. *Reina*, 495 U. S. 676 (1990). We must decide whether Congress has the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority. We conclude that Congress does possess this power.

I

Respondent Billy Jo Lara is an enrolled member of the Turtle Mountain Band of Chippewa Indians in north-central North Dakota. He married a member of a different tribe, the Spirit Lake Tribe, and lived with his wife and children on the Spirit Lake Reservation, also located in North Dakota. See Brief for Spirit Lake Sioux Tribe of North Dakota et al. as *Amici Curiae* 4–5. After several incidents of serious misconduct, the Spirit Lake Tribe issued an order excluding him from the reservation. Lara ignored the order; federal officers stopped him; and he struck one of the arresting officers. 324 F. 3d 635, 636 (CA8 2003) (en banc).

The Spirit Lake Tribe subsequently prosecuted Lara in the Spirit Lake Tribal Court for "violence to a policeman." *Ibid.* Lara pleaded guilty and, in respect to that crime, served 90 days in jail. See *ibid.*; Tr. of Oral Arg. 28.

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gress of American Indians by *Carter G. Phillips*, *Virginia A. Seitz*, and *Riyaz A. Kanji.*

Briefs of *amici curiae* urging affirmance were filed for Lewis County, Idaho, et al. by *Tom D. Tobin* and *Kimron Torgerson;* for the Citizens Equal Rights Foundation by *Randy V. Thompson;* and for the National Association of Criminal Defense Lawyers by *Virginia G. Villa* and *Joshua L. Dratel.*

Jon Metropoulos filed a brief of *amici curiae* for Thomas Lee Morris et al.

After Lara's tribal conviction, the Federal Government charged Lara in the Federal District Court for the District of North Dakota with the federal crime of assaulting a federal officer. 324 F. 3d, at 636; 18 U. S. C. § 111(a)(1). Key elements of this federal crime mirror elements of the tribal crime of "violence to a policeman." See Brief for United States 7. And this similarity between the two crimes would *ordinarily* have brought Lara within the protective reach of the Double Jeopardy Clause. U. S. Const., Amdt. 5 (the Government may not "subject" any person "for the same offence to be twice put in jeopardy of life or limb"); 324 F. 3d, at 636. But the Government, responding to Lara's claim of double jeopardy, pointed out that the Double Jeopardy Clause does not bar successive prosecutions brought by *separate sovereigns*, and it argued that this "dual sovereignty" doctrine determined the outcome here. See *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985) (the Double Jeopardy Clause reflects the "common-law conception of crime as an offense against the sovereignty of the government"; when "a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences' ").

The Government noted that this Court has held that an Indian tribe acts as a separate sovereign when it prosecutes its *own members*. *United States* v. *Wheeler*, 435 U. S. 313, 318, 322–323 (1978) (a tribe's "*sovereign* power to punish *tribal* offenders," while subject to congressional "defeasance," remains among those " 'inherent powers of a limited sovereignty which has never been extinguished' " (emphasis added and deleted)). The Government recognized, of course, that Lara is not one of the Spirit Lake Tribe's *own* members; it also recognized that, in *Duro* v. *Reina*, *supra*, this Court had held that a tribe no longer possessed *inherent or sovereign authority* to prosecute a "nonmember Indian." *Id.*, at 682. But it pointed out that, soon after this Court decided *Duro*, Congress enacted new legislation specifically

authorizing a tribe to prosecute Indian members of a different tribe. See Act of Nov. 5, 1990, §§ 8077(b)–(d), 104 Stat. 1892–1893 (temporary legislation until September 30, 1991); Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation). That new statute, in permitting a tribe to bring certain tribal prosecutions against nonmember Indians, does not purport to delegate the Federal Government's own *federal* power. Rather, it enlarges the *tribes'* own "'powers of self-government'" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians," including nonmembers. 25 U. S. C. § 1301(2) (emphasis added).

In the Government's view, given this statute, the Tribe, in prosecuting Lara, had exercised its own inherent *tribal* authority, not delegated *federal* authority; hence the "dual sovereignty" doctrine applies, *Heath*, *supra*, at 88; and since the two prosecutions were brought by two different sovereigns, the second, federal, prosecution does not violate the Double Jeopardy Clause.

The Federal Magistrate Judge accepted the Government's argument and rejected Lara's double jeopardy claim. 324 F. 3d, at 636–637. An Eighth Circuit panel agreed with the Magistrate Judge. 294 F. 3d 1004 (2002). But the en banc Court of Appeals, by a vote of 7 to 4, reached a different conclusion. 324 F. 3d 635 (2003). It held the Tribal Court, in prosecuting Lara, was exercising a *federal* prosecutorial power; hence the "dual sovereignty" doctrine does not apply; and the Double Jeopardy Clause bars the second prosecution. *Id.*, at 640. The four dissenting judges, agreeing with the Federal Government, concluded that the Tribal Court had exercised *inherent tribal* power in prosecuting Lara; hence the "dual sovereignty" doctrine applies and allows the second, federal, prosecution. *Id.*, at 641 (opinion of M. Arnold, J.).

Because the Eighth Circuit and Ninth Circuit have reached different conclusions about the new statute, we

granted certiorari. Cf. *United States* v. *Enas*, 255 F. 3d 662 (CA9 2001) (en banc), cert. denied, 534 U. S. 1115 (2002). We now reverse the Eighth Circuit.

II

We assume, as do the parties, that Lara's double jeopardy claim turns on the answer to the "dual sovereignty" question. What is "the source of [the] power to punish" nonmember Indian offenders, "inherent *tribal* sovereignty" or delegated *federal* authority? *Wheeler*, *supra*, at 322 (emphasis added).

We also believe that Congress intended the former answer. The statute says that it "recognize[s] and affirm[s]" in each tribe the "*inherent*" *tribal* power (not delegated federal power) to prosecute nonmember Indians for misdemeanors. See *supra*, at 198; Appendix, *infra* (emphasis added). And the statute's legislative history confirms that such was Congress' intent. See, *e. g.*, H. R. Conf. Rep. No. 102–261, pp. 3–4 (1991) ("The Committee of the Conference notes that . . . this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations"); accord, H. R. Rep. No. 102–61, p. 7 (1991); see also S. Rep. No. 102–168, p. 4 (1991) ("recogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians"); 137 Cong. Rec. 9446 (1991) (remarks of Sen. Inouye) (the "premise [of the legislation] is that the Congress affirms the *inherent* jurisdiction of tribal governments over nonmember Indians" (emphasis added)); *id.*, at 10712–10714 (remarks of Rep. Miller, House manager of the bill) (the statute "is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away" and the bill "recognizes an inherent tribal right which always existed"); *id.*, at 10713 (remarks of Rep. Richardson, a sponsor of the amendment) (the legislation "reaffirms" tribes' power).

Thus the statute seeks to adjust the tribes' status. It relaxes the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise of inherent prosecutorial power. The question before us is whether the Constitution authorizes Congress to do so. Several considerations lead us to the conclusion that Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do.

First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as "plenary and exclusive." *E. g.*, *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 470–471 (1979); *Negonsott* v. *Samuels*, 507 U. S. 99, 103 (1993); see *Wheeler*, 435 U. S., at 323; see also W. Canby, American Indian Law 2 (3d ed. 1998) (hereinafter Canby) ("[T]he independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes").

This Court has traditionally identified the Indian Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that power. *E. g.*, *Morton* v. *Mancari*, 417 U. S. 535, 552 (1974); *McClanahan* v. *Arizona Tax Comm'n*, 411 U. S. 164, 172, n. 7 (1973); see also Canby 11–12; F. Cohen, Handbook of Federal Indian Law 209–210 (1982 ed.) (hereinafter Cohen) (also mentioning, *inter alia*, the Property Clause). The "central function of the Indian Commerce Clause," we have said, "is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 192 (1989); see also, *e. g.*, *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of N. M.*, 458 U. S. 832, 837 (1982) ("broad power" under the Indian Commerce Clause); *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980) (same, and citing *Wheeler*, *supra*, at 322–323).

The treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, "to make Treaties." U. S. Const., Art. II, § 2, cl. 2. But, as Justice Holmes pointed out, treaties made pursuant to that power can authorize Congress to deal with "matters" with which otherwise "Congress could not deal." *Missouri* v. *Holland*, 252 U. S. 416, 433 (1920); see also L. Henkin, Foreign Affairs and the U. S. Constitution 72 (2d ed. 1996). And for much of the Nation's history, treaties, and legislation made pursuant to those treaties, governed relations between the Federal Government and the Indian tribes. See, *e. g.*, Cohen 109–111; F. Prucha, American Indian Policy in the Formative Years 44–49 (1962).

We recognize that in 1871 Congress ended the practice of entering into treaties with the Indian tribes. 25 U. S. C. § 71 (stating that tribes are not entities "with whom the United States may contract by treaty"). But the statute saved existing treaties from being "invalidated or impaired," *ibid.*, and this Court has explicitly stated that the statute "in no way affected Congress' plenary powers to legislate on problems of Indians," *Antoine* v. *Washington*, 420 U. S. 194, 203 (1975) (emphasis deleted).

Moreover, "at least during the first century of America's national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law." Cohen 208 (footnotes omitted). Insofar as that is so, Congress' legislative authority would rest in part, not upon "affirmative grants of the Constitution," but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as "necessary concomitants of nationality." *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 315–322 (1936); Henkin, *supra*, at 14–22, 63–72; cf. 2 J. Continental Cong. 174–175 (1775) (W. Ford ed. 1905) (creating departments of Indian affairs, appointing Indian commissioners, and noting the great importance of "se-

curing and preserving the friendship of the Indian Nations"); *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832) ("The treaties and laws of the United States contemplate . . . that all intercourse with [Indians] shall be carried on exclusively by the government of the union").

Second, Congress, with this Court's approval, has interpreted the Constitution's "plenary" grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. From the Nation's beginning Congress' need for such legislative power would have seemed obvious. After all, the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time. See, *e. g.*, Cohen 48. And Congress has in fact authorized at different times very different Indian policies (some with beneficial results but many with tragic consequences). Congressional policy, for example, initially favored "Indian removal," then "assimilation" and the breakup of tribal lands, then protection of the tribal land base (interrupted by a movement toward greater state involvement and "termination" of recognized tribes); and it now seeks greater tribal autonomy within the framework of a "government-to-government relationship" with federal agencies. 59 Fed. Reg. 22951 (1994); see also 19 Weekly Comp. of Pres. Doc. 98 (1983) (President Reagan reaffirming the rejection of termination as a policy and announcing the goal of decreasing tribal dependence on the Federal Government); see 25 U. S. C. § 450a(b) (congressional commitment to "the development of strong and stable tribal governments"). See generally Cohen 78–202 (describing this history); Canby 13–32 (same).

Such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty. The 1871 statute, for example, changed the status of an Indian tribe from a "powe[r] . . . capable of making treaties" to a

"power with whom the United States may [not] contract by treaty." Compare *Worcester*, *supra*, at 559, with 25 U. S. C. § 71.

One can readily find examples in congressional decisions to recognize, or to terminate, the existence of individual tribes. See *United States* v. *Holliday*, 3 Wall. 407, 419 (1866) ("If by [the political branches] those Indians are recognized as a tribe, this court must do the same"); *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968) (examining the rights of Menominee Indians following the termination of their Tribe). Indeed, Congress has restored previously extinguished tribal status—by re-recognizing a Tribe whose tribal existence it previously had terminated. 25 U. S. C. §§ 903–903f (restoring the Menominee Tribe); cf. *United States* v. *Long*, 324 F. 3d 475 (CA7) (upholding against double jeopardy challenge successive prosecutions by the restored Menominee Tribe and the Federal Government), cert. denied, 540 U. S. 822 (2003). Congress has advanced policies of integration by conferring United States citizenship upon all Indians. 8 U. S. C. § 1401(b). Congress has also granted tribes greater autonomy in their inherent law enforcement authority (in respect to tribal members) by increasing the maximum criminal penalties tribal courts may impose. § 4217, 100 Stat. 3207–146, codified at 25 U. S. C. § 1302(7) (raising the maximum from "a term of six months and a fine of $500" to "a term of one year and a fine of $5,000").

Third, Congress' statutory goal—to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State—is not an unusual legislative objective. The political branches, drawing upon analogous constitutional authority, have made adjustments to the autonomous status of other such dependent entities—sometimes making far more radical adjustments than those at issue here. See, *e. g.*, Hawaii—*Hawaii* v. *Mankichi*, 190 U. S. 197, 209–211 (1903) (describing annexation of Hawaii by joint resolution of Congress and the maintenance of a "Republic of Hawaii" until formal incorpo-

ration by Congress); Northern Mariana Islands—note following 48 U. S. C. § 1801 ("in accordance with the [United Nations] trusteeship agreement . . . [establishing] a self-governing commonwealth . . . in political union with and under the sovereignty of the United States"); the Philippines—22 U. S. C. § 1394 (congressional authorization for the President to "withdraw and surrender all right of . . . sovereignty" and to "recognize the independence of the Philippine Islands as a separate and self-governing nation"); Presidential Proclamation No. 2695, 60 Stat. 1352 (so proclaiming); Puerto Rico—Act of July 3, 1950, 64 Stat. 319 ("[T]his Act is now adopted in the nature of a compact so that people of Puerto Rico may organize a government pursuant to a constitution of their own adoption"); P. R. Const., Art. I, § 1 ("Estado Libre Asociado de Puerto Rico"); see also *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank N. A.*, 649 F. 2d 36, 39–41 (CA1 1981) (describing various adjustments to Puerto Rican autonomy through congressional legislation since 1898).

Fourth, Lara points to no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty previously imposed by the political branches. But cf. Part III, *infra*.

Fifth, the change at issue here is a limited one. It concerns a power similar in some respects to the power to prosecute a tribe's own members—a power that this Court has called "inherent." *Wheeler*, 435 U. S., at 322–323. In large part it concerns a tribe's authority to control events that occur upon the tribe's own land. See *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and *their territory*" (emphasis added)); see also, *e. g.*, S. Rep. No. 102–168, at 21 (remarks of P. Hugen). And the tribes' possession of this additional criminal jurisdiction is consistent with our traditional understanding of the tribes' status as "domestic dependent nations." *Chero-*

kee Nation v. *Georgia*, 5 Pet. 1, 17 (1831); see also *id.*, at 16 (describing tribe as "a distinct political society, separated from others, capable of managing its own affairs and governing itself"). Consequently, we are not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status. In particular, this case involves no interference with the power or authority of any State. Nor do we now consider the question whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a nonmember citizen of the United States. See Part III, *infra*.

Sixth, our conclusion that Congress has the power to relax the restrictions imposed by the political branches on the tribes' inherent prosecutorial authority is consistent with our earlier cases. True, the Court held in those cases that the power to prosecute nonmembers was an aspect of the tribes' external relations and hence part of the tribal sovereignty that was divested by treaties and by Congress. *Wheeler*, *supra*, at 326; *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 209–210 (1978); *Duro*, 495 U. S., at 686. But these holdings reflect the Court's view of the tribes' retained sovereign status *as of the time* the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i. e.*, from taking actions that modify or adjust the tribes' status.

To the contrary, *Oliphant* and *Duro* make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches' own determinations. In *Oliphant*, the Court rested its conclusion about inherent tribal authority to prosecute tribe members in large part upon "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts," a presumption which, "[w]hile not conclusive[,] carries considerable weight." 435 U. S., at 206. The Court pointed out that

" 'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and *legislation passed by Congress.*" *Ibid.* (emphasis added). It added that those "instruments . . . form the backdrop for the intricate web of *judicially made* Indian law." *Ibid.* (emphasis added).

Similarly, in *Duro*, the Court drew upon a host of different sources in order to reach its conclusion that a tribe does not possess the inherent power to prosecute a nonmember. The Court referred to historic practices, the views of experts, the experience of forerunners of modern tribal courts, and the published opinions of the Solicitor of the Department of the Interior. 495 U. S., at 689–692. See also, *e. g.*, *Nevada* v. *Hicks*, 533 U. S. 353, 361, n. 4 (2001) ("Our holding in *Worcester* must be considered in light of . . . the 1828 treaty" (alterations and internal quotation marks omitted)); *South Dakota* v. *Bourland*, 508 U. S. 679, 695 (1993) ("Having concluded that Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing, we find no evidence *in the relevant treaties or statutes* that Congress intended to allow the Tribes to assert regulatory jurisdiction over these lands pursuant to *inherent sovereignty*" (emphasis added)); *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, 855–856 (1985) ("[T]he existence and extent of a tribal court's jurisdiction will require *[inter alia]* a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions"); *United States* v. *Kagama*, 118 U. S. 375, 382–383 (1886) (characterizing *Ex parte Crow Dog*, 109 U. S. 556, 570 (1883), as resting on extant treaties and statutes and recognizing congressional overruling of *Crow Dog*).

Thus, the Court in these cases based its descriptions of inherent tribal authority upon the sources as they existed at the time the Court issued its decisions. Congressional legislation constituted one such important source. And that source was subject to change. Indeed *Duro* itself antici-

pated change by inviting interested parties to "address the problem [to] Congress." 495 U. S., at 698.

We concede that *Duro*, like several other cases, referred only to the need to obtain a congressional statute that *"delegated"* power to the tribes. See *id.*, at 686 (emphasis added); *Bourland*, *supra*, at 695, n. 15; *Montana* v. *United States*, 450 U. S. 544, 564 (1981); *Mazurie*, 419 U. S., at 556–557. But in so stating, *Duro* (like the other cases) simply did not consider whether a statute, like the present one, could constitutionally achieve the same end by removing restrictions on the tribes' inherent authority. Consequently we do not read any of these cases as holding that the Constitution forbids Congress to change "judicially made" federal Indian law through this kind of legislation. *Oliphant*, *supra*, at 206; cf. *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 233–237 (1985) (recognizing the "federal common law" component of Indian rights, which "common law" federal courts develop as "a 'necessary expedient' when Congress has not 'spoken to a *particular* issue' " (quoting *Milwaukee* v. *Illinois*, 451 U. S. 304, 313–315 (1981))); *id.*, at 313 ("[F]ederal common law is 'subject to the paramount authority of Congress' " (quoting *New Jersey* v. *New York*, 283 U. S. 336, 348 (1931))).

Wheeler, *Oliphant*, and *Duro*, then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference.

III

Lara makes several additional arguments. First, he points out that the Indian Civil Rights Act of 1968, 82 Stat. 77, lacks certain constitutional protections for criminal defendants, in particular the right of an indigent defendant to counsel. See 25 U. S. C. § 1302. And he argues that the Due Process Clause forbids Congress to permit a tribe to prosecute a nonmember Indian citizen of the United States

in a forum that lacks this protection. See *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972) (Constitution guarantees indigents counsel where imprisonment possible).

Lara's due process argument, however, suffers from a critical structural defect. To explain the defect, we contrast this argument with Lara's "lack of constitutional power" argument discussed in Part II, *supra*. Insofar as that "constitutional power" argument might help Lara win his double jeopardy claim, it must proceed in four steps:

Step One: Congress does not possess the constitutional power to enact a statute that modifies tribal power by "recogniz[ing] and affirm[ing]" the tribes' "inherent" authority to prosecute nonmember Indians. 25 U. S. C. § 1301(2).

Step Two: Consequently, the word "inherent" in the statute's phrase "inherent power" is void.

Step Three: The word "inherent" is severable from the rest of the statute (as are related words). The remainder of the statute is valid without those words, but it then delegates *federal* power to the tribe to conduct the prosecution.

Step Four: Consequently, the Tribe's prosecution of Lara was federal. The current, second, prosecution is also federal. Hence Lara wins his Double Jeopardy Clause claim, the subject of the present proceeding.

Although the Eighth Circuit accepted this argument, 324 F. 3d, at 640, we reject Step One of the argument, Part II, *supra*. That rejection, without more, invalidates the argument.

Lara's due process argument, however, is significantly different. That argument (if valid) would show that *any* prosecution of a nonmember Indian under the statute is invalid; so Lara's tribal prosecution would be invalid, too. Showing Lara's tribal prosecution was invalid, however, does not show that the *source* of that tribal prosecution was *federal power* (showing that a state prosecution violated the Due Process Clause does not make that prosecution *federal*).

But without that "federal power" showing, Lara cannot win his double jeopardy claim here. Hence, we need not, and we shall not, consider the merits of Lara's due process claim. Other defendants in tribal proceedings remain free to raise that claim should they wish to do so. See 25 U. S. C. § 1303 (vesting district courts with jurisdiction over habeas writs from tribal courts).

Second, Lara argues that Congress' use of the words "all Indians," in the statutory phrase "inherent power . . . to exercise criminal jurisdiction over all Indians," violates the Equal Protection Clause. He says that insofar as the words include nonmember Indians within the statute's scope (while excluding all non-Indians) the statute is race based and without justification. Like the due process argument, however, this equal protection argument is simply beside the point, therefore we do not address it. At best for Lara, the argument (if valid) would show, not that Lara's first conviction was federal, but that it was constitutionally defective. And that showing cannot help Lara win his double jeopardy claim.

Third, Lara points out that the *Duro* Court found the absence of certain constitutional safeguards, for example, the guarantee of an indigent's right to counsel, as an important reason for concluding that tribes lacked the "inherent power" to try a "group of citizens" (namely, nonmember Indians) who were not "include[d]" in those "political bodies." 495 U. S., at 693–694. In fact, *Duro* says the following: "We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them." *Id.*, at 693. But this argument simply repeats the due process and equal protection arguments rejected above in a somewhat different form. Since precisely the same problem would exist were we to treat the congressional statute as delegating *federal* power, this argument helps Lara no more than the others.

IV

For these reasons, we hold, with the reservations set forth in Part III, *supra*, that the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians. We hold that Congress exercised that authority in writing this statute. That being so, the Spirit Lake Tribe's prosecution of Lara did not amount to an exercise of federal power, and the Tribe acted in its capacity of a separate sovereign. Consequently, the Double Jeopardy Clause does not prohibit the Federal Government from proceeding with the present prosecution for a discrete *federal* offense. *Heath*, 474 U. S., at 88.

The contrary judgment of the Eighth Circuit is

Reversed.

APPENDIX TO OPINION OF THE COURT

Title 25 U. S. C. § 1301(2), as amended by Act of Oct. 28, 1991, 105 Stat. 646, provides:

" '[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."

JUSTICE STEVENS, concurring.

While I join the Court's opinion without reservation, the additional writing by my colleagues prompts this comment. The inherent sovereignty of the Indian tribes has a historical basis that merits special mention. They governed territory on this continent long before Columbus arrived. In contrast, most of the States were never actually independent sovereigns, and those that were enjoyed that independent

status for only a few years. Given the fact that Congress can authorize the States to exercise—as *their own*—inherent powers that the Constitution has otherwise placed off limits, see, *e. g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 437–438 (1946), I find nothing exceptional in the conclusion that it can also relax restrictions on an ancient inherent tribal power.

JUSTICE KENNEDY, concurring in the judgment.

The amendment to the Indian Civil Rights Act of 1968 (ICRA) enacted after the Court's decision in *Duro* v. *Reina*, 495 U. S. 676 (1990), demonstrates Congress' clear intention to restore to the tribes an inherent sovereign power to prosecute nonmember Indians. Congress was careful to rely on the theory of inherent sovereignty, and not on a delegation. JUSTICE SOUTER's position that it was a delegation nonetheless, *post*, at 231 (dissenting opinion), is by no means without support, but I would take Congress at its word. Under that view, the first prosecution of Lara was not a delegated federal prosecution, and his double jeopardy argument must fail. That is all we need say to resolve this case.

The Court's analysis goes beyond this narrower rationale and culminates in a surprising holding: "For these reasons, we hold . . . that the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians." *Ante*, at 210. The Court's holding is on a point of major significance to our understanding and interpretation of the Constitution; and, in my respectful view, it is most doubtful.

Were we called upon to decide whether Congress has this power, it would be a difficult question. Our decision in *United States* v. *Wheeler*, 435 U. S. 313 (1978), which the Court cites today but discusses very little, is replete with references to the inherent authority of the tribe over its own members. As I read that case, it is the historic possession of inherent power over "the relations among members of a

tribe" that is the whole justification for the limited tribal sovereignty the Court there recognized. *Id.*, at 326. It is a most troubling proposition to say that Congress can relax the restrictions on inherent tribal sovereignty in a way that extends that sovereignty beyond those historical limits. Cf., *e. g.*, *Strate* v. *A–1 Contractors*, 520 U. S. 438, 445–446 (1997) ("In the main . . . 'the inherent sovereign powers of an Indian tribe'—those powers a tribe enjoys apart from express provision by treaty or statute—'do not extend to the activities of nonmembers of the tribe'" (quoting *Montana* v. *United States*, 450 U. S. 544, 565 (1981))). To conclude that a tribe's inherent sovereignty allows it to exercise jurisdiction over a nonmember in a criminal case is to enlarge the "unique and limited character" of the inherent sovereignty that *Wheeler* recognized. 435 U. S., at 323.

Lara, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both. See *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 838–839 (1995) (KENNEDY, J., concurring). Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe. See *Duro*, *supra*, at 693. The majority today reaches beyond that limited exception.

The Court resolves, or perhaps avoids, the basic question of the power of the Government to yield authority inside the domestic borders over citizens to a third sovereign by using the euphemistic formulation that in amending the ICRA Congress merely relaxed restrictions on the tribes. See *ante,* at 196, 200, 202, 205, and 207. There is no language in the statute, or the legislative history, that justifies this unusual phrase, cf. 25 U. S. C. § 1301(2) (referring to "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians"); and, in my respectful view, it obscures what is actually at stake in this case. The terms of the statute are best understood as a grant or cession from Congress to the tribes, and it should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject. The relaxing-restrictions formulation is further belied by the involvement of the United States in all aspects of the tribal prosecution of a nonmember Indian. Federal law defines the separate tribes, § 1301, the broader class of "Indians," the maximum penalty which the tribes may impose for crimes, and the procedural protections to which defendants are entitled in the trials, § 1302. This does not indicate the sort of detachment from the exercise of prosecutorial authority implicit in the description of Congress' Act as having relaxed restrictions.

In addition to trying to evade the important structural question by relying on the verbal formula of relaxation, the Court also tries to bolster its position by noting that due process and equal protection claims are still reserved. *Ante,* at 210. That is true, but it ignores the elementary principle that the constitutional structure was in place before the Fifth and Fourteenth Amendments were adopted. To demean the constitutional structure and the consent upon which it rests by implying they are wholly dependent for their vindication on the Due Process and Equal Protection

Clauses is a further, unreasoned holding of serious import. The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights. Cf. *Clinton* v. *City of New York*, 524 U. S. 417, 449–453 (1998) (KENNEDY, J., concurring). The individual citizen has an enforceable right to those structural guarantees of liberty, a right which the majority ignores. Perhaps the Court's holding could be justified by an argument that by enrolling in one tribe Lara consented to the criminal jurisdiction of other tribes, but the Court does not mention the point. And, in all events, we should be cautious about adopting that fiction.

The present case, however, does not require us to address these difficult questions of constitutional dimension. Congress made it clear that its intent was to recognize and affirm tribal authority to try Indian nonmembers as inherent in tribal status. The proper occasion to test the legitimacy of the Tribe's authority, that is, whether Congress had the power to do what it sought to do, was in the first, tribal proceeding. There, however, Lara made no objection to the Tribe's authority to try him. In the second, federal proceeding, because the express rationale for the Tribe's authority to try Lara—whether legitimate or not—was inherent sovereignty, not delegated federal power, there can be no double jeopardy violation. Cf. *Grafton* v. *United States*, 206 U. S. 333, 345 (1907) ("[B]efore a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged"). For that reason, I concur in the judgment.

JUSTICE THOMAS, concurring in the judgment.

As this case should make clear, the time has come to reexamine the premises and logic of our tribal sovereignty cases. It seems to me that much of the confusion reflected

in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. See, *e. g.*, *United States* v. *Wheeler*, 435 U. S. 313, 319 (1978). Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members. See, *e. g.*, *id.*, at 326. These assumptions, which I must accept as the case comes to us, dictate the outcome in this case, and I therefore concur in the judgment.

I write separately principally because the Court fails to confront these tensions, a result that flows from the Court's inadequate constitutional analysis. I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the "metes and bounds of tribal sovereignty." *Ante*, at 202; see also *ante*, at 210 (holding that "the Constitution authorizes Congress" to regulate tribal sovereignty). Unlike the Court, *ante*, at 200–201, I cannot locate such congressional authority in the Treaty Clause, U. S. Const., Art. II, § 2, cl. 2, or the Indian Commerce Clause, Art. I, § 8, cl. 3. Additionally, I would ascribe much more significance to legislation such as the Act of Mar. 3, 1871, Rev. Stat. § 2079, 16 Stat. 566, codified at 25 U. S. C. § 71, that purports to terminate the practice of dealing with Indian tribes by treaty. The making of treaties, after all, is the one mechanism that the Constitution clearly provides for the Federal Government to interact with sovereigns other than the States. Yet, if I accept that Congress does have this authority, I believe that the result in *Wheeler* is questionable. In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.

I

In response to the Court's decision in *Duro* v. *Reina*, 495 U. S. 676 (1990) (holding that the tribes lack inherent author-

ity to prosecute nonmember Indians), Congress amended the Indian Civil Rights Act of 1968 (ICRA). Specifically, through this "*Duro* fix," Congress amended ICRA's definition of the tribes' "powers of self-government" to "recogniz[e] and affir[m]" the existence of "inherent power . . . to exercise criminal jurisdiction over all Indians." 25 U. S. C. § 1301(2). There is quite simply no way to interpret a recognition and affirmation of inherent power as a delegation of federal power, as the Court explains. *Ante*, at 199. Delegated power is the very antithesis of inherent power.

But even if the statute were less clear, I would not interpret it as a delegation of federal power. The power to bring federal prosecutions, which is part of the putative delegated power, is manifestly and quintessentially executive power. *Morrison* v. *Olson*, 487 U. S. 654, 691 (1988); *id.*, at 705 (SCALIA, J., dissenting). Congress cannot transfer federal executive power to individuals who are beyond "meaningful Presidential control." *Printz* v. *United States*, 521 U. S. 898, 922–923 (1997). And this means that, at a minimum, the President must have some measure of "the power to appoint and remove" those exercising that power. *Id.*, at 922; see also *Morrison*, *supra*, at 706–715 (SCALIA, J., dissenting).

It does not appear that the President has any control over tribal officials, let alone a substantial measure of the appointment and removal power. Cf. Brief for National Congress of American Indians as *Amicus Curiae* 27–29. Thus, at least until we are prepared to recognize absolutely independent agencies entirely outside of the Executive Branch with the power to bind the Executive Branch (for a tribal prosecution would then bar a subsequent federal prosecution), the tribes cannot be analogized to administrative agencies, as the dissent suggests, *post*, at 227 (opinion of SOUTER, J.). That is, reading the "*Duro* fix" as a delegation of federal power (without also divining some adequate method of Presidential control) would create grave constitutional difficulties. Cf. *INS* v. *St. Cyr*, 533 U. S. 289, 299–300 (2001); *Solid Waste*

Agency of Northern Cook Cty. v. *Army Corps of Engineers*, 531 U. S. 159, 173 (2001). Accordingly, the Court has only two options: Either the "*Duro* fix" changed the result in *Duro* or it did nothing at all.[1]

II

In *Wheeler*, 435 U. S., at 322–323, the Court explained that, prior to colonization, "the tribes were self-governing sovereign political communities." The Court acknowledged, however, that, after "[t]heir incorporation within the territory of the United States," the tribes could exercise their inherent sovereignty only as consistent with federal policy embodied in treaties, statutes, and Executive Orders. *Id.*, at 323; see also *id.*, at 327–328. Examining these sources for potential conflict, the Court concluded that the tribes retained the ability to exercise their inherent sovereignty to punish their own members. *Id.*, at 323–330.

Although *Wheeler* seems to be a sensible example of federal common lawmaking, I am not convinced that it was correctly decided. To be sure, it makes sense to conceptualize

[1] I am sympathetic to JUSTICE KENNEDY's position that we need not resolve the question presented. *Ante*, at 211 (opinion concurring in judgment). If Congress has power to restore tribal authority to prosecute nonmember Indians, respondent's tribal prosecution was the legitimate exercise of a separate sovereign. As such, under the dual sovereignty doctrine, it does not bar his subsequent federal prosecution. On the other hand, if the amendment to ICRA had no effect (the only other possibility), jeopardy did not attach in the tribal prosecution. See, *e. g.*, *Serfass* v. *United States*, 420 U. S. 377, 391 (1975); *Grafton* v. *United States*, 206 U. S. 333, 345 (1907) (noting "that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged"); *United States* v. *Phelps*, 168 F. 3d 1048, 1053–1054 (CA8 1999) (holding tribal court prosecution without jurisdiction did not bar subsequent federal prosecution). Jeopardy could have attached in the tribal prosecution for federal purposes only if the Federal Government had authorized the prosecution. But Congress did not authorize tribal prosecutions, and nothing suggests that the Executive Branch prompted respondent's tribal prosecution.

the tribes as sovereigns that, due to their unique situation, cannot exercise the full measure of their sovereign powers. *Wheeler*, at times, seems to analyze the problem in just this way. See, *e. g.*, *id.*, at 323–326; *id.*, at 323 (relying on *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191 (1978), discussed *infra*).

But I do not see how this is consistent with the apparently "undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government." 435 U. S., at 319. The sovereign is, by definition, the entity "in which independent and supreme authority is vested." Black's Law Dictionary 1395 (6th ed. 1990). It is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.

Further, federal policy itself could be thought to be inconsistent with this residual-sovereignty theory. In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 U. S. C. § 71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, § 2, cl. 2, and to recognize foreign governments, Art. II, § 3; see, *e. g.*, *United States* v. *Pink*, 315 U. S. 203, 228–230 (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter.

To be sure, this does not quite suffice to demonstrate that the tribes had lost their sovereignty. After all, States retain sovereignty despite the fact that Congress can regulate States *qua* States in certain limited circumstances. See, *e. g.*, *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); cf. *New York* v. *United States*, 505 U. S. 144, 160–161 (1992); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985). But the States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments and specifically grants Congress authority to legislate with respect to them, see

U. S. Const., Amdt. 14, § 5. And even so, we have explained that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York*, 505 U. S., at 166; *id.*, at 162–166; see also *Printz*, 521 U. S., at 910–915.

The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it. As Chief Justice Marshall explained:

> "[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else. . . .
>
> "[Y]et it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations." *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 16–17 (1831).

Chief Justice Marshall further described the tribes as "independent political communities, retaining their original natural rights," and specifically noted that the tribes possessed the power to "mak[e] treaties." *Worcester* v. *Georgia*, 6 Pet. 515, 559 (1832). Although the tribes never fit comfortably within the category of foreign nations, the 1871 Act tends to show that the political branches no longer considered the tribes to be anything like foreign nations. And it is at least arguable that the United States no longer considered the tribes to be sovereigns.[2] Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases.

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[2] Additionally, the very enactment of ICRA through normal legislation conflicts with the notion that tribes possess inherent sovereignty. Title 25 U. S. C. § 1302, for example, requires tribes "in exercising powers of self-government" to accord individuals most of the protections in the Bill of Rights. I doubt whether Congress could, through ordinary legislation, require States (let alone foreign nations) to use grand juries.

Nevertheless, if I accept *Wheeler*, I also must accept that the tribes do retain inherent sovereignty (at least to enforce their criminal laws against their own members) and the logical consequences of this fact. In *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985), the Court elaborated the dual sovereignty doctrine and explained that a single act that violates the "'peace and dignity' of two sovereigns by breaking the laws of each" constitutes two separate offenses. This, of course, is the reason that the Double Jeopardy Clause does not bar successive prosecutions by separate sovereigns. But whether an act violates the "peace and dignity" of a sovereign depends not in the least on whether the perpetrator is a member (in the case of the tribes) or a citizen (in the case of the States and the Nation) of the sovereign.

Heath also instructs, relying on *Wheeler*, that the separate-sovereign inquiry "turns on whether the two entities draw their authority to punish the offender from distinct sources of power." *Heath*, *supra*, at 88. But *Wheeler* makes clear that the tribes and the Federal Government do draw their authority to punish from distinct sources and that they are separate sovereigns. Otherwise, the subsequent federal prosecution in *Wheeler* would have violated the Double Jeopardy Clause.[3] It follows from our case law that Indian tribes possess inherent sovereignty to punish *anyone* who violates their laws.

In *Duro* v. *Reina*, 495 U. S. 676 (1990), the Court held that the Indian tribes could no longer enforce their criminal laws against nonmember Indians. Despite the obvious tension, *Duro* and *Wheeler* are not necessarily inconsistent. Although *Wheeler* and *Heath*, taken together, necessarily imply that the tribes retain inherent sovereignty to try anyone who violates their criminal laws, *Wheeler* and *Duro* make

[3] I acknowledge that *Wheeler* focused specifically on the tribes' authority to try their own members. See 435 U. S., at 323–330. But, as I discuss below, the distinction between the tribes' external and internal powers is not constitutionally required.

clear that conflict with federal policy can operate to prohibit the exercise of this sovereignty. *Duro*, then, is not a case about "inherent sovereignty" (a term that we have used too imprecisely); rather, it is a case about whether a specific exercise of tribal sovereignty conflicts with federal policy.

Indeed, the Court in *Duro* relied primarily on *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191 (1978), which held that tribes could not enforce their criminal laws against non-Indians. In reaching that conclusion, the Court in *Oliphant* carefully examined the views of Congress and the Executive Branch. *Id.*, at 197–206 (discussing treaties, statutes, and views of the Executive Branch); *id.*, at 199 (discussing Attorney General opinions, including 2 Op. Atty. Gen. 693 (1834) (concluding that tribal exercise of criminal jurisdiction over non-Indians was inconsistent with various treaties)). *Duro* at least rehearsed the same analysis. 495 U. S., at 688–692. Thus, although *Duro* is sprinkled with references to various constitutional concerns, see, *e. g.*, *id.*, at 693–694, *Duro*, *Oliphant*, and *Wheeler* are classic federal-common-law decisions. See also *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 233–236 (1985).

I acknowledge that our cases have distinguished between "tribal power [that] is necessary to protect tribal self-government or to control internal relations" and tribal power as it relates to the external world. *Montana* v. *United States*, 450 U. S. 544, 564 (1981); see also *Nevada* v. *Hicks*, 533 U. S. 353, 358–359 (2001); *South Dakota* v. *Bourland*, 508 U. S. 679, 695, n. 15 (1993); *Duro*, *supra*, at 685–686; *Wheeler*, 435 U. S., at 322–325. This distinction makes perfect sense as a matter of federal common law: Purely "internal" matters are by definition unlikely to implicate any federal policy. But, critically, our cases have never drawn this line as a constitutional matter. That is why we have analyzed extant federal law (embodied in treaties, statutes, and Executive Orders) before concluding that particular tribal assertions of power were incompatible with the position of the tribes.

See, *e. g.*, *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, 853–854 (1985); *Oliphant*, *supra*, at 204 ("While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago [referring to *In re Mayfield*, 141 U. S. 107 (1891)] that Congress consistently believed this to be the necessary result of its repeated legislative actions").[4]

As noted, in response to *Duro*, Congress amended ICRA. Specifically, Congress "recognized and affirmed" the existence of "inherent power . . . to exercise criminal jurisdiction over all Indians." 25 U. S. C. § 1301(2). President Bush signed this legislation into law. See 27 Weekly Comp. of Pres. Doc. 1573–1574 (1991). Further, as this litigation demonstrates, it is the position of the Executive Branch that the tribes possess inherent authority to prosecute nonmember Indians.

In my view, these authoritative pronouncements of the political branches make clear that the exercise of this aspect of sovereignty is not inconsistent with federal policy and therefore with the position of the tribes. Thus, while *Duro* may have been a correct federal-common-law decision at the time, the political branches have subsequently made clear that the

[4] JUSTICE SOUTER believes that I have overlooked *Oliphant*'s reliance on sources other than "treaties, statutes, and the views of the Executive Branch." *Post*, at 230, n. 2. JUSTICE SOUTER quotes the following passage from *Oliphant:* "[E]ven ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status.*" 435 U. S., at 208 (emphasis added; internal quotation marks and citation omitted). The second quoted sentence is entirely consistent with federal common lawmaking and is difficult to understand as anything else. I admit that the first sentence, which removes from consideration most of the sources of federal common law, makes the second sentence puzzling. But this is precisely the confusion that I have identified and that I hope the Court begins to resolve.

tribes' exercise of criminal jurisdiction against nonmember Indians is consistent with federal policy. The potential conflicts on which *Duro* must have been premised, according to the political branches, do not exist. See also *ante*, at 205. I therefore agree that, as the case comes to us, the Tribe acted as a separate sovereign when it prosecuted respondent. Accordingly, the Double Jeopardy Clause does not bar the subsequent federal prosecution.

III

I believe that we must examine more critically our tribal sovereignty case law. Both the Court and the dissent, however, compound the confusion by failing to undertake the necessary rigorous constitutional analysis. I would begin by carefully following our assumptions to their logical conclusions and by identifying the potential sources of federal power to modify tribal sovereignty.

The dissent admits that "[t]reaties and statutes delineating the tribal-federal relationship are properly viewed as an independent elaboration by the political branches of the fine details of the tribes' dependent position, which strips the tribes of any power to exercise criminal jurisdiction over those outside their own memberships." *Post*, at 228. To the extent that this is a description of the federal-common-law process, I agree. But I do not understand how the dissent can then conclude that "the jurisdictional implications [arising from this analysis are] constitutional in nature." *Ibid.* By this I understand the dissent to mean that Congress cannot alter the result, though the dissent never quite says so.

The analysis obviously has constitutional implications. It is, for example, dispositive of respondent's double jeopardy claim. But it does not follow that this Court's federal-common-law decisions limiting tribes' authority to exercise their inherent sovereignty somehow become enshrined as constitutional holdings that the political branches cannot

alter. When the political branches demonstrate that a particular exercise of the tribes' sovereign power is in fact consistent with federal policy, the underpinnings of a federal-common-law decision disabling the exercise of that tribal power disappear. Although I do not necessarily agree that the tribes have any residual inherent sovereignty or that Congress is the constitutionally appropriate branch to make adjustments to sovereignty, see Part II, *supra*, it is important to recognize the logical implications of these assumptions.

Similarly unavailing is the dissent's observation that when we perform the separate-sovereign analysis "we are undertaking a constitutional analysis based on legal categories of constitutional dimension." *Post*, at 229. The dissent concludes from this that our double jeopardy analysis in this context "must itself have had constitutional status." *Ibid.* This *ipse dixit* does not transform our common-law decisions into constitutional holdings. Cf. *Dickerson* v. *United States*, 530 U. S. 428, 459–461 (2000) (SCALIA, J., dissenting).

I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power. *Ante*, at 200. I cannot agree that the Indian Commerce Clause " 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.' " *Ibid.* (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U. S. 163, 192 (1989)). At one time, the implausibility of this assertion at least troubled the Court, see, *e. g.*, *United States* v. *Kagama*, 118 U. S. 375, 378–379 (1886) (considering such a construction of the Indian Commerce Clause to be "very strained"), and I would be willing to revisit the question. Cf., *e. g.*, *United States* v. *Morrison*, 529 U. S. 598 (2000); *United States* v. *Lopez*, 514 U. S. 549 (1995); *id.*, at 584–593 (THOMAS, J., concurring).

Next, the Court acknowledges that "[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties.'" *Ante*, at 201 (quoting U. S. Const., Art. II, § 2, cl. 2). This, of course, suffices to show that it provides *no* power to *Congress*, at least in the absence of a specific treaty. Cf. *Missouri* v. *Holland*, 252 U. S. 416 (1920). The treaty power does not, as the Court seems to believe, provide Congress with free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified treaty. Such an assertion is especially ironic in light of Congress' enacted prohibition on Indian treaties.

In the end, the Court resorts to citing past examples of congressional assertions of this or similar power. *Ante*, at 202–203. At times, such history might suffice. Cf. *Dames & Moore* v. *Regan*, 453 U. S. 654, 686 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610–611 (1952) (Frankfurter, J., concurring). But it does not suffice here for at least two reasons. First, federal Indian law is at odds with itself. I find it difficult to reconcile the result in *Wheeler* with Congress' 1871 prospective prohibition on the making of treaties with the Indian tribes. The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling "sovereignty." See Part II, *supra*. In short, the history points in both directions.

Second, much of the practice that the Court cites does not actually help its argument. The "Insular Cases," which include the Hawaii and Puerto Rico examples, *ante*, at 203–204, involved Territories of the United States, over which Congress has plenary power to govern and regulate. See *Reid* v. *Covert*, 354 U. S. 1, 13 (1957); U. S. Const., Art. IV, § 3, cl. 2. The existence of a textual source for congressional power distinguishes these cases. And, incidentally, al-

though one might think that Congress' authority over the tribes could be found in Article IV, § 3, cl. 2, the Court has held that the Territories are the United States for double jeopardy purposes, see, *e. g.*, *Wheeler*, 435 U. S., at 321–322; *Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 264–266 (1937), which would preclude the result in *Wheeler*. It is for this reason as well that the degree of autonomy of Puerto Rico is beside the point. See *Wheeler*, *supra*, at 321; *post*, at 229.

The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgment might allow the Court to ask the logically antecedent question *whether* Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.

JUSTICE SOUTER, with whom JUSTICE SCALIA joins, dissenting.

It is as true today as it was in 1886 that the relationship of Indian tribes to the National Government is "an anomalous one and of a complex character." *United States* v. *Kagama*, 118 U. S. 375, 381. Questions of tribal jurisdiction, whether legislative or judicial, do not get much help from the general proposition that tribes are "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831), or "wards of the [American] nation," *Kagama*, *supra*, at 383. Our cases deciding specific questions, however, demonstrate that the tribes do retain jurisdiction necessary to protect tribal self-government or control internal tribal relations,

Montana v. *United States*, 450 U. S. 544, 564 (1981), including the right to prosecute tribal members for crimes, *United States* v. *Wheeler*, 435 U. S. 313, 323–324 (1978), a sovereign right that is "inherent," *ibid.*, but neither exclusive, *Kagama*, *supra*, at 384–385 (federal criminal jurisdiction), nor immune to abrogation by Congress, *Wheeler*, *supra*, at 323 ("the sufferance of Congress"). Furthermore, except as provided by Congress, tribes lack criminal jurisdiction over non-Indians, *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 212 (1978), and over nonmember Indians, *Duro* v. *Reina*, 495 U. S. 676, 685, 688 (1990).

Of particular relevance today, we held in *Duro* that because tribes have lost their inherent criminal jurisdiction over nonmember Indians, any subsequent exercise of such jurisdiction "could only have come to the Tribe" (if at all) "by delegation from Congress." *Id.*, at 686. Three years later, in *South Dakota* v. *Bourland*, 508 U. S. 679 (1993), we reiterated this understanding that any such "delegation" would not be a restoration of prior inherent sovereignty; we specifically explained that "tribal sovereignty over nonmembers cannot survive without express congressional delegation, and is therefore *not* inherent." *Id.*, at 695, n. 15 (emphasis in original; citation and internal quotation marks omitted).[1] Our precedent, then, is that any tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a "delegation" of federal power and is not akin to a State's congressionally permitted exercise of some authority that would otherwise be barred by the dormant Commerce Clause, see *New York* v. *United States*, 505 U. S. 144, 171 (1992). It is more like the delegation of lawmaking power to an administrative agency, whose jurisdiction would not even exist absent congressional authorization.

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[1] *Bourland* was a civil case about the regulation of hunting and fishing by non-Indians. Its applicability in the criminal context is presumably *a fortiori*.

It is of no moment that we have given ostensibly alternating explanations for this conclusion. We have sometimes indicated that the tribes' lack of inherent criminal jurisdiction over nonmembers is a necessary legal consequence of the basic fact that the tribes are dependent on the Federal Government. *Wheeler*, *supra*, at 326 ("[The tribes' inability to] try nonmembers in tribal courts . . . rest[s] on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations"); *Oliphant*, 435 U. S., at 210 ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States . . ."). At other times, our language has suggested that the jurisdictional limit stems from congressional and treaty limitations on tribal powers. See *id.*, at 204 ("Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts"); *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U. S. 845, 853–854 (1985) ("In *Oliphant* we . . . concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly pre-empted tribal jurisdiction"). What has never been explicitly stated, but should come as no surprise, is that these two accounts are not inconsistent. Treaties and statutes delineating the tribal-federal relationship are properly viewed as an independent elaboration by the political branches of the fine details of the tribes' dependent position, which strips the tribes of any power to exercise criminal jurisdiction over those outside their own memberships.

What should also be clear, and what I would hold today, is that our previous understanding of the jurisdictional implications of dependent sovereignty was constitutional in nature, certainly so far as its significance under the Double Jeopardy

Clause is concerned. Our discussions of Indian sovereignty have naturally focused on the scope of tribes' inherent legislative or judicial jurisdiction. *E. g.*, *Nevada* v. *Hicks*, 533 U. S. 353 (2001) (jurisdiction of tribal courts over civil suit against state official); *South Dakota* v. *Bourland*, *supra* (tribal regulations governing hunting and fishing). And application of the double jeopardy doctrine of dual sovereignty, under which one independent sovereign's exercise of criminal jurisdiction does not bar another sovereign's subsequent prosecution of the same defendant, turns on just this question of how far a prosecuting entity's inherent jurisdiction extends. *Grafton* v. *United States*, 206 U. S. 333, 354–355 (1907). When we enquire "whether the two [prosecuting] entities draw their authority to punish the offender from distinct sources of power," *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985), in other words, we are undertaking a constitutional analysis based on legal categories of constitutional dimension (*i. e.*, is this entity an independent or dependent sovereign?). Thus, our application of the doctrines of independent and dependent sovereignty to Indian tribes in response to a double jeopardy claim must itself have had constitutional status. See *Wheeler*, *supra*, at 326 (holding that tribes' inability to prosecute nonmembers "rest[s] on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations").

That means that there are only two ways that a tribe's inherent sovereignty could be restored so as to alter application of the dual sovereignty rule: either Congress could grant the same independence to the tribes that it did to the Philippines, see *ante*, at 204, or this Court could repudiate its existing doctrine of dependent sovereignty. The first alternative has obviously not been attempted, and I see no reason for us to venture down a path toward the second. To begin with, the theory we followed before today has the virtue of fitting the facts: no one could possibly deny that the tribes are sub-

ordinate to the National Government. Furthermore, while this is not the place to reexamine the concept of dual sovereignty itself, there is certainly no reason to adopt a canon of broad construction calling for maximum application of the doctrine. Finally, and perhaps most importantly, principles of *stare decisis* are particularly compelling in the law of tribal jurisdiction, an area peculiarly susceptible to confusion. And confusion, I fear, will be the legacy of today's decision, for our failure to stand by what we have previously said reveals that our conceptualizations of sovereignty and dependent sovereignty are largely rhetorical.[2]

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[2] JUSTICE THOMAS's disagreement with me turns ultimately on his readiness to discard prior case law in this field and, indeed, on his rejection in this very case of the concept of dependent sovereignty. He notes, for example, *ante*, at 220 (opinion concurring in judgment), that the Court in *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985), explained that one act that violates the peace and dignity of two sovereigns constitutes two separate offenses for purposes of double jeopardy. JUSTICE THOMAS then concludes that whether an act violates a sovereign's peace and dignity does not depend (when the sovereign is an Indian tribe) on whether the perpetrator is a member of the tribe. JUSTICE THOMAS therefore assumes that tribes "retain inherent sovereignty to try anyone who violates their criminal laws." *Ante*, at 220. This Court, however, has held exactly to the contrary: a tribe has no inherent jurisdiction to prosecute a nonmember. In rejecting this precedent, JUSTICE THOMAS implicitly rejects the concept of dependent sovereignty, upon which our holdings in *United States* v. *Wheeler*, 435 U. S. 313 (1978), and *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191 (1978), rested. Reciting *Oliphant*'s examination of treaties, statutes, and views of the Executive Branch, JUSTICE THOMAS attempts to suggest that these opinions were only momentary expressions of malleable federal policy. But he somehow ignores *Oliphant*'s own emphasis that its analysis did not rest on historical expressions of federal policy; rather, "even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status*." *Id.*, at 208 (emphasis in original; citation and internal quotation marks omitted); see also *Duro* v. *Reina*, 495 U. S. 676, 686 (1990). There is simply no basis for JUSTICE THOMAS's recharacterization of this clear holding.

I would therefore stand by our explanations in *Oliphant* and *Duro* and hold that Congress cannot reinvest tribal courts with inherent criminal jurisdiction over nonmember Indians. It is not that I fail to appreciate Congress's express wish that the jurisdiction conveyed by statute be treated as inherent, but Congress cannot control the interpretation of the statute in a way that is at odds with the constitutional consequences of the tribes' continuing dependent status. What may be given controlling effect, however, is the principal object of the 1990 amendments to the Indian Civil Rights Act of 1968, 25 U. S. C. § 1301 *et seq.*, which was to close "the jurisdictional void" created by *Duro* by recognizing (and empowering) the tribal court as "the best forum to handle misdemeanor cases over non-member Indians," H. R. Rep. No. 102–261, p. 6 (1991). I would therefore honor the drafters' substantive intent by reading the Act as a delegation of federal prosecutorial power that eliminates the jurisdictional gap.[3] Finally, I would hold that a tribe's exercise of this delegated power bars subsequent federal prosecution for the same offense. I respectfully dissent.

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[3] JUSTICE THOMAS suggests that this delegation may violate the separation of powers. *Ante*, at 215–217. But we are not resolving the question whether Lara could be "prosecuted pursuant to . . . delegated power," 324 F. 3d 635, 640 (CA8 2003), only whether the prosecution was in fact the exercise of an inherent power, see Pet. for Cert. (I), and whether the exercise of a delegated power would implicate the protection against double jeopardy.

Syllabus

HOUSEHOLD CREDIT SERVICES, INC., ET AL. *v.* PFENNIG

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

No. 02–857. Argued February 23, 2004—Decided April 21, 2004

The Truth in Lending Act (TILA) regulates, *inter alia*, the disclosures that credit card issuers must make to consumers, 15 U. S. C. § 1637(a), and provides consumers with a civil remedy for creditors' failure to comply, § 1640. Among other things, the creditor's periodic balance statement to the consumer must include "[t]he amount of any finance charge," § 1637(b)(4), which is defined as an amount "payable directly or indirectly by the [consumer], and imposed directly or indirectly by the creditor as an incident to the extension of credit," § 1605(a). Section 1604(a) expressly gives to the Federal Reserve Board (Board) expansive authority to prescribe regulations containing "such classifications, differentiations, or other provisions" as, in the Board's judgment, "are necessary or proper to effectuate [TILA's] purposes . . . , to prevent circumvention or evasion thereof, or to facilitate compliance therewith." The Board's Regulation Z interprets § 1605(a)'s "finance charge" definition to exclude "charges . . . for exceeding a credit limit" (over-limit fees).

Respondent holds a credit card issued by one of the petitioner financial institutions and in which the other holds an interest. Although the parties' agreement set respondent's credit limit at $2,000, she was able to make charges exceeding that limit, subject to a $29 over-limit fee for each month in which her balance exceeded $2,000. While her monthly billing statement disclosed the over-limit fees, the amount was not included as part of the "finance charge," consistent with Regulation Z. Respondent filed suit alleging that petitioners violated TILA by failing to classify over-limit fees as "finance charges," but the District Court granted petitioners' motion to dismiss on the ground that Regulation Z specifically excludes such fees. The Sixth Circuit reversed, holding that the exclusion conflicts with § 1605(a)'s plain language. Noting, first, that, as a remedial statute, TILA must be liberally interpreted in favor of consumers, the court then concluded that the over-limit fees in this case were imposed "incident to an extension of credit" and therefore fell squarely within § 1605's language. That conclusion turned on the distinction the court drew between unilateral acts of default, which would not generate a "finance charge," and acts of default resulting from an agreement between the creditor and the consumer, which would.

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Held: Regulation Z is not an unreasonable interpretation of § 1605. Pp. 238–245.

(a) Because respondent does not challenge the Board's authority under § 1604(a) to issue binding regulations, this Court faces only two questions. It asks, first, whether "Congress has directly spoken to the precise question at issue," *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842, in which case courts, as well as the Board, "must give effect to the unambiguously expressed intent of Congress," *id.*, at 842–843. However, whenever Congress has "explicitly left a gap for the [implementing] agency to fill," the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.*, at 843–844. Pp. 238–239.

(b) TILA itself does not explicitly address whether over-limit fees are included within the "finance charge" definition. The Sixth Circuit did not attempt to clarify the scope of § 1605(a)'s critical term "incident to the extension of credit." Because the phrase "incident to" does not make clear whether a substantial (as opposed to a remote) connection is required between an antecedent and its object, cf. *Holly Farms Corp.* v. *NLRB*, 517 U. S. 392, 402, n. 9, it cannot be concluded that the term "finance charge," standing alone, unambiguously includes over-limit fees. Moreover, an examination of TILA's related provisions, as well as the full text of § 1605 itself, casts doubt on the Sixth Circuit's interpretation. A consumer holding an open-end credit plan may incur two types of charges—finance charges and "other charges which may be imposed as part of the plan." §§ 1637(a)(1)–(5). TILA does not make clear which charges fall into each category, but its recognition of at least two categories establishes that Congress did not contemplate that *all* charges made in connection with an open-end credit plan would be considered "finance charges." And where TILA explicitly addresses over-limit fees, it defines them as fees imposed "in connection with an extension of credit," § 1637(c)(1)(B)(iii), rather than "incident to an extension of credit," § 1605(a). Furthermore, none of § 1605's specific examples of charges that fall within the "finance charge" definition includes over-limit or comparable fees. Thus, § 1605(a) is, at best, ambiguous. Pp. 239–242.

(c) Regulation Z's exclusion of over-limit fees from "finance charge[s]" is in no way manifestly contrary to § 1605. Regulation Z defines "finance charge" as "the cost of consumer credit," excluding as less relevant to determining such cost a number of specific payments, including over-limit fees, that do not automatically recur or are imposed only when a consumer defaults on a credit agreement. Because over-limit fees are imposed only in the latter circumstance, they can reasonably be

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characterized as a penalty for defaulting on the credit agreement, and the Board's decision to exclude them from "finance charge[s]" is reasonable. Despite the Board's rational decision to adopt a uniform rule excluding from the term "finance charge" *all* penalties imposed for exceeding the credit limit, the lower court adopted a case-by-case approach contingent on whether an act of default was "unilateral." That approach would prove unworkable to creditors and, more importantly, lead to significant confusion for the consumer, who would be able to decipher if a charge is more properly a "finance charge" or an "other charge" only by recalling the details of the particular transaction that caused him to exceed his credit limit. In most cases, the consumer would not even know the relevant facts, which are contingent on the nature of the authorization given by the creditor to the merchant. Here, the Board accomplished all of the objectives set forth in § 1604(a)'s broad delegation of rulemaking authority when it set forth a clear, easy to apply (and easy to enforce) rule that highlights the charges the Board determined to be most relevant to a consumer's credit decisions. Pp. 242–245.

295 F. 3d 522, reversed.

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

Seth P. Waxman argued the cause for petitioners. With him on the briefs were *Louis R. Cohen*, *Christopher R. Lipsett*, *Richard C. Pepperman II*, and *William G. Porter.*

Barbara B. McDowell argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Olson*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Clement*, *Matthew D. Roberts*, *James V. Mattingly, Jr.*, and *Katherine H. Wheatley.*

Sylvia Antalis Goldsmith argued the cause for respondent. With her on the brief were *John T. Murray*, *Joseph F. Murray,* and *Brian K. Murphy.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bankers Association et al. by *Drew S. Days III*, *Beth S. Brinkmann*, and *Seth M. Galanter;* and for William P. Schlenk by *Richard A. Cordray*, *Mark D. Fischer*, and *Mark McClure Sandmann.*

JUSTICE THOMAS delivered the opinion of the Court.

Congress enacted the Truth in Lending Act (TILA), 82 Stat. 146, in order to promote the "informed use of credit" by consumers. 15 U. S. C. § 1601(a). To that end, TILA's disclosure provisions seek to ensure "meaningful disclosure of credit terms." *Ibid.* Further, Congress delegated expansive authority to the Federal Reserve Board (Board) to enact appropriate regulations to advance this purpose. § 1604(a). We granted certiorari, 539 U. S. 957 (2003), to decide whether the Board's Regulation Z, which specifically excludes fees imposed for exceeding a credit limit (over-limit fees) from the definition of "finance charge," is an unreasonable interpretation of § 1605. We conclude that it is not, and, accordingly, we reverse the judgment of the Court of Appeals for the Sixth Circuit.

I

Respondent, Sharon Pfennig, holds a credit card initially issued by petitioner Household Credit Services, Inc. (Household), but in which petitioner MBNA America Bank, N. A., now holds an interest through the acquisition of Household's credit card portfolio. Although the terms of respondent's credit card agreement set respondent's credit limit at $2,000, respondent was able to make charges exceeding that limit, subject to a $29 "over-limit fee" for each month in which her balance exceeded $2,000.

TILA regulates, *inter alia*, the substance and form of disclosures that creditors offering "open end consumer credit plans" (a term that includes credit card accounts) must make to consumers, § 1637(a), and provides a civil remedy for consumers who suffer damages as a result of a creditor's failure to comply with TILA's provisions, § 1640.[1] When a creditor

[1] An "open end credit plan" is a plan under which a creditor "reasonably contemplates repeated transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance." 15 U. S. C. § 1602(i).

and a consumer enter into an open-end consumer credit plan, the creditor is required to provide to the consumer a statement for each billing cycle for which there is an outstanding balance due. § 1637(b). The statement must include the account's outstanding balance at the end of the billing period, § 1637(b)(8), and "[t]he amount of any finance charge added to the account during the period, itemized to show the amounts, if any, due to the application of percentage rates and the amount, if any, imposed as a minimum or fixed charge," § 1637(b)(4). A "finance charge" is an amount "payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." § 1605(a). The Board has interpreted this definition to exclude "[c]harges . . . for exceeding a credit limit." See 12 CFR § 226.4(c)(2) (2004) (Regulation Z). Thus, although respondent's billing statement disclosed the imposition of an over-limit fee when she exceeded her $2,000 credit limit, consistent with Regulation Z, the amount was not included as part of the "finance charge."

On August 24, 1999, respondent filed a complaint in the United States District Court for the Southern District of Ohio on behalf of a purported nationwide class of all consumers who were charged or assessed over-limit fees by petitioners. Respondent alleged in her complaint that petitioners allowed her and each of the other putative class members to exceed their credit limits, thereby subjecting them to over-limit fees. Petitioners violated TILA, respondent alleged, by failing to classify the over-limit fees as "finance charges" and thereby "misrepresented the true cost of credit" to respondent and the other class members. Class Action Complaint in No. C2–99 815, ¶¶ 34–39, App. to Pet. for Cert. A39–A40. Petitioners moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that Regulation Z specifically excludes over-limit fees from the definition of "finance charge." 12 CFR

§ 226.4(c)(2) (2004). The District Court agreed and granted petitioners' motion to dismiss.

On appeal, respondent argued, and the Court of Appeals agreed, that Regulation Z's explicit exclusion of over-limit fees from the definition of "finance charge" conflicts with the plain language of 15 U. S. C. § 1605(a). The Court of Appeals first noted that, as a remedial statute, TILA must be liberally interpreted in favor of consumers. 295 F. 3d 522, 528 (CA6 2002). The Court of Appeals then concluded that the over-limit fees in this case were imposed "incident to the extension of credit" and therefore fell squarely within § 1605's definition of "finance charge." *Id.*, at 528–529. The Court of Appeals' conclusion turned on the distinction between unilateral acts of default and acts of default resulting from consumers' requests for additional credit, exceeding a predetermined credit limit, that creditors grant. Under the Court of Appeals' reasoning, a penalty imposed due to a unilateral act of default would not constitute a "finance charge." *Id.*, at 530–531. Respondent alleged in her complaint, however, that petitioners "allowed [her] to make charges and/or assessed [her] charges that allowed her balance to exceed her credit limit of two thousand dollars," App. to Pet. for Cert. A39, ¶ 34, putting her actions under the category of acts of default resulting from consumers' requests for additional credit, exceeding a predetermined credit limit, that creditors grant. The Court of Appeals held that because petitioners "made an additional extension of credit to [respondent] over and above the alleged 'credit limit,' " *id.*, ¶ 35, and charged the over-limit fee as a condition of this additional extension of credit, the over-limit fee clearly and unmistakably fell under the definition of a "finance charge." 295 F. 3d, at 530. Based on its reading of respondent's allegations, the Court of Appeals limited its holding to "those instances in which the creditor knowingly permits the credit card holder to exceed his or her credit limit and then imposes

a fee incident to the extension of that credit." *Id.*, at 532, n. 5.[2]

II

Congress has expressly delegated to the Board the authority to prescribe regulations containing "such classifications, differentiations, or other provisions" as, in the judgment of the Board, "are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." § 1604(a). Thus, the Court has previously recognized that "the [Board] has played a pivotal role in 'setting [TILA] in motion. . . .'" *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980) (quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933)). Indeed, "Congress has specifically designated the [Board] and staff as the primary source for interpretation and application of truth-in-lending law." 444 U. S., at 566. As the Court recognized in *Ford Motor Credit Co.*, twice since the passage of TILA, Congress has made this intention clear: first by providing a good-faith defense to creditors who comply with the Board's rules and regulations, 88 Stat. 1518, codified at 15 U. S. C. § 1640(f), and, second, by expanding this good-faith defense to creditors who conform to "any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals," 90 Stat. 197, codified as amended, at § 1640(f). 444 U. S., at 566–567.

Respondent does not challenge the Board's authority to issue binding regulations. Thus, in determining whether

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[2] To the extent that respondent sought monetary relief, the Court of Appeals affirmed the District Court's dismissal of respondent's TILA claim because § 1640(f) provides a good-faith defense to creditors who act in conformity with rules promulgated by the Board. 295 F. 3d, at 532–533.

Regulation Z's interpretation of TILA's text is binding on the courts, we are faced with only two questions. We first ask whether "Congress has directly spoken to the precise question at issue." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). If so, courts, as well as the agency, "must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842–843. However, whenever Congress has "explicitly left a gap for the agency to fill," the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.*, at 843–844.

A

TILA itself does not explicitly address whether over-limit fees are included within the definition of "finance charge." Congress defined "finance charge" as "all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." § 1605(a). The Court of Appeals, however, made no attempt to clarify the scope of the critical term "incident to the extension of credit." The Court of Appeals recognized that, "'[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" 295 F. 3d, at 529–530 (quoting *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988)). However, the Court of Appeals failed to examine TILA's other provisions, or even the surrounding language in § 1605, before reaching its conclusion. Because petitioners would not have imposed the over-limit fee had they not "granted [respondent's] request for additional credit, which resulted in her exceeding her credit limit," the Court of Appeals held that the over-limit fee in this case fell squarely within § 1605(a)'s definition of "finance charge." 295 F. 3d, at 528–529. Thus, the Court of Appeals rested

its holding primarily on its particular characterization of the transaction that led to the over-limit charge in this case.[3]

The Court of Appeals' characterization of the transaction in this case, however, is not supported even by the facts as set forth in respondent's complaint. Respondent alleged in her complaint that the over-limit fee is imposed for each month in which her balance exceeds the original credit limit. App. to Pet. for Cert. A39, ¶ 35. If this were true, however, the over-limit fee would be imposed not as a direct result of an extension of credit for a purchase that caused respondent to exceed her $2,000 limit, but rather as a result of the fact that her charges exceeded her $2,000 limit at the time respondent's monthly charges were officially calculated. Because over-limit fees, regardless of a creditor's particular billing practices, are imposed only when a consumer exceeds his credit limit, it is perfectly reasonable to characterize an over-limit fee not as a charge imposed for obtaining an extension of credit over a consumer's credit limit, but rather as a penalty for violating the credit agreement.

The Court of Appeals thus erred in resting its conclusion solely on this particular characterization of the details of credit card transactions, a characterization that is not clearly compelled by the terms and definitions of TILA, and one with which others could reasonably disagree. Certainly, regardless of how the fee is characterized, there is at least some connection between the over-limit fee and an extension of credit. But, this Court has recognized that the phrase

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[3] Respondent does not attempt to defend the Court of Appeals' reasoning in this Court and has abandoned her principal argument on appeal—that Regulation Z conflicts with the plain language of § 1605. Instead, respondent maintains that the Board's exclusion of over-limit fees in Regulation Z is not challenged in this case because Regulation Z does not cover over-limit fees imposed for authorized extensions of credit. Because respondent did not advance this theory in the Court of Appeals, and did not raise it in her brief in opposition accompanied by an appropriate cross-petition, see *Northwest Airlines, Inc.* v. *County of Kent*, 510 U. S. 355, 364 (1994), we decline to consider it here.

"incident to or in conjunction with" implies some *necessary* connection between the antecedent and its object, although it "does not place beyond rational debate the nature or extent of the required connection." *Holly Farms Corp.* v. *NLRB*, 517 U. S. 392, 403, n. 9 (1996) (internal quotation marks omitted). In other words, the phrase "incident to" does not make clear whether a substantial (as opposed to a remote) connection is required. Thus, unlike the Court of Appeals, we cannot conclude that the term "finance charge" unambiguously includes over-limit fees. That term, standing alone, is ambiguous.

Moreover, an examination of TILA's related provisions, as well as the full text of § 1605 itself, casts doubt on the Court of Appeals' interpretation of the statute. A consumer holding an open-end credit plan may incur two types of charges—finance charges and "other charges which may be imposed as part of the plan." §§ 1637(a)(1)–(5). TILA does not make clear which charges fall into each category. But TILA's recognition of at least two categories of charges does make clear that Congress did not contemplate that *all* charges made in connection with an open-end credit plan would be considered "finance charges." And where TILA does explicitly address over-limit fees, it defines them as fees imposed "in connection with an extension of credit," § 1637(c)(1)(B)(iii), rather than "incident to the extension of credit," § 1605(a). Furthermore, none of § 1605's specific examples of charges that fall within the definition of "finance charge" includes over-limit or comparable fees. See, *e. g.*, § 1605(a)(2) ("[s]ervice or carrying charge"); § 1605(a)(3) (loan fee or similar charge); § 1605(a)(6) (mortgage broker fees).[4]

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[4] Additionally, by specifically excepting charges from the term "finance charge" that would otherwise be included under a broad reading of "incident to the extension of credit," see § 1605(a) (charges of a type payable in a comparable cash transaction); *ibid.* (fees imposed by third-party closing agents); § 1605(d)(1) (fees and charges relating to perfecting security interests); § 1605(e) (fees relating to the extension of credit secured by real

As our prior discussion indicates, the best interpretation of the term "finance charge" may exclude over-limit fees. But § 1605(a) is, at best, ambiguous, because neither § 1605(a) nor its surrounding provisions provides a clear answer. While we acknowledge that there may be some fees not explicitly addressed by § 1605(a)'s definition of "finance charge" but which are unambiguously included in or excluded by that definition, over-limit fees are not such fees.

B

Because § 1605 is ambiguous, the Board's regulation implementing § 1605 "is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U. S. 218, 227 (2001).

Regulation Z's exclusion of over-limit fees from the term "finance charge" is in no way manifestly contrary to § 1605. Regulation Z defines the term "finance charge" as "the cost of consumer credit." 12 CFR § 226.4 (2004). It specifically excludes from the definition of "finance charge" the following:

> "(1) Application fees charged to all applicants for credit, whether or not credit is actually extended.
>
> "(2) Charges for actual unanticipated late payment, *for exceeding a credit limit*, or for delinquency, default, or a similar occurrence.
>
> "(3) Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing.
>
> "(4) Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis.

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property), Congress appears to have excluded such an expansive interpretation of the term.

"(5) Seller's points.

"(6) Interest forfeited as a result of an interest reduction required by law on a time deposit used as security for an extension of credit.

"(7) [Certain fees related to real estate.]

"(8) Discounts offered to induce payment for a purchase by cash, check, or other means, as provided in section 167(b) of the Act." § 226.4(c) (emphasis added).

The Board adopted the regulation to emphasize "disclosures that are relevant to credit decisions, as opposed to disclosures related to events occurring after the initial credit choice," because "the primary goals of [TILA] are not particularly enhanced by regulatory provisions relating to changes in terms on outstanding obligations and on the effects of the failure to comply with the terms of the obligation." 45 Fed. Reg. 80649 (1980). The Board's decision to emphasize disclosures that are most relevant to a consumer's initial credit decisions reflects an understanding that "*[m]eaningful* disclosure does not mean *more* disclosure," but instead "describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload].'" *Ford Motor Credit Co.*, 444 U. S., at 568 (quoting S. Rep. No. 96–73, p. 3 (1979)). Although the fees excluded from the term "finance charge" in Regulation Z (*e. g.*, application charges, late payment charges, and over-limit fees) might be relevant to a consumer's credit decision, the Board rationally concluded that these fees—which are not automatically recurring or are imposed only when a consumer defaults on a credit agreement—are less relevant to determining the true cost of credit. Because over-limit fees, which are imposed only when a consumer breaches the terms of his credit agreement, can reasonably be characterized as a penalty for defaulting on the credit agreement, the Board's decision to exclude them from the term "finance charge" is surely reasonable.

In holding that Regulation Z conflicts with § 1605's definition of the term "finance charge," the Court of Appeals ignored our warning that "judges ought to refrain from substituting their own interstitial lawmaking for that of the [Board]." *Ford Motor Credit Co., supra*, at 568. Despite the Board's rational decision to adopt a uniform rule excluding from the term "finance charge" *all* penalties imposed for exceeding the credit limit, the Court of Appeals adopted a case-by-case approach contingent on whether an act of default was "unilateral." Putting aside the lack of textual support for this approach, the Court of Appeals' approach would prove unworkable to creditors and, more importantly, lead to significant confusion for consumers. Under the Court of Appeals' rule, a consumer would be able to decipher if a charge is considered a "finance charge" or an "other charge" each month only by recalling the details of the particular transaction that caused the consumer to exceed his credit limit. In most cases, the consumer would not even know the relevant facts, which are contingent on the nature of the authorization given by the creditor to the merchant. Moreover, the distinction between "unilateral" acts of default and acts of default where a consumer exceeds his credit limit (but has not thereby renegotiated his credit limit and is still subject to the over-limit fee) is based on a fundamental misunderstanding of the workings of the credit card industry. As the Board explained below, a creditor's "authorization" of a particular point-of-sale transaction does not represent a final determination that a particular transaction is within a consumer's credit limit because the authorization system is not suited to identify instantaneously and accurately over-limit transactions. Brief for Board of Governors of Federal Reserve System as *Amicus Curiae* in No. 00–4213 (CA6), pp. 7–9.

Congress has authorized the Board to make "such classifications, differentiations, or other provisions, and [to] provide for such adjustments and exceptions for any class of transac-

tions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." § 1604(a). Here, the Board has accomplished all of these objectives by setting forth a clear, easy to apply (and easy to enforce) rule that highlights the charges the Board determined to be most relevant to a consumer's credit decisions. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

Syllabus

ENGINE MANUFACTURERS ASSOCIATION ET AL. *v.* SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ET AL.

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

No. 02–1343. Argued January 14, 2004—Decided April 28, 2004

Respondent South Coast Air Quality Management District (District)—the California subdivision responsible for air pollution control in the Los Angeles metropolitan area—enacted six Fleet Rules prohibiting the purchase or lease by various public and private fleet operators of vehicles that do not comply with requirements in the Rules. Petitioner Engine Manufacturers Association sued the District and its officials, claiming that the Fleet Rules were pre-empted by § 209 of the federal Clean Air Act (CAA), which prohibits the adoption or attempted enforcement of any state or local "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines," 42 U. S. C. § 7543(a). In upholding the Rules, the District Court found that they were not "standard[s]" under § 209 because they regulate only the purchase of vehicles that are otherwise certified for sale in California, and distinguished decisions of the First and Second Circuits pre-empting similar state laws as involving a restriction on vehicle sales rather than vehicle purchases. The Ninth Circuit affirmed.

Held:

1. The Fleet Rules do not escape pre-emption just because they address the purchase of vehicles, rather than their manufacture or sale. Neither the District Court's interpretation of "standard" to include only regulations that compel manufacturers to meet specified emission limits nor its resulting distinction between purchase and sales restrictions finds support in § 209(a)'s text or the CAA's structure. The ordinary meaning of language employed by Congress is assumed accurately to express its legislative purpose. *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 194. Today, as when § 209(a) became law, "standard" means that which "is established by authority, custom, or general consent, as a model or example; criterion; test." Webster's Second New International Dictionary 2455. The criteria referred to in § 209 relate to the emission characteristics of a vehicle or engine. This interpretation is consistent with the use of "standard" throughout Title II of the CAA. Defining "standard" to encompass only production mandates

Syllabus

confuses standards with methods of enforcing standards. Manufacturers (or purchasers) can be made responsible for ensuring that vehicles comply with emission standards, but the standards themselves are separate from enforcement techniques. While standards target vehicles and engines, standard-enforcement efforts can be directed toward manufacturers or purchasers. This distinction is borne out in the enforcement provisions immediately following CAA §202. And §246, which requires federal purchasing restrictions, shows that Congress contemplated the enforcement of emission standards through purchase requirements. A purchase/sale distinction also makes no sense, since a manufacturer's right to sell federally approved vehicles is meaningless absent a purchaser's right to buy them. Pp. 252–258.

2. While at least certain aspects of the Fleet Rules appear to be preempted, the case is remanded for the lower courts to address, in light of the principles articulated here, questions neither passed on below nor presented in the certiorari petition that may affect the ultimate disposition of petitioners' suit. Pp. 258–259.

309 F. 3d 550, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a dissenting opinion, *post*, p. 259.

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *Jed R. Mandel*, *Timothy A. French*, *Jeffrey T. Green*, *Eric A. Shumsky*, *Kenneth S. Geller*, *Andrew J. Pincus*, and *John J. Sullivan*.

Solicitor General Olson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Sansonetti*, *Deputy Solicitor General Hungar*, *Deputy Assistant Attorney General Clark*, *Jeffrey P. Minear*, *Greer S. Goldman*, *John A. Bryson*, and *R. Justin Smith*.

Seth P. Waxman argued the cause for respondents. With him on the brief for respondent South Coast Air Quality Management District were *C. Boyden Gray*, *Jonathan E. Nuechterlein*, *Luke A. Sobota*, *Daniel P. Selmi*, *Fran M. Layton*, and *Barbara Baird*. *Gail Ruderman Feuer* and

Christopher J. Wright filed a brief for respondents Natural Resources Defense Council, Inc., et al.*

JUSTICE SCALIA delivered the opinion of the Court.

Respondent South Coast Air Quality Management District (District) is a political subdivision of California responsible for air pollution control in the Los Angeles metropolitan area and parts of surrounding counties that make up the South Coast Air Basin. It enacted six Fleet Rules that generally prohibit the purchase or lease by various public and private

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Catherine E. Stetson*, *Christopher T. Handman*, and *Robin S. Conrad;* for the Alliance of Automobile Manufacturers et al. by *Arnold W. Reitze, Jr.*, *Stuart A. C. Drake*, *Eric B. Wolff*, *Julie C. Becker*, *Charles H. Lockwood II*, *Jan S. Amundson*, *Quentin Riegel*, *G. William Frick*, *Ralph Colleli, Jr.*, *Janice K. Raburn*, and *Douglas I. Greenhaus;* and for the American Automotive Leasing Association et al. by *Kipp A. Coddington.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel M. Madeiros*, Solicitor General, *Richard M. Frank*, Chief Assistant Attorney General, *Theodora Berger*, Senior Assistant Attorney General, *Craig C. Thompson*, Supervising Deputy Attorney General, *Susan L. Durbin*, Deputy Attorney General, and *Kristen M. Campfield*, by *Anabelle Rodríguez*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Thurbert E. Baker* of Georgia, *Lisa Madigan* of Illinois, *G. Steven Rowe* of Maine, *Tom Reilly* of Massachusetts, *Brian Sandoval* of Nevada, *Peter D. Smith* of New Hampshire, *Peter C. Harvey* of New Jersey, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Greg Abbott* of Texas, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, and *Peggy A. Lautenschlager* of Wisconsin; for the American Academy of Pediatrics (California District) et al. by *David M. Driesen;* for the National League of Cities et al. by *Richard Ruda* and *Timothy J. Dowling;* for the Natural Gas Vehicle Coalition et al. by *Gary S. Guzy;* and for the Sunline Transit Agency by *Lisa Garvin Copeland.*

A brief of *amici curiae* was filed for the American Road & Transportation Builders Association et al. by *Lawrence J. Joseph*, *Robert Digges, Jr.*, and *Mary Lynn Pickel.*

fleet operators of vehicles that do not comply with stringent emission requirements. The question in this case is whether these local Fleet Rules escape pre-emption under § 209(a) of the Clean Air Act (CAA), 81 Stat. 502, as renumbered and amended, 42 U. S. C. § 7543(a), because they address the purchase of vehicles, rather than their manufacture or sale.

I

The District is responsible under state law for developing and implementing a "comprehensive basinwide air quality management plan" to reduce emission levels and thereby achieve and maintain "state and federal ambient air quality standards." Cal. Health & Safety Code Ann. § 40402(e) (West 1996). Between June and October 2000, the District adopted six Fleet Rules. The Rules govern operators of fleets of street sweepers (Rule 1186.1), of passenger cars, light-duty trucks, and medium-duty vehicles (Rule 1191), of public transit vehicles and urban buses (Rule 1192), of solid waste collection vehicles (Rule 1193), of airport passenger transportation vehicles, including shuttles and taxicabs picking up airline passengers (Rule 1194), and of heavy-duty on-road vehicles (Rule 1196). All six Rules apply to public operators; three apply to private operators as well (Rules 1186.1, 1193, and 1194).

The Fleet Rules contain detailed prescriptions regarding the types of vehicles that fleet operators must purchase or lease when adding or replacing fleet vehicles. Four of the Rules (1186.1, 1192, 1193, and 1196) require the purchase or lease of "alternative-fuel vehicles,"[1] and the other two

[1] These Rules define "alternative-fuel vehicles" in varying ways, but all exclude vehicles that run on diesel. See Rule 1186.1(c)(2), App. 17 (a vehicle with an engine that "use[s] compressed or liquefied natural gas, liquefied petroleum gas (propane), methanol, electricity, or fuel cells. Hybrid-electric and dual-fuel technologies that use diesel fuel are not considered alternative-fuel technologies for the purposes of this rule"); Rule 1192(c)(1), *id.*, at 47 (same definition as Rule 1186.1 for the most part, but

(1191 and 1194) require the purchase or lease of either "alternative-fueled vehicles"[2] or vehicles that meet certain emission specifications established by the California Air Resources Board (CARB).[3] CARB is a statewide regulatory body that California law designates as "the air pollution control agency for all purposes set forth in federal law." Cal.

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also adds that the vehicle must "mee[t] the emission requirements of Title 13, Section 1956.1 of the California Code of Regulations"); Rule 1193(c)(1), *id.*, at 52 (a vehicle that "uses compressed or liquefied natural gas, liquefied petroleum gas, methanol, electricity, fuel cells, or other advanced technologies that do not rely on diesel fuel"); Rule 1196(c)(1), *id.*, at 66–67 (same definition as Rule 1193 for the most part, but also adds that the vehicle must be "certified by the California Air Resources Board").

[2] Rule 1191(c)(1), *id.*, at 24–25, defines "alternative-fueled vehicle" as a vehicle that "is not powered by gasoline or diesel fuel and emits hydrocarbon, carbon monoxide, or nitrogen oxides, on an individual basis at least equivalent to or lower than a ULEV [acronym described in n. 3, *infra*]." Rule 1194(c)(2), App. 59, defines "alternative-fueled vehicle" as a vehicle that "is not powered by gasoline or diesel fuel."

[3] More specifically, Rules 1191(d), (e)(1), *id.*, at 27–28, require that these vehicles comply with CARB's Low-Emission Vehicle (LEV), Ultra-Low-Emission Vehicle (ULEV), Super-Ultra-Low-Emission Vehicle (SULEV), or Zero-Emission Vehicle (ZEV) standards. Rule 1194(d), *id.*, at 61–63, requires that the vehicles comply with the ULEV, SULEV, or ZEV standards. LEV, ULEV, SULEV, and ZEV are acronyms adopted by CARB as part of a federally approved emission reduction program. This program establishes five tiers of vehicles based on their emission characteristics: Transitional Low-Emission Vehicles (TLEVs); LEVs; ULEVs; SULEVs; and ZEVs. The tiers are subject to varying emission limitations for carbon monoxide, formaldehyde, nonmethane organic gases, oxides of nitrogen, and particulate matter. See Cal. Code Regs., tit. 13, §§ 1960.1(e)(3), (g), (h)(2), (p), § 1961(a) (2004). No vehicle may be sold in California unless it meets the TLEV, LEV, ULEV, SULEV, or ZEV requirements. See Cal. Health & Safety Code Ann. §§ 43009, 43016–43017, 43102, 43105, 43150–43156 (West 1996). Additionally, manufacturers are obligated to meet overall "fleet average" emission requirements. The fleet average emission requirements decrease over time, requiring manufacturers to sell progressively cleaner mixes of vehicles. See Cal. Code Regs., tit. 13, §§ 1960.1(g)(2), 1961(b) (2004). Manufacturers retain flexibility to decide how many vehicles in each emission tier to sell in order to meet the fleet average. See 158 F. Supp. 2d 1107, 1113–1114 (CD Cal. 2001).

Health & Safety Code Ann. § 39602 (West 1996). The Rules require operators to keep records of their purchases and leases and provide access to them upon request. See, *e. g.*, Rule 1186.1(g)(1), App. 23. Violations expose fleet operators to fines and other sanctions. See Cal. Health & Safety Code Ann. §§ 42400–42410, 40447.5 (West 1996 and Supp. 2004).

In August 2000, petitioner Engine Manufacturers Association sued the District and its officials, also respondents, claiming that the Fleet Rules are pre-empted by § 209 of the CAA, which prohibits the adoption or attempted enforcement of any state or local "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U. S. C. § 7543(a).[4] The District Court granted summary judgment to respondents, upholding the Rules in their entirety. It held that the Rules were not "standard[s]" under § 209(a) because they regulate only the purchase of vehicles that are otherwise certified for sale in California. The District Court recognized that the Courts of Appeals for the First and Second Circuits had previously held that CAA § 209(a) pre-empted state laws mandating that a specified percentage of a manufacturer's in-state sales be of "zero-emission vehicles." See *Association of Int'l Automobile Mfrs., Inc.* v. *Commissioner, Mass. Dept. of Environmental Protection*, 208 F. 3d 1, 6–7 (CA1 2000); *American Automobile Mfrs. Assn.* v. *Cahill*, 152 F. 3d 196, 200 (CA2 1998).[5] It did not express disagreement with these rulings, but distinguished them as involving a restriction on vehicle sales rather than vehicle purchases: "Where a state

[4] Petitioner Western States Petroleum Association intervened as a plaintiff. Respondents Coalition for Clean Air, Inc., Natural Resources Defense Council, Inc., Communities for a Better Environment, Inc., Planning and Conservation League, and Sierra Club intervened as defendants.

[5] The ZEV requirements at issue in these cases were virtually identical to those previously promulgated by CARB. See *Association of Int'l Automobile Mfrs., Inc.* v. *Commissioner, Mass. Dept. of Environmental Protection*, 208 F. 3d, at 1, 3; *American Automobile Mfrs. Assn.* v. *Cahill*, 152 F. 3d, at 199.

regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard." 158 F. Supp. 2d 1107, 1118 (CD Cal. 2001).

The Ninth Circuit affirmed on the reasoning of the District Court. 309 F. 3d 550 (2002). We granted certiorari. 539 U. S. 914 (2003).

II

Section 209(a) of the CAA states:

> "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." 42 U. S. C. § 7543(a).

The District Court's determination that this express preemption provision did not invalidate the Fleet Rules hinged on its interpretation of the word "standard" to include only regulations that compel manufacturers to meet specified emission limits. This interpretation of "standard" in turn caused the court to draw a distinction between purchase restrictions (not pre-empted) and sale restrictions (pre-empted). Neither the manufacturer-specific interpretation of "standard" nor the resulting distinction between purchase and sale restrictions finds support in the text of § 209(a) or the structure of the CAA.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 194 (1985). Today, as in 1967 when § 209(a) became law, "standard" is defined as that which "is estab-

lished by authority, custom, or general consent, as a model or example; criterion; test." Webster's Second New International Dictionary 2455 (1945). The criteria referred to in § 209(a) relate to the emission characteristics of a vehicle or engine. To meet them the vehicle or engine must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions. This interpretation is consistent with the use of "standard" throughout Title II of the CAA (which governs emissions from moving sources) to denote requirements such as numerical emission levels with which vehicles or engines must comply, *e. g.*, 42 U. S. C. § 7521(a)(3)(B)(ii), or emission-control technology with which they must be equipped, *e. g.*, § 7521(a)(6).

Respondents, like the courts below, engraft onto this meaning of "standard" a limiting component, defining it as only "[a] *production* mandat[e] that require[s] *manufacturers* to ensure that the vehicles they produce have particular emissions characteristics, whether individually or in the aggregate." Brief for Respondent South Coast Air Quality Management District 13 (emphases added). This confuses standards with the means of enforcing standards. Manufacturers (or purchasers) can be made responsible for ensuring that vehicles *comply* with emission standards, but the standards themselves are separate from those enforcement techniques. While standards target vehicles or engines, standard-enforcement efforts that are proscribed by § 209 can be directed to manufacturers or purchasers.

The distinction between "standards," on the one hand, and methods of standard enforcement, on the other, is borne out in the provisions immediately following § 202. These separate provisions enforce the emission criteria—*i. e.*, the § 202 standards. Section 203 prohibits manufacturers from selling any new motor vehicle that is not covered by a "certificate of conformity." 42 U. S. C. § 7522(a). Section 206

enables manufacturers to obtain such a certificate by demonstrating to the Environmental Protection Agency that their vehicles or engines conform to the § 202 standards. § 7525. Sections 204 and 205 subject manufacturers, dealers, and others who violate the CAA to fines imposed in civil or administrative enforcement actions. §§ 7523–7524. By defining "standard" as a "production mandate directed toward manufacturers," respondents lump together § 202 and these other distinct statutory provisions, acknowledging a standard to be such only when it is combined with a mandate that prevents manufacturers from selling noncomplying vehicles.

That a standard is a standard even when not enforced through manufacturer-directed regulation can be seen in Congress's use of the term in another portion of the CAA. As the District Court recognized, CAA § 246 (in conjunction with its accompanying provisions) requires state-adopted and federally approved "restrictions on the purchase of fleet vehicles *to meet clean-air standards.*" 158 F. Supp. 2d, at 1118 (emphasis added); see also 42 U. S. C. §§ 7581–7590. (Respondents do not defend the District's Fleet Rules as authorized by this provision; the Rules do not comply with all of the requirements that it contains.) Clearly, Congress contemplated the enforcement of emission standards through purchase requirements.[6]

Respondents contend that their qualified meaning of "standard" is necessary to prevent § 209(a) from pre-empting "far too much" by "encompass[ing] a broad range of state-level clean-air initiatives" such as voluntary incentive pro-

[6] The District Court reasoned that "[i]t is not rational to conclude that the CAA would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a 'standard,' on the other." 158 F. Supp. 2d, at 1118. This reasoning is flawed; it is not irrational to view Congress's prescription of numerous detailed requirements for such programs as inconsistent with unconstrained state authority to enact programs that ignore those requirements.

grams. Brief for Respondent South Coast Air Quality Management District 29; *id.*, at 29–30. But it is hard to see why limitation to mandates on manufacturers is necessary for this purpose; limitation to mandates on manufacturers and purchasers, or to mandates on *anyone*, would have the same salvific effect. We need not resolve application of § 209(a) to voluntary incentive programs in this case, since all the Fleet Rules are mandates.

In addition to having no basis in the text of the statute, treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense. The manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them. It is true that the Fleet Rules at issue here cover only certain purchasers and certain federally certified vehicles, and thus do not eliminate all demand for covered vehicles. But if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme.

A command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular emission characteristics is as much an "attempt to enforce" a "standard" as a command, accompanied by sanctions, that a certain percentage of a manufacturer's sales volume must consist of such vehicles. We decline to read into § 209(a) a purchase/sale distinction that is not to be found in the text of § 209(a) or the structure of the CAA.

III

The dissent expresses many areas of disagreement with our interpretation, but this should not obscure its agreement with our answer to the question "whether these local Fleet Rules escape pre-emption . . . because they address the purchase of vehicles, rather than their manufacture or sale." *Supra,* at 249. The dissent joins us in answering "no." See *post,* at 262–263 (opinion of SOUTER, J.). It reaches a differ-

ent outcome in the case because (1) it feels free to read into the unconditional words of the statute a requirement for the courts to determine which purchase restrictions *in fact* coerce manufacture and which do not; and (2) because it believes that Fleet Rules containing a "commercial availability" proviso do not coerce manufacture.

As to the first point: The language of § 209(a) is categorical. It is (as we have discussed) impossible to find in it an exception for standards imposed through purchase restrictions rather than directly upon manufacturers; it is even more inventive to discover an exception for only that *sub*category of standards-imposed-through-purchase-restrictions that does not coerce manufacture. But even if one accepts that invention, one cannot conclude that these "provisos" save the day. For if a vehicle of the mandated type *were* commercially available, thus eliminating application of the proviso, the need to sell vehicles to persons governed by the Rule would effectively coerce manufacturers into meeting the artificially created demand. To say, as the dissent does, that this would be merely the consequence of "market demand and free competition," *post,* at 263, is fanciful. The demand is a demand, not generated by the market but compelled by the Rules, which in turn effectively compels production. To think that the Rules are invalid until such time as one manufacturer makes a compliant vehicle available, whereupon they become binding, seems to us quite bizarre.

The dissent objects to our interpretive method, which neither invokes the "presumption against preemption" to determine the *scope* of pre-emption nor delves into legislative history. *Post,* at 260–261. Application of those methods, on which not all Members of this Court agree, demonstrably makes no difference to resolution of the principal question, which the dissent (after applying them) answers the same as we. As for the additional question that the dissent reaches, we think the same is true: The textual obstacles to the strained interpretation that would validate the Rules by rea-

son of the "commercial availability" provisos are insurmountable—principally, the categorical words of § 209(a). The dissent contends that giving these words their natural meaning of barring implementation of standards at the purchase and sale stage renders superfluous the second sentence of § 209(a), which provides: "No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." 42 U. S. C. § 7543(a). We think it not superfluous, since it makes clear that the term "attempt to enforce" in the first sentence is not limited to the actual imposition of penalties for violation, but includes steps preliminary to that action. *Ibid.* The sentence is, however, fatal to the *dissent's* interpretation of the statute. It *categorically* prohibits "certification, inspection, or any other approval" as conditions precedent to sale. Why in the world would it do that if it had no *categorical* objection to standards imposed at the sale stage? Why disable the States from assuring compliance with requirements that they are authorized to impose?

The dissent next charges that our interpretation attributes carelessness to Congress because § 246 *mandates* fleet purchasing restrictions, but does so without specifying "notwithstanding" § 209(a). *Post,* at 264. That addition might have been nice, but hardly seems necessary. It is obvious, after all, that the principal sales restrictions against which § 209(a) is directed are those requiring compliance with *state*-imposed standards. What § 246 mandates are fleet purchase restrictions under *federal* standards designed precisely for *federally required* clean-fuel fleet vehicle programs—which programs, in turn, must be *federally approved* as meeting detailed *federal specifications.* It is not surprising that a "notwithstanding" § 209(a) did not come to mind. Far from casting doubt upon our interpretation, § 246

is impossible to reconcile with the *dissent's* interpretation. The fleet purchase standards it mandates must comply strictly with federal specifications, being neither more lenient nor more demanding. But what is the use of imposing such a limitation if the States are entirely free to impose their *own* fleet purchase standards with entirely different specifications?

Finally, the dissent says that we should "admit" that our opinion pre-empts voluntary incentive programs. *Post*, at 265–266. Voluntary programs are not at issue in this case, and are significantly different from command-and-control regulation. Suffice it to say that nothing in the present opinion necessarily *entails* pre-emption of voluntary programs. It is at least arguable that the phrase "adopt or attempt to enforce any standard" refers only to standards that *are* enforceable—a possibility reinforced by the fact that the prohibition is imposed only on entities (States and political subdivisions) that have power to enforce.

IV

The courts below held all six of the Fleet Rules to be entirely outside the pre-emptive reach of § 209(a) based on reasoning that does not withstand scrutiny. In light of the principles articulated above, it appears likely that at least certain aspects of the Fleet Rules are pre-empted. For example, the District may have attempted to enforce CARB's ULEV, SULEV, and ZEV standards when, in Rule 1194, it required 50% of new passenger-car and medium-duty-vehicle purchases by private airport-shuttle van operators to "meet ULEV, SULEV, or ZEV emission standards" after July 1, 2001, and 100% to meet those standards after July 1, 2002.[7] See Rules 1194(d)(2)(A)–(B), App. 62.

It does not necessarily follow, however, that the Fleet Rules are pre-empted *in toto*. We have not addressed a

[7] For a description of the ULEV, SULEV, and ZEV standards, see n. 3, *supra*.

number of issues that may affect the ultimate disposition of petitioners' suit, including the scope of petitioners' challenge, whether some of the Fleet Rules (or some applications of them) can be characterized as internal state purchase decisions (and, if so, whether a different standard for pre-emption applies), and whether § 209(a) pre-empts the Fleet Rules even as applied beyond the purchase of new vehicles (*e. g.*, to lease arrangements or to the purchase of used vehicles). These questions were neither passed on below nor presented in the petition for certiorari. They are best addressed in the first instance by the lower courts in light of the principles articulated above.

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

It is so ordered.

JUSTICE SOUTER, dissenting.

The Court holds that preemption by the Clean Air Act, 77 Stat. 392, as amended, 42 U. S. C. § 7401 *et seq.*, prohibits one of the most polluted regions in the United States[1] from requiring private fleet operators to buy clean engines that are readily available on the commercial market. I respectfully dissent and would hold that the South Coast Air Quality Management District Fleet Rules are not preempted by the Act.

I

So far as it concerns this case, § 209(a) of the Act provides that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to [Title II of the Act]." 42 U. S. C.

[1] In its *amicus* brief, the United States notes that the Los Angeles South Coast Air Basin is the only region in the country that has been designated an ozone "'extreme' nonattainment" area as defined by the Act. Brief for United States as *Amicus Curiae* 7 (citing 40 CFR § 81.305 (2003)).

§ 7543(a). The better reading of this provision rests on two interpretive principles the majority opinion does not address.

First, "[i]n all pre-emption cases, and particularly in those [where] Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470, 485 (1996) (citation and internal quotation marks omitted); see also *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 605 (1991) (applying presumption against preemption to a local regulation). The pertinence of this presumption against federal preemption is clear enough from the terms of the Act itself: § 101 states that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U. S. C. § 7401(a)(3);[2] see *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power"). The resulting presumption against displacing law enacted or authorized by a State applies both to the "question whether

[2] The original version of this provision specified that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." § 1(a)(3), 77 Stat. 393. It is irrelevant that the 1967 amendments to the Act (which separated the existing Act into separate titles) moved this finding to Title I rather than Title II (which regulates motor vehicle emissions). There is no doubt that § 101 recognizes state primacy over efforts to control pollution from all sources. Indeed, § 101 specifically notes that the "air pollution" to which it refers is "brought about by," among other causes, "motor vehicles." 42 U. S. C. § 7401(a)(2).

Congress intended any pre-emption at all" and to "questions concerning the *scope* of [§ 209(a)'s] intended invalidation of state law." *Medtronic*, *supra*, at 485 (emphasis in original).

Second, legislative history should inform interpretive choice, and the legislative history of this preemption provision shows that Congress's purpose in passing it was to stop States from imposing regulatory requirements that directly limited what manufacturers could sell. During the hearings leading up to the 1967 amendments, "[t]he auto industry . . . was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry." S. Rep. No. 403, 90th Cong., 1st Sess., 33 (1967). Auto manufacturers sought to safeguard "[t]he ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls," and to prevent "a chaotic situation from developing in interstate commerce in new motor vehicles." H. R. Rep. No. 728, 90th Cong., 1st Sess., 21 (1967). Cf. Air Pollution Control, Hearings on S. 306 before a Special Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 89th Cong., 1st Sess., 91 (1965) (Sen. Muskie) ("Do you think a given manufacturer could produce automobiles meeting 50 standards?"). Congress was not responding to concerns about varying regional appetites for whatever vehicle models the manufacturers did produce; it was addressing the industry's fear that States would bar manufacturers from selling engines that failed to meet specifications that might be different in each State.[3]

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[3] In fact, Congress allowed California to adopt its own specification standards, 42 U. S. C. § 7543(b) (§ 209(b) of the Act); see also S. Rep. No. 403, 90th Cong., 1st Sess., 33 (1967), but only California was so indulged. Cf. 42 U. S. C. § 7507 (§ 177 of the Act) (reiterating that States may not require the creation of "a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a 'third vehicle')").

Section 209(a) can easily be read to give full effect to both principles. As amended in 1967, § 202 of the Act authorized federal regulators to promulgate emissions standards for "any class or classes of new motor vehicles or new motor vehicle engines." § 202(a), 81 Stat. 499. The 1967 amendments in turn defined "new motor vehicle" as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser," and a "new motor vehicle engine" as "an engine in a new motor vehicle or a motor vehicle engine the equitable or legal title to which has never been transferred to the ultimate purchaser." § 212(3), 81 Stat. 503. Section 202 of the 1967 Act, in other words, is naturally understood as concerning itself with vehicles prior to sale and eligible to be sold. Section 203 further underscored this focus on what manufacturers could produce for sale: as incorporated in the 1967 amendments, § 203 prohibited a variety of acts by manufacturers, but left vehicle purchasers and users entirely unregulated. 81 Stat. 499.

On this permissible reading of the 1967 amendments, § 209(a) has no preemptive application to South Coast's fleet purchase requirement. The National Government took over the direct regulation of manufacturers' design specifications addressing tailpipe emissions, and disabled States (the California exception aside, see n. 3, *supra*) from engaging in the same project. The "standards" that § 209(a) preempts, accordingly, are production mandates imposed directly on manufacturers as a condition of sale. Section 209(a) simply does not speak to regulations that govern a vehicle buyer's choice between various commercially available options.

This is not to say that every conceivable purchase restriction would be categorically free from preemption. A state law prohibiting any purchase by any buyer of any vehicle that failed to meet novel, state-specified emissions criteria would have the same effect as direct regulation of car manufacturers, and would be preempted by § 209(a) as an "attempt to enforce [a] standard relating to the control of emissions

from new motor vehicles." 42 U. S. C. § 7543(a). But that fantasy is of no concern here, owing to a third central point that the majority passes over: South Coast's Fleet Rules require the purchase of cleaner engines only if cleaner engines are commercially available. *E. g.*, App. 69 (Fleet Rule 1196(e)(1)(C) (exempting fleets from Rule if no complying engine "is commercially available from any manufacturer . . . or could be used in a specific application")); see also App. 21, 30, 50, 55, 63 (Fleet Rules 1186.1(e), 1191(f)(8), 1192(e)(2), 1193(e)(3), and 1194(e)(2)). If no one is selling cleaner engines, fleet owners are free to buy any vehicles they desire. The manufacturers would, of course, understand that a market existed for cleaner engines, and if one auto maker began producing them, others might well be induced to do the same; but that would not matter under the Act, which was not adopted to exempt producers from market demand and free competition. So long as a purchase requirement is subject to a commercial availability proviso, there is no basis to condemn that kind of market-based limitation along with the state command-and-control regulation of production specifications that prompted the passage of § 209.

In sum, I am reading "standard" in a practical way that keeps the Act's preemption of standards in tune with Congress's object in providing for preemption, which was to prevent the States from forcing manufacturers to produce engines with particular characteristics as a legal condition of sale. The majority's approach eliminates this consideration of legislative purposes, as well as the presumption against preemption, by acting as though anything that could possibly be described as a standard must necessarily be a "standard" for the purposes of the Act: a standard is a standard is a standard.[4] The majority reveals its misalliance with Ger-

[4] This same hypersimplification allows the majority to mischaracterize my narrower definition of "standard" as the illegitimate creation of a nontextual exception to § 209(a)'s categorical preemption of standards. *Ante*, at 256.

trude Stein throughout its response to this dissent. See *ante*, at 256–257, 258.

II

Reading the statute this way not only does a better job of honoring preemption principles consistently with congressional intent, but avoids some difficulties on the majority's contrary interpretation. To begin with, the Court's broad definition of an "'attempt to enforce any standard relating to the control of emissions,'" *ante*, at 252, renders superfluous the second sentence of § 209(a), which provides that "[n]o State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle," 42 U. S. C. § 7543(a). At the very least, on the majority's view, it is hard to imagine any state inspection requirement going to the control of emissions from a new motor vehicle that would not be struck down anyway as an attempt to enforce an emissions standard.

Next, on the majority's broad interpretation of "standard," Congress would seem to have been careless in drafting a critical section of the Act. In the one clear instance of which we are aware in which the Act authorizes States to enact laws that would otherwise be preempted by § 209, Congress expressly provided that the authorization is effective notwithstanding that preemption section. See 42 U. S. C. § 7507 (authorizing States to adopt California production mandates "[n]otwithstanding section 7543(a) of this title"). The natural negative implication is that, if a statutory authorization does not include such a "notwithstanding" clause or something similar, its subject matter would not otherwise be preempted by § 209(a). Given that, the majority's interpretation of the scope of § 209(a) is difficult to square with § 246, which requires States to establish fleet purchasing requirements for "covered fleet operator[s]" in ozone and carbon monoxide "nonattainment areas" (that is, regions strug-

gling with especially intractable pollution), 42 U. S. C. § 7586. Section 246 thus requires States, in some cases, to establish precisely the kind of purchaser regulations (adopted here by a lower level governmental authority) that the majority claims have been preempted by § 209(a). But § 246 gives no indication that its subject matter would otherwise be preempted; there is certainly no "notwithstanding" clause. This silence suggests that Congress never thought § 209(a) would have any preemptive effect on fleet purchasing requirements like the ones at issue.

Finally, the Court suggests that both voluntary incentive programs, *ante*, at 254–255, and internal state purchasing decisions, *ante*, at 258–259, may well be permissible on its reading of § 209(a). These suggestions are important in avoiding apparent implausibility in the majority's position; if a State were said to be barred even from deciding to run a cleaner fleet than the National Government required, it would take an airtight argument to convince anyone that Congress could have meant such a thing. But it is difficult, when actually applying the majority's expansive sense of forbidden "standard," to explain how the specification of emissions characteristics in a State's internal procurement guidelines could escape being considered an impermissible "adopt[ion of a] standard," 42 U. S. C. § 7543(a), even if the standard only guided local purchasing decisions. By the same token, it is not obvious how, without some legal sleight of hand, the majority can avoid preempting voluntary incentive programs aimed at the private sector; the benefit proffered by such schemes hinges on the recipient's willingness to buy a vehicle or engine that complies with an emissions standard (*i. e.*, a vehicle or engine that, in the words of the majority, "must not emit more than a certain amount of a given pollutant, must be equipped with a certain type of pollution-control device, or must have some other design feature related to the control of emissions," *ante*, at 253). Such a program clearly "adopt[s]" an emissions standard as

the majority defines it. Cf. *ibid.* (cautioning respondents not to "confus[e] standards with the means of enforcing standards"). The Court should, then, admit to preemption of state programs that even petitioners concede are not barred by § 209(a). See Reply Brief for Petitioners 7 (acknowledging that § 209(a) does not preempt voluntary incentive programs). That is not a strong recommendation for the majority's reading.

III

These objections to the Court's interpretation are not, to be sure, dispositive, standing alone. They call attention to untidy details, and rightly understood legislation can be untidy: statutes can be unsystematic, redundant, and fuzzy about drawing lines. As a purely textual matter, both the majority's reading and mine have strengths and weaknesses. The point is that the tie breakers cut in favor of sustaining the South Coast Fleet Rules. My reading adheres more closely to the legislative history of § 209(a). It takes proper account of the fact that the Fleet Rules with this commercial availability condition do not require manufacturers, even indirectly, to produce a new kind of engine. And, most importantly, my reading adheres to the well-established presumption against preemption.

Syllabus

VIETH ET AL. *v.* JUBELIRER, PRESIDENT OF THE PENNSYLVANIA SENATE, ET AL.

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

No. 02–1580. Argued December 10, 2003—Decided April 28, 2004

After Pennsylvania's General Assembly adopted a congressional redistricting plan, plaintiffs-appellants sued to enjoin the plan's implementation, alleging, *inter alia,* that it constituted a political gerrymander in violation of Article I and the Fourteenth Amendment's Equal Protection Clause. The three-judge District Court dismissed the gerrymandering claim, and the plaintiffs appealed.

Held: The judgment is affirmed.

241 F. Supp. 2d 478, affirmed.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE THOMAS, concluded that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist. They would therefore overrule *Davis* v. *Bandemer*, 478 U. S. 109, in which this Court held that political gerrymandering claims are justiciable, but could not agree upon a standard for assessing political gerrymandering claims. Pp. 274–306.

(a) Political gerrymanders existed in colonial times and continued through the framing. The Framers provided a remedy for the problem: The Constitution gives state legislatures the initial power to draw federal election districts, but authorizes Congress to "make or alter" those districts. U. S. Const., Art. I, § 4. In *Bandemer*, the Court held that the Equal Protection Clause also grants judges the power—and duty—to control that practice. Pp. 274–277.

(b) Neither Art. I, § 2 or § 4, nor the Equal Protection Clause, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting. Pp. 277–291.

(1) Among the tests for determining the existence of a "nonjusticiable" or "political" question is a lack of judicially discoverable and manageable standards for resolving the question. *Baker* v. *Carr*, 369 U. S. 186, 217. Because the *Bandemer* Court was "not persuaded" that there are no such standards for deciding political gerrymandering cases, 478 U. S., at 123, such cases *were* justiciable. However, the six-Justice majority in *Bandemer* could not discern what the standards might be. For the past 18 years, the lower courts have simply applied the *Bandemer*

plurality's standard, almost invariably producing the same result as would have obtained had the question been nonjusticiable: Judicial intervention has been refused. Eighteen years of judicial effort with virtually nothing to show for it justifies revisiting whether the standard promised by *Bandemer* exists. Pp. 277–281.

(2) The *Bandemer* plurality's standard—that a political gerrymandering claim can succeed only where the plaintiffs show "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group," 478 U. S., at 127—has proved unmanageable in application. Because that standard was misguided when proposed, has not been improved in subsequent application, and is not even defended by the appellants in this Court, it should not be affirmed as a constitutional requirement. Pp. 281–284.

(3) Appellants' proposed two-pronged standard based on Art. I, § 2, and the Equal Protection Clause is neither discernible nor manageable. Appellants are mistaken when they contend that their intent prong ("predominant intent") is no different from that which this Court has applied in racial gerrymandering cases. In those cases, the predominant intent test is applied to the challenged district in which the plaintiffs voted, see, *e. g.*, *Miller* v. *Johnson*, 515 U. S. 900, whereas here appellants assert that their test is satisfied only when partisan advantage was the predominant motivation *behind the entire statewide plan.* Vague as a predominant motivation test might be when used to evaluate single districts, it all but evaporates when applied statewide. For this and other reasons, the racial gerrymandering cases provide no comfort. The effects prong of appellants' proposal requires (1) that the plaintiffs show that the rival party's voters are systematically "packed" or "cracked"; and (2) that the court be persuaded from the totality of the circumstances that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats. This standard is not discernible because the Constitution provides no right to proportional representation. Even were the standard discernible, it is not judicially manageable. There is no effective way to ascertain a party's majority status, and, in any event, majority status in statewide races does not establish majority status for particular district contests. Moreover, even if a majority party could be identified, it would be impossible to ensure that it won a majority of seats unless the States' traditional election structures were radically revised. Pp. 284–290.

(4) For many of the same reasons, Justice Powell's *Bandemer* standard—a totality-of-the-circumstances analysis that evaluates districts with an eye to ascertaining whether the particular gerrymander is not "fair"—must also be rejected. "Fairness" is not a judicially manageable standard. Some criterion more solid and more demonstrably

met than that is necessary to enable state legislatures to discern the limits of their districting discretion, to meaningfully constrain the courts' discretion, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decision-making. Pp. 290–291.

(c) Writing separately in dissent, JUSTICES STEVENS, SOUTER, and BREYER each propose a different standard for adjudicating political gerrymandering claims. These proposed standards each have their own deficiencies, but additionally fail for reasons identified with respect to the standards proposed by appellants and those proposed in *Bandemer*. JUSTICE KENNEDY concurs in the judgment, recognizing that there are no existing manageable standards for measuring whether a political gerrymander burdens the representational rights of a party's voters. Pp. 292–305.

(d) *Stare decisis* does not require that *Bandemer* be allowed to stand. *Stare decisis* claims are at their weakest with respect to a decision interpreting the Constitution, particularly where there has been no reliance on that decision. Pp. 305–306.

JUSTICE KENNEDY, while agreeing that appellants' complaint must be dismissed, concluded that all possibility of judicial relief should not be foreclosed in cases such as this because a limited and precise rationale may yet be found to correct an established constitutional violation. Courts confront two obstacles when presented with a claim of injury from partisan gerrymandering. First is the lack of comprehensive and neutral principles for drawing electoral boundaries. No substantive definition of fairness in districting commands general assent. Second is the absence of rules to limit and confine judicial intervention. That courts can grant relief in districting cases involving race does not answer the need for fairness principles, since those cases involve sorting permissible districting classifications from impermissible ones. Politics is a different matter. *Gaffney* v. *Cummings*, 412 U. S. 735. A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective. The object of districting is to establish "fair and effective representation for all citizens." *Reynolds* v. *Sims*, 377 U. S. 533. It might seem that courts could determine, by the exercise of their judgment, whether political classifications are related to this object or instead burden representational rights. The lack, however, of any agreed upon model of fair and effective representation makes the analysis difficult. With no agreed upon substantive principles of fair districting, there is no basis on which to define clear, manage-

Syllabus

able, and politically neutral standards for measuring the burden a given partisan classification imposes on representational rights. Suitable standards for measuring this burden are critical to our intervention. In this case, the plurality convincingly demonstrates that the standards proposed in *Davis* v. *Bandemer*, 478 U. S. 109, by the parties here, and by the dissents are either unmanageable or inconsistent with precedent, or both. There are, then, weighty arguments for holding cases like these to be nonjusticiable. However, they are not so compelling that they require the Court now to bar all future partisan gerrymandering claims. *Baker* v. *Carr*, 369 U. S. 186, makes clear that the more abstract standards that guide analysis of all Fourteenth Amendment claims suffice to ensure justiciability of claims like these. That a workable standard for measuring a gerrymander's burden on representational rights has not yet emerged does not mean that none will emerge in the future. The Court should adjudicate only what is in the case before it. In this case, absent a standard by which to measure the burden appellants claim has been imposed on their representational rights, appellants' evidence at best demonstrates only that the legislature adopted political classifications. That describes no constitutional flaw under the governing Fourteenth Amendment standard. *Gaffney*, *supra*, at 752. While the equal protection standard continues to govern such cases, the First Amendment may prove to offer a sounder and more prudential basis for judicial intervention in political gerrymandering cases. First Amendment analysis does not dwell on whether a generally permissible classification has been used for an impermissible purpose, but concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association. That analysis allows a pragmatic or functional assessment that accords some latitude to the States. See, *e. g.*, *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214. Pp. 306–317.

SCALIA, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and O'CONNOR and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 306. STEVENS, J., filed a dissenting opinion, *post*, p. 317. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 343. BREYER, J., filed a dissenting opinion, *post*, p. 355.

Paul M. Smith argued the cause for appellants. With him on the briefs were *Thomas J. Perrelli*, *Bruce V. Spiva*, *Sam Hirsch*, *Daniel Mach*, and *Robert B. Hoffman*.

John P. Krill, Jr., argued the cause for appellee Jubelirer et al. With him on the brief were *Linda J. Shorey* and *Julia M. Glencer*. *J. Bart DeLone*, Senior Deputy Attorney General of Pennsylvania, argued the cause for appellee Cortés et al. With him on the brief were *D. Michael Fisher*, Attorney General, and *John G. Knorr III*, Chief Deputy Attorney General.*

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

Plaintiffs-appellants Richard Vieth, Norma Jean Vieth, and Susan Furey challenge a map drawn by the Pennsylvania General Assembly establishing districts for the election of congressional Representatives, on the ground that the districting constitutes an unconstitutional political gerrymander.[1] In *Davis* v. *Bandemer*, 478 U. S. 109 (1986), this Court held that political gerrymandering claims are justiciable, but

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*Briefs of *amici curiae* urging reversal were filed for the Texas House Democratic Caucus et al. by *J. Gerald Hebert* and *Pamela S. Karlan;* for the American Civil Liberties Union et al. by *Burt Neuborne*, *Deborah Goldberg*, *J. J. Gass*, *Steven R. Shapiro*, *Arthur N. Eisenberg*, *Laughlin McDonald*, and *Neil Bradley;* for Public Citizen et al. by *Alan B. Morrison*, *Amanda Frost*, and *Scott Nelson;* for the Reform Institute et al. by *Daniel R. Ortiz* and *Trevor Potter;* for JoAnn Erfer et al. by *Einer Elhauge;* and for Pennsylvania State Senator Robert J. Mellow by *Gladys M. Brown*.

Briefs of *amici curiae* were filed for Alabama State Senator Lowell Barron et al. by *James U. Blacksher* and *Robert D. Segall;* for the Center for Research into Governmental Processes, Inc., by *Jamin B. Raskin;* for the DKT Liberty Project by *Scott A. Sinder;* for Bernard Grofman et al. by *H. Reed Witherby;* and for Jack N. Rakove et al. by *Joseph R. Guerra* and *Stephen B. Kinnaird*.

[1] The term "political gerrymander" has been defined as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Black's Law Dictionary 696 (7th ed. 1999).

could not agree upon a standard to adjudicate them. The present appeal presents the questions whether our decision in *Bandemer* was in error, and, if not, what the standard should be.

I

The facts, as alleged by the plaintiffs, are as follows. The population figures derived from the 2000 census showed that Pennsylvania was entitled to only 19 Representatives in Congress, a decrease in 2 from the Commonwealth's previous delegation. Pennsylvania's General Assembly took up the task of drawing a new districting map. At the time, the Republican Party controlled a majority of both state Houses and held the Governor's office. Prominent national figures in the Republican Party pressured the General Assembly to adopt a partisan redistricting plan as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans elsewhere. The Republican members of Pennsylvania's House and Senate worked together on such a plan. On January 3, 2002, the General Assembly passed its plan, which was signed into law by Governor Schweiker as Act 1.

Plaintiffs, registered Democrats who vote in Pennsylvania, brought suit in the United States District Court for the Middle District of Pennsylvania, seeking to enjoin implementation of Act 1 under Rev. Stat. § 1979, 42 U. S. C. § 1983. Defendants-appellees were the Commonwealth of Pennsylvania and various executive and legislative officers responsible for enacting or implementing Act 1. The complaint alleged, among other things, that the legislation created malapportioned districts, in violation of the one-person, one-vote requirement of Article I, § 2, of the United States Constitution, and that it constituted a political gerrymander, in violation of Article I and the Equal Protection Clause of the Fourteenth Amendment. With regard to the latter contention, the complaint alleged that the districts created by Act 1 were "meandering and irregular," and "ignor[ed] all traditional redistricting criteria, including the preservation of

local government boundaries, solely for the sake of partisan advantage." Juris. Statement 136a, ¶ 22, 135a, ¶ 20.

A three-judge panel was convened pursuant to 28 U. S. C. § 2284. The defendants moved to dismiss. The District Court granted the motion with respect to the political gerrymandering claim, and (on Eleventh Amendment grounds) all claims against the Commonwealth; but it declined to dismiss the apportionment claim as to other defendants. See *Vieth* v. *Pennsylvania*, 188 F. Supp. 2d 532 (MD Pa. 2002) *(Vieth I)*. On trial of the apportionment claim, the District Court ruled in favor of plaintiffs. See *Vieth* v. *Pennsylvania*, 195 F. Supp. 2d 672 (MD Pa. 2002) *(Vieth II)*. It retained jurisdiction over the case pending the court's review and approval of a remedial redistricting plan. On April 18, 2002, Governor Schweiker signed into law Act No. 2002–34, Pa. Stat. Ann., Tit. 25, § 3595.301 (Purdon Supp. 2003) (Act 34), a remedial plan that the Pennsylvania General Assembly had enacted to cure the apportionment problem of Act 1.

Plaintiffs moved to impose remedial districts, arguing that the District Court should not consider Act 34 to be a proper remedial scheme, both because it was malapportioned, and because it constituted an unconstitutional political gerrymander like its predecessor. The District Court denied this motion, concluding that the new districts were not malapportioned, and rejecting the political gerrymandering claim for the reasons previously assigned in *Vieth I*. *Vieth* v. *Pennsylvania*, 241 F. Supp. 2d 478, 484–485 (MD Pa. 2003) *(Vieth III)*. The plaintiffs appealed the dismissal of their Act 34 political gerrymandering claim.[2] We noted probable jurisdiction. 539 U. S. 957 (2003).

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[2] The plaintiffs apparently never amended their complaint to allege that Act 34 was a political gerrymander, yet the District Court's decision in *Vieth III* resolved that claim on the merits. Because subject-matter jurisdiction is not implicated and neither party has raised the point, we assume that the District Court deemed the plaintiffs' original complaint to have been constructively amended.

II

Political gerrymanders are not new to the American scene. One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives. See E. Griffith, The Rise and Development of the Gerrymander 26–28 (1974) (hereinafter Griffith). In 1732, two members of His Majesty's Council and the attorney general and deputy inspector and comptroller general of affairs of the Province of North Carolina reported that the Governor had proceeded to "divide old Precincts established by Law, & to enact new Ones in Places, whereby his Arts he has endeavoured to prepossess People in a future election according to his desire, his Designs herein being . . . either to endeavour by his means to get a Majority of his creatures in the Lower House" or to disrupt the assembly's proceedings. 3 Colonial Records of North Carolina 380–381 (W. Saunders ed. 1886); see also Griffith 29. The political gerrymander remained alive and well (though not yet known by that name) at the time of the framing. There were allegations that Patrick Henry attempted (unsuccessfully) to gerrymander James Madison out of the First Congress. See 2 W. Rives, Life and Times of James Madison 655, n. 1 (reprint 1970); Letter from Thomas Jefferson to William Short, Feb. 9, 1789, reprinted in 5 Works of Thomas Jefferson 451 (P. Ford ed. 1904). And in 1812, of course, there occurred the notoriously outrageous political districting in Massachusetts that gave the gerrymander its name—an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ("salamander") which the outline of an election district he was credited with forming was thought to resemble. See Webster's New International Dictionary 1052 (2d ed. 1945). "By 1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation

enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength." Griffith 123.

It is significant that the Framers provided a remedy for such practices in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to "make or alter" those districts if it wished.[3] Many objected to the congressional oversight established by this provision. In the course of the debates in the Constitutional Convention, Charles Pinckney and John Rutledge moved to strike the relevant language. James Madison responded in defense of the provision that Congress must be given the power to check partisan manipulation of the election process by the States:

> "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controuling power to the Natl. Legislature?" 2 Records of the Federal Convention of 1787, pp. 240–241 (M. Farrand ed. 1911).

Although the motion of Pinckney and Rutledge failed, opposition to the "make or alter" provision of Article I, § 4—and the defense that it was needed to prevent political gerryman-

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[3] Article I, § 4, provides as follows:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

dering—continued to be voiced in the state ratifying debates. A delegate to the Massachusetts convention warned that state legislatures

> "might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." 2 Debates on the Federal Constitution 27 (J. Elliot 2d ed. 1876).

The power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant. In the Apportionment Act of 1842, 5 Stat. 491, Congress provided that Representatives must be elected from single-member districts "composed of contiguous territory." See Griffith 12 (noting that the law was "an attempt to forbid the practice of the gerrymander"). Congress again imposed these requirements in the Apportionment Act of 1862, 12 Stat. 572, and in 1872 further required that districts "contai[n] as nearly as practicable an equal number of inhabitants," 17 Stat. 28, § 2. In the Apportionment Act of 1901, Congress imposed a compactness requirement. 31 Stat. 733. The requirements of contiguity, compactness, and equality of population were repeated in the 1911 apportionment legislation, 37 Stat. 13, but were not thereafter continued. Today, only the single-member-district-requirement remains. See 2 U. S. C. § 2c. Recent history, however, attests to Congress's awareness of the sort of districting practices appellants protest, and of its power under Article I, § 4, to control them. Since 1980, no fewer than five bills have been introduced to regulate gerry-

mandering in congressional districting. See H. R. 5037, 101st Cong., 2d Sess. (1990); H. R. 1711, 101st Cong., 1st Sess. (1989); H. R. 3468, 98th Cong., 1st Sess. (1983); H. R. 5529, 97th Cong., 2d Sess. (1982); H. R. 2349, 97th Cong., 1st Sess. (1981).[4]

Eighteen years ago, we held that the Equal Protection Clause grants judges the power—and duty—to control political gerrymandering, see *Davis* v. *Bandemer*, 478 U. S. 109 (1986). It is to consideration of this precedent that we now turn.

III

As Chief Justice Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. See, *e. g.*, *Nixon* v. *United States*, 506 U. S. 224 (1993) (challenge to procedures used in Senate impeachment proceedings); *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118 (1912) (claims arising under the Guaranty Clause of Article IV, § 4). Such questions are said to be "nonjusticiable," or "political questions."

In *Baker* v. *Carr*, 369 U. S. 186 (1962), we set forth six independent tests for the existence of a political question:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable stand-

[4] The States, of course, have taken their own steps to prevent abusive districting practices. A number have adopted standards for redistricting, and measures designed to insulate the process from politics. See, *e. g.*, Iowa Code § 42.4(5) (2003); N. J. Const., Art. II, § 2; Haw. Rev. Stat. § 25–2 (1993); Idaho Code § 72–1506 (1948–1999); Me. Rev. Stat. Ann., Tit. 21–A, §§ 1206, 1206–A (West Supp. 2003); Mont. Code Ann. § 5–1–115 (2003); Wash. Rev. Code § 44.05.090 (1994).

> ards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*, at 217.

These tests are probably listed in descending order of both importance and certainty. The second is at issue here, and there is no doubt of its validity. "The judicial Power" created by Article III, § 1, of the Constitution is not *whatever* judges choose to do, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 487 (1982); cf. *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 332–333 (1999), or even *whatever* Congress chooses to assign them, see *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 576–577 (1992); *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 110–114 (1948). It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.

Over the dissent of three Justices, the Court held in *Davis* v. *Bandemer* that, since it was "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided," 478 U. S., at 123, such cases *were* justiciable. The clumsy shifting of the burden of proof for the premise (the Court was "not persuaded" that standards do not exist, rather than "persuaded"

that they do) was necessitated by the uncomfortable fact that the six-Justice majority could not discern what the judicially discernable standards might be. There was no majority on that point. Four of the Justices finding justiciability believed that the standard was one thing, see *id.*, at 127 (plurality opinion of White, J., joined by Brennan, Marshall, and Blackmun, JJ.); two believed it was something else, see *id.*, at 161 (Powell, J., joined by STEVENS, J., concurring in part and dissenting in part). The lower courts have lived with that assurance of a standard (or more precisely, lack of assurance that there is no standard), coupled with that inability to specify a standard, for the past 18 years. In that time, they have considered numerous political gerrymandering claims; this Court has never revisited the unanswered question of what standard governs.

Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate. They have simply applied the standard set forth in *Bandemer*'s four-Justice plurality opinion. This might be thought to prove that the four-Justice plurality standard has met the test of time—but for the fact that its application has almost invariably produced the same result (except for the incurring of attorney's fees) as would have obtained if the question were nonjusticiable: Judicial intervention has been refused. As one commentary has put it, "[t]hroughout its subsequent history, *Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress." S. Issacharoff, P. Karlan, & R. Pildes, The Law of Democracy 886 (rev. 2d ed. 2002). The one case in which relief was provided (and merely preliminary relief, at that) did *not* involve the drawing of district lines;[5] in *all* of the cases we are aware of involving that most

[5] See *Republican Party of North Carolina* v. *Martin*, 980 F. 2d 943 (CA4 1992) (upholding denial of Federal Rule of Civil Procedure 12(b)(6) judgment for the defendants); *Republican Party of North Carolina* v. *North Carolina State Bd. of Elections*, 27 F. 3d 563 (CA4 1994) (unpublished

common form of political gerrymandering, relief was denied.[6] Moreover, although the case in which relief was provided seemingly involved the *ne plus ultra* of partisan manipulation, see n. 5, *supra*, we would be at a loss to explain why the *Bandemer* line should have been drawn just there, and should not have embraced several districting plans that were upheld despite allegations of extreme partisan discrimina-

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opinion) (upholding, as modified, a preliminary injunction). *Martin* dealt with North Carolina's system of electing superior court judges statewide, a system that had resulted in the election of only a single Republican judge since 1900. 980 F. 2d, at 948. Later developments in the case are described in n. 8, *infra*.

[6] For cases in which courts rejected prayers for relief under *Davis* v. *Bandemer*, 478 U. S. 109 (1986), see, *e. g.*, *Duckworth* v. *State Administrative Bd. of Election Laws*, 332 F. 3d 769 (CA4 2003); *Smith* v. *Boyle*, 144 F. 3d 1060 (CA7 1998); *La Porte County Republican Central Comm.* v. *Board of Comm'rs of County of La Porte*, 43 F. 3d 1126 (CA7 1994); *Session* v. *Perry*, 298 F. Supp. 2d 451 (ED Tex. 2004) *(per curiam); Martinez* v. *Bush*, 234 F. Supp. 2d 1275 (SD Fla. 2002) (three-judge panel); *O'Lear* v. *Miller*, 222 F. Supp. 2d 850 (ED Mich.), summarily aff'd, 537 U. S. 997 (2002); *Marylanders for Fair Representation, Inc.* v. *Schaefer*, 849 F. Supp. 1022 (Md. 1994) (three-judge panel); *Terrazas* v. *Slagle*, 821 F. Supp. 1162 (WD Tex. 1993) (three-judge panel); *Pope* v. *Blue*, 809 F. Supp. 392 (WDNC) (three-judge panel), summarily aff'd, 506 U. S. 801 (1992); *Illinois Legislative Redistricting Comm'n* v. *LaPaille*, 782 F. Supp. 1272 (ND Ill. 1992); *Fund for Accurate and Informed Representation, Inc.* v. *Weprin*, 796 F. Supp. 662 (NDNY) (three-judge panel), summarily aff'd, 506 U. S. 1017 (1992); *Holloway* v. *Hechler*, 817 F. Supp. 617 (SD W. Va. 1992) (three-judge panel), summarily aff'd, 507 U. S. 956 (1993); *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634 (ND Ill. 1991) (three-judge panel); *Anne Arundel County Republican Central Comm.* v. *State Administrative Bd. of Election Laws*, 781 F. Supp. 394 (Md. 1991) (three-judge panel), summarily aff'd, 504 U. S. 938 (1992); *Republican Party of Virginia* v. *Wilder*, 774 F. Supp. 400 (WD Va. 1991) (three-judge panel); *Badham* v. *Eu*, 694 F. Supp. 664, 670 (ND Cal. 1988), summarily aff'd, 488 U. S. 1024 (1989); *In re 2003 Legislative Apportionment of House of Representatives*, 2003 ME 81, 827 A. 2d 810; *McClure* v. *Secretary of Commonwealth*, 436 Mass. 614, 766 N. E. 2d 847 (2002); *Legislative Redistricting Cases*, 331 Md. 574, 629 A. 2d 646 (1993); *Kenai Peninsula Borough* v. *State*, 743 P. 2d 1352 (Alaska 1987).

tion, bizarrely shaped districts, and disproportionate results. See, *e. g.*, *Session* v. *Perry*, 298 F. Supp. 2d 451 (ED Tex. 2004) *(per curiam); O'Lear* v. *Miller*, 222 F. Supp. 2d 850 (ED Mich.), summarily aff'd, 537 U. S. 997 (2002); *Badham* v. *Eu*, 694 F. Supp. 664, 670 (ND Cal. 1988), summarily aff'd, 488 U. S. 1024 (1989). To think that this lower court jurisprudence has brought forth "judicially discernible and manageable standards" would be fantasy.

Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.

A

We begin our review of possible standards with that proposed by Justice White's plurality opinion in *Bandemer* because, as the narrowest ground for our decision in that case, it has been the standard employed by the lower courts. The plurality concluded that a political gerrymandering claim could succeed only where plaintiffs showed "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U. S., at 127. As to the intent element, the plurality acknowledged that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.*, at 129. However, the effects prong was significantly harder to satisfy. Relief could not be based merely upon the fact that a group of persons banded together for political purposes had failed to achieve representation commensurate with its numbers, or that the apportionment scheme made its winning of elections more difficult. *Id.*, at 132. Rather,

it would have to be shown that, taking into account a variety of historic factors and projected election results, the group had been "denied its chance to effectively influence the political process" as a whole, which could be achieved even without electing a candidate. *Id.*, at 132–133. It would not be enough to establish, for example, that Democrats had been "placed in a district with a supermajority of other Democratic voters" or that the district "departs from pre-existing political boundaries." *Id.*, at 140–141. Rather, in a challenge to an individual district the inquiry would focus "on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate." *Id.*, at 133. A statewide challenge, by contrast, would involve an analysis of "the voters' direct *or indirect* influence on the elections of the state legislature as a whole." *Ibid.* (emphasis added). With what has proved to be a gross understatement, the plurality acknowledged this was "of necessity a difficult inquiry." *Id.*, at 143.

In her *Bandemer* concurrence, JUSTICE O'CONNOR predicted that the plurality's standard "will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality." *Id.*, at 155 (opinion concurring in judgment, joined by Burger, C. J., and REHNQUIST, J.). A similar prediction of unmanageability was expressed in Justice Powell's opinion, making it the prognostication of a majority of the Court. See *id.*, at 171 ("The . . . most basic flaw in the plurality's opinion is its failure to enunciate any standard that affords guidance to legislatures and courts"). That prognostication has been amply fulfilled.

In the lower courts, the legacy of the plurality's test is one long record of puzzlement and consternation. See, *e. g.*, *Session*, *supra*, at 474 ("Throughout this case we have borne

witness to the powerful, conflicting forces nurtured by *Bandemer*'s holding that the judiciary is to address 'excessive' partisan line-drawing, while leaving the issue virtually unenforceable"); *Vieth I*, 188 F. Supp. 2d, at 544 (noting that the "recondite standard enunciated in *Bandemer* offers little concrete guidance"); *Martinez* v. *Bush*, 234 F. Supp. 2d 1275, 1352 (SD Fla. 2002) (three-judge court) (Jordan, J., concurring) (the "lower courts continue to struggle in an attempt to interpret and apply the 'discriminatory effect' prong of the *[Bandemer]* standard"); *O'Lear*, *supra*, at 855 (describing *Bandemer*'s standard for assessing discriminatory effect as "somewhat murky"). The test has been criticized for its indeterminacy by a host of academic commentators. See, *e. g.*, L. Tribe, American Constitutional Law § 13–9, p. 1083 (2d ed. 1988) ("Neither Justice White's nor Justice Powell's approach to the question of partisan apportionment gives any real guidance to lower courts forced to adjudicate this issue . . ."); Still, Hunting of the Gerrymander, 38 UCLA L. Rev. 1019, 1020 (1991) (noting that the plurality opinion has "confounded legislators, practitioners, and academics alike"); Schuck, The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum. L. Rev. 1325, 1365 (1987) (noting that the *Bandemer* plurality's standard requires judgments that are "largely subjective and beg questions that lie at the heart of political competition in a democracy"); Issacharoff, Judging Politics: The Elusive Quest for Judicial Review of Political Fairness, 71 Texas L. Rev. 1643, 1671 (1993) ("*Bandemer* begot only confusion"); Grofman, An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies, 21 Stetson L. Rev. 783, 816 (1992) ("[A]s far as I am aware I am one of only two people who believe that *Bandemer* makes sense. Moreover, the other person, Daniel Lowenstein, has a diametrically opposed view as to *what* the plurality opinion means"). Because this standard was misguided when proposed, has not been improved in subsequent application, and is not even de-

fended before us today by the appellants, we decline to affirm it as a constitutional requirement.

B

Appellants take a run at enunciating their own workable standard based on Article I, §2, and the Equal Protection Clause. We consider it at length not only because it reflects the litigant's view as to the best that can be derived from 18 years of experience, but also because it shares many features with other proposed standards, so that what is said of it may be said of them as well. Appellants' proposed standard retains the two-pronged framework of the *Bandemer* plurality—intent plus effect—but modifies the type of showing sufficient to satisfy each.

To satisfy appellants' intent standard, a plaintiff must "show that the mapmakers acted with a *predominant intent* to achieve partisan advantage," which can be shown "by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." Brief for Appellants 19 (emphasis added). As compared with the *Bandemer* plurality's test of mere intent to disadvantage the plaintiff's group, this proposal seemingly makes the standard more difficult to meet—but only at the expense of making the standard more indeterminate.

"Predominant intent" to disadvantage the plaintiff's political group refers to the relative importance of that goal as compared with all the other goals that the map seeks to pursue—contiguity of districts, compactness of districts, observance of the lines of political subdivision, protection of incumbents of all parties, cohesion of natural racial and ethnic neighborhoods, compliance with requirements of the Voting Rights Act of 1965 regarding racial distribution, etc. Appellants contend that their intent test *must* be discernible and manageable because it has been borrowed from our racial gerrymandering cases. See *Miller* v. *Johnson*, 515 U. S. 900

(1995); *Shaw* v. *Reno*, 509 U. S. 630 (1993). To begin with, in a very important respect that is not so. In the racial gerrymandering context, the predominant intent test has been applied to the challenged district in which the plaintiffs voted. See *Miller*, *supra; United States* v. *Hays*, 515 U. S. 737 (1995). Here, however, appellants do not assert that an apportionment fails their intent test if any single district does so. Since "it would be quixotic to attempt to bar state legislatures from considering politics as they redraw district lines," Brief for Appellants 3, appellants propose a test that is satisfied only when "partisan advantage was the predominant motivation *behind the entire statewide plan*," *id.*, at 32 (emphasis added). Vague as the "predominant motivation" test might be when used to evaluate single districts, it all but evaporates when applied statewide. Does it mean, for instance, that partisan intent must outweigh all other goals—contiguity, compactness, preservation of neighborhoods, etc.—*statewide?* And how is the statewide "outweighing" to be determined? If three-fifths of the map's districts forgo the pursuit of partisan ends in favor of strictly observing political-subdivision lines, and only two-fifths ignore those lines to disadvantage the plaintiffs, is the observance of political subdivisions the "predominant" goal between those two? We are sure appellants do not think so.

Even within the narrower compass of challenges to a single district, applying a "predominant intent" test to *racial* gerrymandering is easier and less disruptive. The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics. See *Miller*, *supra*, at 914 ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition . . ."); *Shaw*, *supra*, at 662 (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics . . ."); *Gaffney* v. *Cummings*, 412 U. S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have sub-

stantial political consequences"). By contrast, the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered. Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it. Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering. Finally, courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear; whereas they are not justified in inferring a judicially enforceable constitutional obligation (the obligation not to apply *too much* partisanship in districting) which is both dubious and severely unmanageable. For these reasons, to the extent that our racial gerrymandering cases represent a model of discernible and manageable standards, they provide no comfort here.

The effects prong of appellants' proposal replaces the *Bandemer* plurality's vague test of "denied its chance to effectively influence the political process," 478 U. S., at 132–133, with criteria that are seemingly more specific. The requisite effect is established when "(1) the plaintiffs show that the districts systematically 'pack' and 'crack' the rival party's voters,[7] *and* (2) the court's examination of the 'totality of circumstances' confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority

[7] "Packing" refers to the practice of filling a district with a supermajority of a given group or party. "Cracking" involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts.

of seats." Brief for Appellants 20 (emphasis and footnote added). This test is loosely based on our cases applying § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973, to discrimination by race, see, *e. g.*, *Johnson* v. *De Grandy*, 512 U. S. 997 (1994). But a person's politics is rarely as readily discernible—and *never* as permanently discernible—as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy. See *Bandemer*, *supra*, at 156 (O'CONNOR, J., concurring in judgment).[8]

Assuming, however, that the effects of partisan gerrymandering can be determined, appellants' test would invalidate the districting only when it prevents a majority of the electorate from electing a majority of representatives. Before considering whether this particular standard is judicially

[8] A delicious illustration of this is the one case we have found—alluded to above—that provided relief under *Bandemer*. See n. 5, *supra*. In *Republican Party of North Carolina* v. *Hunt*, No. 94–2410, 1996 WL 60439 (CA4, Feb. 12, 1996) *(per curiam)* (unpublished), judgt. order reported at 77 F. 3d 470, the District Court, after a trial with no less than 311 stipulations by the parties, 132 witness statements, approximately 300 exhibits, and 2 days of oral argument, concluded that North Carolina's system of electing superior court judges on a statewide basis "had resulted in Republican candidates experiencing a consistent and pervasive lack of success and exclusion from the electoral process as a whole and that these effects were likely to continue unabated into the future." 1996 WL 60439, at *1. In the elections for superior court judges conducted just *five days* after this pronouncement, "every Republican candidate standing for the office of superior court judge was victorious at the state level," *ibid.*, a result which the Fourth Circuit thought (with good reason) "directly at odds with the recent prediction by the district court," *id.*, at *2, causing it to remand the case for reconsideration.

manageable we question whether it is judicially discernible in the sense of being relevant to some constitutional violation. Deny it as appellants may (and do), this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.[9]

Even if the standard were relevant, however, it is not judicially manageable. To begin with, how is a party's majority status to be established? Appellants propose using the results of statewide races as the benchmark of party support. But as their own complaint describes, in the 2000 Pennsylvania statewide elections some Republicans won and some Democrats won. See Juris. Statement 137a–138a (describing how Democratic candidates received more votes for President and auditor general, and Republicans received more votes for United States Senator, attorney general, and treasurer). Moreover, to think that majority status in statewide races establishes majority status for district contests, one would have to believe that the only factor determining voting behavior at all levels is political affiliation. That is assuredly not true. As one law review comment has put it:

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[9] The Constitution also does not share appellants' alarm at the asserted tendency of partisan gerrymandering to create more partisan representatives. Assuming that assertion to be true, the Constitution does not answer the question whether it is better for Democratic voters to have their State's congressional delegation include 10 wishy-washy Democrats (because Democratic voters are "effectively" distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts). Choosing the former "dilutes" the vote of the radical Democrat; choosing the latter does the same to the moderate. Neither Article I, § 2, nor the Equal Protection Clause takes sides in this dispute.

> "There is no statewide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is. If the districts change, the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes. Political parties do not compete for the highest statewide vote totals or the highest mean district vote percentages: They compete for specific seats." Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory, 33 UCLA L. Rev. 1, 59–60 (1985).

See also Schuck, Partisan Gerrymandering: A Political Problem Without Judicial Solution, in Political Gerrymandering and the Courts 240, 241 (B. Grofman ed. 1990).

But if we could identify a majority party, we would find it impossible to ensure that that party wins a majority of seats—unless we radically revise the States' traditional structure for elections. In any winner-take-all district system, there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party. The point is proved by the 2000 congressional elections in Pennsylvania, which, according to appellants' own pleadings, were conducted under a judicially drawn district map "free from partisan gerrymandering." Juris. Statement 137a. On this "neutral playing fiel[d]," the Democrats' statewide majority of the major-party vote (50.6%) translated into a minority of seats (10, versus 11 for the Republicans). *Id.*, at 133a, 137a. Whether by reason of partisan districting or not, party constituents may always wind up "packed" in some districts and "cracked" throughout others. See R. Dixon, Democratic Representation 462 (1968) ("All Districting Is 'Gerrymandering' "); Schuck, 87 Colum. L. Rev., at 1359. Consider, for

example, a legislature that draws district lines with no objectives in mind except compactness and respect for the lines of political subdivisions. Under that system, political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a "natural" packing effect. See *Bandemer*, 478 U. S., at 159 (O'CONNOR, J., concurring in judgment).

Our one-person, one-vote cases, see *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), have no bearing upon this question, neither in principle nor in practicality. Not in principle, because to say that each individual must have an equal say in the selection of representatives, and hence that a majority of individuals must have a majority say, is not at all to say that each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers. And not in practicality, because the easily administrable standard of population equality adopted by *Wesberry* and *Reynolds* enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts; whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.

For these reasons, we find appellants' proposed standards neither discernible nor manageable.

C

For many of the same reasons, we also reject the standard suggested by Justice Powell in *Bandemer*. He agreed with the plurality that a plaintiff should show intent and effect, but believed that the ultimate inquiry ought to focus on whether district boundaries had been drawn solely for parti-

san ends to the exclusion of "all other neutral factors relevant to the fairness of redistricting." 478 U. S., at 161 (opinion concurring in part and dissenting in part); see also *id.*, at 164–165. Under that inquiry, the courts should consider numerous factors, though "[n]o one factor should be dispositive." *Id.*, at 173. The most important would be "the shapes of voting districts and adherence to established political subdivision boundaries." *Ibid.* "Other relevant considerations include the nature of the legislative procedures by which the apportionment law was adopted and legislative history reflecting contemporaneous legislative goals." *Ibid.* These factors, which "bear directly on the fairness of a redistricting plan," combined with "evidence concerning population disparities and statistics tending to show vote dilution," make out a claim of unconstitutional partisan gerrymandering. *Ibid.*

While Justice Powell rightly criticized the *Bandemer* plurality for failing to suggest a constitutionally based, judicially manageable standard, the standard proposed in his opinion also falls short of the mark. It is essentially a totality-of-the-circumstances analysis, where all conceivable factors, none of which is dispositive, are weighed with an eye to ascertaining whether the particular gerrymander has gone too far—or, in Justice Powell's terminology, whether it is not "fair." "Fairness" does not seem to us a judicially manageable standard. Fairness is compatible with noncontiguous districts, it is compatible with districts that straddle political subdivisions, and it is compatible with a party's not winning the number of seats that mirrors the proportion of its vote. Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.

IV

We turn next to consideration of the standards proposed by today's dissenters. We preface it with the observation that the mere fact that these four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitutionally discernible standard.

A

JUSTICE STEVENS concurs in the judgment that we should not address plaintiffs' statewide political gerrymandering challenges. Though he reaches that result via standing analysis, *post*, at 327, 328 (dissenting opinion), while we reach it through political-question analysis, our conclusions are the same: these statewide claims are nonjusticiable.

JUSTICE STEVENS would, however, require courts to consider political gerrymandering challenges at the individual-district level. Much of his dissent is addressed to the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment, any more than we disagree with the judgment that it would be unconstitutional for the Senate to employ, in impeachment proceedings, procedures that are incompatible with its obligation to "try" impeachments. See *Nixon* v. *United States*, 506 U. S. 224 (1993). The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy. On that point, JUSTICE STEVENS's dissent is less helpful, saying, essentially, that if we can do it in the racial gerrymandering context we can do it here.

We have examined, *supra*, at 285–288, the many reasons why that is not so. Only a few of them are challenged by JUSTICE STEVENS. He says that we "mistakenly assum[e] that race cannot provide a legitimate basis for making politi-

cal judgments." *Post*, at 338. But we do not say that race-conscious decisionmaking is always unlawful. Race can be used, for example, as an indicator to achieve the purpose of neighborhood cohesiveness in districting. What we have said is impermissible is "the purpose of segregating voters on the basis of race," *supra*, at 286—that is to say, racial gerrymandering for race's sake, which would be the equivalent of political gerrymandering for politics' sake. JUSTICE STEVENS says we "er[r] in assuming that politics is 'an ordinary and lawful motive'" in districting, *post*, at 324—but all he brings forward to contest that is the argument that an *excessive* injection of politics is *un*lawful. So it is, and so does our opinion assume. That does not alter the reality that setting out to segregate voters by race is unlawful and hence rare, and setting out to segregate them by political affiliation is (so long as one doesn't go too far) lawful and hence ordinary.

JUSTICE STEVENS's confidence that what courts have done with racial gerrymandering can be done with political gerrymandering rests in part upon his belief that "the same standards should apply," *post*, at 335. But in fact the standards are quite different. A purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Shaw*, 509 U. S., at 650 (citation omitted). That quoted passage was in direct response to (and rejection of) the suggestion made by JUSTICES White and STEVENS in dissent that "a racial gerrymander of the sort alleged here is functionally equivalent to

gerrymanders for nonracial purposes, such as political gerrymanders." *Ibid.* See also *Bush* v. *Vera*, 517 U. S. 952, 964 (1996) (plurality opinion) ("We have not subjected political gerrymandering to strict scrutiny").

JUSTICE STEVENS relies on *First Amendment cases* to suggest that politically discriminatory gerrymanders are subject to strict scrutiny under the *Equal Protection Clause*. See *post*, at 324–325. It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable. To say that suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny. Only an equal protection claim is before us in the present case—perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs. What cases such as *Elrod* v. *Burns*, 427 U. S. 347 (1976), require is not merely that Republicans be given a decent share of the jobs in a Democratic administration, but that political affiliation *be disregarded*.

Having failed to make the case for strict scrutiny of political gerrymandering, JUSTICE STEVENS falls back on the argument that scrutiny levels simply do not matter for purposes of justiciability. He asserts that a standard imposing a strong presumption of invalidity (strict scrutiny) is no more discernible and manageable than a standard requiring an evenhanded balancing of all considerations with no thumb on the scales (ordinary scrutiny). To state this is to refute it. As is well known, strict scrutiny readily, and almost always, results in invalidation. Moreover, the mere fact that there

exist standards which this Court could apply—the proposition which much of JUSTICE STEVENS's opinion is devoted to establishing, see, *e. g.*, *post,* at 321–327, 340–341—does not mean that those standards are discernible in the Constitution. This Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms. JUSTICE STEVENS points out, see *post,* at 327, n. 15, that *Bandemer* said differences between racial and political groups "may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case." 478 U. S., at 125. As 18 years have shown, *Bandemer* was wrong.

B

JUSTICE SOUTER, like JUSTICE STEVENS, would restrict these plaintiffs, on the allegations before us, to district-specific political gerrymandering claims. *Post,* at 346, 353 (dissenting opinion). Unlike JUSTICE STEVENS, however, JUSTICE SOUTER recognizes that there is no existing workable standard for adjudicating such claims. He proposes a "fresh start," *post,* at 345: a newly constructed standard loosely based in form on our Title VII cases, see *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973), and complete with a five-step prima facie test sewn together from parts of, among other things, our Voting Rights Act jurisprudence, law review articles, and apportionment cases. Even if these self-styled "clues" to unconstitutionality could be manageably applied, which we doubt, there is no reason to think they would detect the constitutional crime which JUSTICE SOUTER is investigating—an "extremity of unfairness" in partisan competition. *Post,* at 344.

Under JUSTICE SOUTER's proposed standard, in order to challenge a particular district, a plaintiff must show (1) that he is a member of a "cohesive political group"; (2) "that the district of his residence . . . paid little or no heed" to traditional districting principles; (3) that there were "specific cor-

relations between the district's deviations from traditional districting principles and the distribution of the population of his group"; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of the plaintiff's group, and deviates less from traditional districting principles; and (5) that "the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group." *Post*, at 347–350. When those showings have been made, the burden would shift to the defendants to justify the district "by reference to objectives other than naked partisan advantage." *Post*, at 351.

While this five-part test seems eminently scientific, upon analysis one finds that each of the last four steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards: *How much* disregard of traditional districting principles? *How many* correlations between deviations and distribution? *How much* remedying of packing or cracking by the hypothetical district? *How many legislators* must have had the intent to pack and crack—and *how efficacious* must that intent have been (must it have been, for example, a *sine qua non* cause of the districting, or a *predominant* cause)? At step two, for example, JUSTICE SOUTER would require lower courts to assess whether mapmakers paid "little or no heed to . . . traditional districting principles." *Post*, at 348. What is a lower court to do when, as will often be the case, the district adheres to some traditional criteria but not others? JUSTICE SOUTER's only response to this question is to evade it: "It is not necessary now to say exactly how a district court would balance a good showing on one of these indices against a poor showing on another, for that sort of detail is best worked out case by case." *Post*, at 348–349. But the devil lurks precisely in such detail. The central problem is determining when political gerrymandering has gone too far. It does not solve that problem to break down the original unanswerable ques-

tion (How much political motivation and effect is too much?) into four more discrete but equally unanswerable questions.

JUSTICE SOUTER's proposal is doomed to failure for a more basic reason: No test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing *for*. In the present context, the test ought to identify deprivation of that minimal degree of representation or influence to which a political group is constitutionally entitled. As we have seen, the *Bandemer* test sought (unhelpfully, but at least gamely) to specify what that minimal degree was: "[a] chance to effectively influence the political process." 478 U. S., at 133. So did the appellants' proposed test: "[the] ability to translate a majority of votes into a majority of seats." Brief for Appellants 20. JUSTICE SOUTER avoids the difficulties of those formulations by never telling us what his test is looking for, other than the utterly unhelpful "extremity of unfairness." He vaguely describes the harm he is concerned with as vote dilution, *post*, at 351, a term which usually implies some actual effect on the weight of a vote. But no element of his test looks to the effect of the gerrymander on the electoral success, the electoral opportunity, or even the political influence, of the plaintiff's group. We do not know the precise constitutional deprivation his test is designed to identify and prevent.

Even if (though it is implausible) JUSTICE SOUTER believes that the constitutional deprivation consists of merely "vote dilution," his test would not even identify *that* effect. Despite his claimed reliance on the *McDonnell Douglas* framework, JUSTICE SOUTER would allow the plaintiff no opportunity to show that the mapmakers' compliance with traditional districting factors is pretextual.[10] His reason for

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[10] JUSTICE SOUTER would allow a State, in proving its affirmative defense, to demonstrate that the reasons given for the district's shape "were more than a mere pretext for an old-fashioned gerrymander." *Post*, at 352. But the need to establish that affirmative defense does not arise

this is never stated, but it certainly cannot be that adherence to traditional districting factors negates any possibility of intentional vote dilution. As we have explained above, packing and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines. See *supra*, at 289–290. An even better example is the traditional criterion of incumbency protection. JUSTICE SOUTER has previously acknowledged it to be a traditional and constitutionally acceptable districting principle. See *Vera*, 517 U. S., at 1047–1048 (dissenting opinion). Since that is so, his test would not protect those who are packed, and often tightly so, to ensure the reelection of representatives of either party. Indeed, efforts to maximize partisan representation statewide might well begin with packing voters of the opposing party into the districts of existing incumbents of that party. By this means an incumbent is protected, a potential adversary to the districting mollified, and votes of the opposing party are diluted.

Like us, JUSTICE SOUTER acknowledges and accepts that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent." *Post*, at 344. Thus, again like us, he recognizes that "the issue is one of how much is too much." *Ibid.* And once those premises are conceded, the only line that can be drawn must be based, as JUSTICE SOUTER again candidly admits, upon a substantive "notio[n] of fairness." *Ibid.* This is the same flabby goal that deprived Justice Powell's test of all determinacy. To be sure, JUSTICE SOUTER frames it somewhat differently: Courts must intervene, he says, when "partisan competition has reached an *extremity* of unfairness." *Ibid.* (emphasis added). We do not think the problem is solved by adding the modifier.

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until the plaintiff has established his prima facie case. And that prima facie case fails when, under step two, the district on its face complies with traditional districting criteria.

C

We agree with much of JUSTICE BREYER's dissenting opinion, which convincingly demonstrates that "political considerations will likely play an important, and proper, role in the drawing of district boundaries." *Post*, at 358. This places JUSTICE BREYER, like the other dissenters, in the difficult position of drawing the line between good politics and bad politics. Unlike them, he would tackle this problem at the statewide level.

The criterion JUSTICE BREYER proposes is nothing more precise than "the *unjustified* use of political factors to entrench a minority in power." *Post*, at 360 (emphasis in original). While he invokes in passing the Equal Protection Clause, it should be clear to any reader that what constitutes *unjustified* entrenchment depends on his own theory of "effective government." *Post*, at 356. While one must agree with JUSTICE BREYER's incredibly abstract starting point that our Constitution sought to create a "basically democratic" form of government, *ibid.*, that is a long and impassable distance away from the conclusion that the Judiciary may assess whether a group (somehow defined) has achieved a level of political power (somehow defined) commensurate with that to which they would be entitled absent *unjustified* political machinations (whatever that means).

JUSTICE BREYER provides no real guidance for the journey. Despite his promise to do so, *ibid.*, he never tells us what he is testing for, beyond the unhelpful "*unjustified* entrenchment." *Post*, at 360. Instead, he "set[s] forth several sets of circumstances that lay out the indicia of abuse," "along a continuum," *post*, at 365, proceeding (presumably) from the most clearly unconstitutional to the possibly unconstitutional. With regard to the first "scenario," he is willing to assert that the indicia "would be sufficient to support a claim." *Post*, at 366. This seems refreshingly categorical, until one realizes that the indicia consist not merely of the failure of the party receiving the majority of votes to acquire

a majority of seats in two successive elections, *but also* of the fact that there is no "neutral" explanation for this phenomenon. *Ibid.* But of course there *always is* a neutral explanation—if only the time-honored criterion of incumbent protection. The indicia set forth in JUSTICE BREYER's second scenario "*could* also add up to unconstitutional gerrymandering," *ibid.* (emphasis added); and for those in the third "a court *may* conclude that the map crosses the constitutional line," *post,* at 367 (emphasis added). We find none of this helpful. Each scenario suffers from at least one of the problems we have previously identified, most notably the difficulties of assessing partisan strength statewide and of ascertaining whether an entire statewide plan is motivated by political or neutral justifications, see *supra,* at 285–286, 289–290. And even at that, the last two scenarios *do not even purport to provide an answer,* presumably leaving it to each district court to determine whether, under those circumstances, "*unjustified* entrenchment" has occurred. In sum, we neither know precisely what JUSTICE BREYER is testing for, nor precisely what fails the test.

But perhaps the most surprising omission from JUSTICE BREYER's dissent, given his views on other matters, is the absence of any cost-benefit analysis. JUSTICE BREYER acknowledges that "a majority normally can work its political will," *post,* at 362, and well describes the number of actors, from statewide executive officers, to redistricting commissions, to Congress, to the People in ballot initiatives and referenda, that stand ready to make that happen. See *post,* at 362–363. He gives no instance (and we know none) of permanent frustration of majority will. But where the majority has failed to assert itself for some indeterminate period (two successive elections, if we are to believe his first scenario), JUSTICE BREYER simply assumes that "court action may prove necessary," *post,* at 364. Why so? In the real world, of course, court action that is available tends to be sought, not just where it is necessary, but where it is in the interest of the seeking party. And the vaguer the test

for availability, the more frequently interest rather than necessity will produce litigation. Is the regular insertion of the judiciary into districting, with the delay and uncertainty that brings to the political process and the partisan enmity it brings upon the courts, worth the benefit to be achieved—an accelerated (by some unknown degree) effectuation of the majority will? We think not.

V

JUSTICE KENNEDY recognizes that we have "demonstrat[ed] the shortcomings of the other standards that have been considered to date," *post*, at 308 (opinion concurring in judgment). He acknowledges, moreover, that we "lack . . . comprehensive and neutral principles for drawing electoral boundaries," *post*, at 306–307; and that there is an "absence of rules to limit and confine judicial intervention," *post*, at 307. From these premises, one might think that JUSTICE KENNEDY would reach the conclusion that political gerrymandering claims are nonjusticiable. Instead, however, he concludes that courts should continue to adjudicate such claims because a standard *may* one day be discovered.

The first thing to be said about JUSTICE KENNEDY's disposition is that it is not legally available. The District Court in this case considered the plaintiffs' claims *justiciable* but dismissed them because the standard for unconstitutionality had not been met. It is logically impossible to affirm that dismissal without either (1) finding that the unconstitutional-districting standard applied by the District Court, or some other standard that it *should* have applied, has not been met, or (2) finding (as we have) that the claim is nonjusticiable. JUSTICE KENNEDY seeks to affirm "[b]ecause, in the case before us, we have no standard." *Post*, at 313. But it is *our* job, not the plaintiffs', to explicate the standard that makes the facts alleged by the plaintiffs adequate or inadequate to state a claim. We cannot nonsuit *them* for our failure to do so.

JUSTICE KENNEDY asserts that to declare nonjusticiability would be incautious. *Post*, at 311. Our rush to such a holding after a mere 18 years of fruitless litigation "contrasts starkly" he says, "with the more patient approach" that this Court has taken in the past. *Post*, at 310. We think not. When it has come to determining what areas fall beyond our Article III authority to adjudicate, this Court's practice, from the earliest days of the Republic to the present, has been more reminiscent of Hannibal than of Hamlet. On July 18, 1793, Secretary of State Thomas Jefferson wrote the Justices at the direction of President Washington, asking whether they might answer "questions [that] depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land," but that arise "under circumstances *which do not give a cognisance of them to the tribunals of the country.*" 3 Correspondence and Public Papers of John Jay 486–487 (H. Johnston ed. 1891) (emphasis in original). The letter specifically invited the Justices to give less than a categorical yes-or-no answer, offering to present the particular questions "from which [the Justices] will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on." *Id.*, at 487. On August 8, 1793, the Justices responded in a categorical and decidedly "impatient" manner, saying that the giving of advisory opinions—not just advisory opinions on particular questions but *all* advisory opinions, presumably even those concerning legislation affecting the Judiciary—was beyond their power. "[T]he lines of separation drawn by the Constitution between the three departments of the government" prevented it. *Id.*, at 488. The Court rejected the more "cautious" course of not "deny[ing] all hopes of intervention," *post*, at 310, but leaving the door open to the possibility that at least *some* advisory opinions (on a theory we could not yet imagine) would not violate the separation of powers. In *Gilligan* v. *Morgan*, 413 U. S. 1, 7 (1973), a case filed after the Ohio National Guard's shooting

of students at Kent State University, the plaintiffs sought "initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard." The Court held the suit nonjusticiable; the matter was committed to the political branches because, *inter alia*, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.*, at 10. The Court did not adopt the more "cautious" course of letting the lower courts try their hand at regulating the military before we declared it impossible. Most recently, in *Nixon* v. *United States*, the Court, *joined* by JUSTICE KENNEDY, held that a claim that the Senate had employed certain impermissible procedures in trying an impeachment was a nonjusticiable political question. Our decision was not limited to the particular procedures under challenge, and did not reserve the possibility that sometime, somewhere, technology or the wisdom derived from experience might make a court challenge to Senate impeachment all right.

The only cases JUSTICE KENNEDY cites in defense of his never-say-never approach are *Baker* v. *Carr* and *Bandemer*. See *post*, at 310–311. *Bandemer* provides no cover. There, all of the Justices who concluded that political gerrymandering claims are justiciable proceeded to describe what they regarded as the discernible and manageable standard that rendered it so. The lower courts were set wandering in the wilderness for 18 years not because the *Bandemer* majority thought it a good idea, but because five Justices could not agree upon a single standard, and because the standard the plurality proposed turned out not to work.

As for *Baker* v. *Carr:* It is true enough that, having had no experience *whatever* in apportionment matters of any sort, the Court there refrained from spelling out the equal protection standard. (It did so a mere two years later in *Reynolds* v. *Sims*, 377 U. S. 533 (1964).) But the judgment under review in *Baker*, unlike the one under review here, did not *demand* the determination of a standard. The lower

court in *Baker* had held the apportionment claim of the plaintiffs *nonjusticiable*, and so it was logically possible to dispose of the appeal by simply disagreeing with the nonjusticiability determination. As we observed earlier, that is not possible here, where the lower court has held the claim *justiciable* but unsupported by the facts. We must either enunciate the standard that causes us to agree or disagree with that merits judgment, or else affirm that the claim is beyond our competence to adjudicate.

JUSTICE KENNEDY worries that "[a] determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene." *Post*, at 310. But it is the function of the courts to provide relief, not hope. What we think would erode confidence is the Court's refusal to do its job—announcing that there may well be a valid claim here, but we are not yet prepared to figure it out. Moreover, that course does more than erode confidence; by placing the district courts back in the business of pretending to afford help when they in fact can give none, it deters the political process from affording genuine relief. As was noted by a lower court confronted with a political gerrymandering claim:

> "When the Supreme Court resolves *Vieth*, it may choose to retreat from its decision that the question is justiciable, or it may offer more guidance on the nature of the required effect. . . . We have learned firsthand what will result if the Court chooses to do neither. Throughout this case we have borne witness to the powerful, conflicting forces nurtured by *Bandemer*'s holding that the judiciary is to address 'excessive' partisan line-drawing, while leaving the issue virtually unenforceable. Inevitably, as the political party in power uses district lines to lock in its present advantage, the party out of power attempts to stretch the protective cover of the Voting Rights Act, urging dilution of critical standards that may, if accepted, aid their party in the short-run but

> work to the detriment of persons now protected by the Act in the long-run. Casting the appearance both that there is a wrong and that the judiciary stands ready with a remedy, *Bandemer* as applied steps on legislative incentives for self-correction." *Session*, 298 F. Supp. 2d, at 474.

But the conclusive refutation of JUSTICE KENNEDY's position is the point we first made: it is not an available disposition. We can affirm because political districting presents a nonjusticiable question; or we can affirm because we believe the correct standard which identifies unconstitutional political districting has not been met; we cannot affirm because we do not know what the correct standard is. Reduced to its essence, JUSTICE KENNEDY's opinion boils down to this: "As presently advised, I know of no discernible and manageable standard that can render this claim justiciable. I am unhappy about that, and hope that I will be able to change my opinion in the future." What are the lower courts to make of this pronouncement? We suggest that they must treat it as a reluctant fifth vote against justiciability at district and statewide levels—a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable.

VI

We conclude that neither Article I, § 2, nor the Equal Protection Clause, nor (what appellants only fleetingly invoke) Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.

Considerations of *stare decisis* do not compel us to allow *Bandemer* to stand. That case involved an interpretation of the Constitution, and the claims of *stare decisis* are at their weakest in that field, where our mistakes cannot be corrected by Congress. See *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). They are doubly weak in *Bandemer* because the ma-

jority's inability to enunciate the judicially discernible and manageable standard that it thought existed (or did not think did not exist) presaged the need for reconsideration in light of subsequent experience. And they are triply weak because it is hard to imagine how any action taken in reliance upon *Bandemer* could conceivably be frustrated—except the bringing of lawsuits, which is not the sort of primary conduct that is relevant.

While we do not lightly overturn one of our own holdings, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" 501 U. S., at 827 (quoting *Smith* v. *Allwright*, 321 U. S. 649, 665 (1944)). Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims.

The judgment of the District Court is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. The Court is correct to refrain from directing this substantial intrusion into the Nation's political life. While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.

When presented with a claim of injury from partisan gerrymandering, courts confront two obstacles. First is the lack of comprehensive and neutral principles for drawing

electoral boundaries. No substantive definition of fairness in districting seems to command general assent. Second is the absence of rules to limit and confine judicial intervention. With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.

That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here. Those controversies implicate a different inquiry. They involve sorting permissible classifications in the redistricting context from impermissible ones. Race is an impermissible classification. See *Shaw* v. *Reno*, 509 U. S. 630 (1993). Politics is quite a different matter. See *Gaffney* v. *Cummings*, 412 U. S. 735, 752 (1973) ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it").

A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.

The object of districting is to establish "fair and effective representation for all citizens." *Reynolds* v. *Sims*, 377 U. S. 533, 565–568 (1964). At first it might seem that courts could determine, by the exercise of their own judgment, whether political classifications are related to this object or instead burden representational rights. The lack, however, of any agreed upon model of fair and effective representation makes this analysis difficult to pursue.

The second obstacle—the absence of rules to confine judicial intervention—is related to the first. Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manage-

able, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights. Suitable standards for measuring this burden, however, are critical to our intervention. Absent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent.

In this case, we have not overcome these obstacles to determining that the challenged districting violated appellants' rights. The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept. Even if the novelty of the proposed principle were accompanied by a convincing rationale for its adoption, there is no obvious way to draw a satisfactory standard from it for measuring an alleged burden on representational rights. The plurality demonstrates the shortcomings of the other standards that have been considered to date. See *ante*, at Parts III and IV (demonstrating that the standards proposed in *Davis* v. *Bandemer*, 478 U. S. 109 (1986), by the parties before us, and by our dissenting colleagues are either unmanageable or inconsistent with precedent, or both). I would add two comments to the plurality's analysis. The first is that the parties have not shown us, and I have not been able to discover, helpful discussions on the principles of fair districting discussed in the annals of parliamentary or legislative bodies. Our attention has not been drawn to statements of principled, well-accepted rules of fairness that should govern districting, or to helpful formulations of the legislator's duty in drawing district lines.

Second, even those criteria that might seem promising at the outset (*e. g.*, contiguity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would

unavoidably have significant political effect, whether intended or not. For example, if we were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political party over another. See *Gaffney*, *supra*, at 753 ("District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely"); see also R. Bork, The Tempting of America: The Political Seduction of the Law 88–89 (1990) (documenting the author's service as a special master responsible for redistricting Connecticut and noting that his final plan so benefited the Democratic Party, albeit unintentionally, that the party chairman personally congratulated him); M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 Pol. Geography 989, 1000–1006 (1998) (explaining that compactness standards help Republicans because Democrats are more likely to live in high density regions).

The challenge in finding a manageable standard for assessing burdens on representational rights has long been recognized. See Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory? 33 UCLA L. Rev. 1, 74 (1985) ("[W]hat matters to us, and what we think matters to almost all Americans when district lines are drawn, is how the fortunes of the parties and the policies the parties stand for are affected. When such things are at stake there is no neutrality. There is only political contest"). The dearth of helpful historical guidance must, in part, cause this uncertainty.

There are, then, weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run. In my view, however, the arguments are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander. It is not in our tradition to foreclose the judicial process from the at-

tempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied. Nor is it alien to the Judiciary to draw or approve election district lines. Courts, after all, already do so in many instances. A determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene.

Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering. The plurality's conclusion that absent an "easily administrable standard," *ante*, at 290, the appellants' claim must be nonjusticiable contrasts starkly with the more patient approach of *Baker* v. *Carr*, 369 U. S. 186 (1962), not to mention the controlling precedent on the question of justiciability of *Davis* v. *Bandemer*, *supra*, the case the plurality would overrule. See *ante*, at 305–306.

In *Baker* the Court made clear that the more abstract standards that guide analysis of all Fourteenth Amendment claims sufficed to ensure justiciability of a one-person, one-vote claim. See 369 U. S., at 226.

> "Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Ibid.*

The Court said this before the more specific standard with which we are now familiar emerged to measure the burden nonequipopulous districting causes on representational rights. See *Reynolds*, 377 U. S., at 565–568 (concluding that

"[s]ince the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment," a legislature's reliance on other apportionment interests is invalid, arbitrary, and capricious action if it leads to unequal populations among districts). The plurality's response that in *Baker* this Court sat in review only of a nonjusticiability holding is wide of the mark. See *ante*, at 303–304. As the plurality itself instructs: Before a court can conclude that it "has [any] business entertaining [a] claim," it must conclude that some "judicially enforceable righ[t]" is at issue. *Ante*, at 277. Whether a manageable standard made the right at issue in *Baker* enforceable was as much a necessary inquiry there as it is here. In light of *Baker* and *Davis* v. *Bandemer*, which directly address the question of nonjusticiability in the specific context of districting and of asserted violations of the Fourteenth Amendment, the plurality's further survey of cases involving different approaches to the justiciability of different claims cannot be thought controlling. See *ante*, at 302–303.

Even putting *Baker* to the side—and so assuming that the existence of a workable standard for measuring a gerrymander's burden on representational rights distinguishes one-person, one-vote claims from partisan gerrymandering claims for justiciability purposes—I would still reject the plurality's conclusions as to nonjusticiability. Relying on the distinction between a claim having or not having a workable standard of that sort involves a difficult proof: proof of a categorical negative. That is, the different treatment of claims otherwise so alike hinges entirely on proof that no standard could exist. This is a difficult proposition to establish, for proving a negative is a challenge in any context.

That no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution. Allegations of unconstitutional bias in apportionment are

most serious claims, for we have long believed that "the right to vote" is one of "those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938). If a State passed an enactment that declared "All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles," we would surely conclude the Constitution had been violated. If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive. This possibility suggests that in another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is unrelated to the aims of apportionment and thus is used in an impermissible fashion).

The plurality says that 18 years, in effect, prove the negative. *Ante,* at 306 ("Eighteen years of essentially pointless litigation have persuaded us"). As JUSTICE SOUTER is correct to point out, however, during these past 18 years the lower courts could do no more than follow *Davis* v. *Bandemer,* which formulated a single, apparently insuperable standard. See *post,* at 344–345 (dissenting opinion). Moreover, by the timeline of the law 18 years is rather a short period. In addition, the rapid evolution of technologies in the apportionment field suggests yet unexplored possibilities. Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months. See, *e. g.*, *Larios* v. *Cox,* 305 F. Supp. 2d 1335 (ND Ga. 2004) *(per curiam).* Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new

technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards.

If suitable standards with which to measure the burden a gerrymander imposes on representational rights did emerge, hindsight would show that the Court prematurely abandoned the field. That is a risk the Court should not take. Instead, we should adjudicate only what is in the papers before us. See *Baker*, 369 U. S., at 331 (Harlan, J., dissenting) (concluding that the malapportionment claim "should have been dismissed for 'failure to state a claim upon which relief can be granted' " because "[u]ntil it is first decided to what extent [the] right [to apportion] is limited by the Federal Constitution, and whether what [a State] has done or failed to do . . . runs afoul of any such limitation, we need not reach the issues of 'justiciability' or 'political question' ").

Because, in the case before us, we have no standard by which to measure the burden appellants claim has been imposed on their representational rights, appellants cannot establish that the alleged political classifications burden those same rights. Failing to show that the alleged classifications are unrelated to the aims of apportionment, appellants' evidence at best demonstrates only that the legislature adopted political classifications. That describes no constitutional flaw, at least under the governing Fourteenth Amendment standard. See *Gaffney*, 412 U. S., at 752. As a consequence, appellants' complaint alleges no impermissible use of political classifications and so states no valid claim on which relief may be granted. It must be dismissed as a result. See Fed. Rule Civ. Proc. 12(b)(6); see also *Davis* v. *Bandemer*, 478 U. S., at 134.

The plurality thinks I resolve this case with reference to no standard, see *ante*, at 301, but that is wrong. The Four-

teenth Amendment standard governs; and there is no doubt of that. My analysis only notes that if a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, we could conclude that appellants' evidence states a provable claim under the Fourteenth Amendment standard.

Though in the briefs and at argument the appellants relied on the Equal Protection Clause as the source of their substantive right and as the basis for relief, I note that the complaint in this case also alleged a violation of First Amendment rights. See Amended Complaint ¶ 48; Juris. Statement 145a. The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. See *Elrod* v. *Burns*, 427 U. S. 347 (1976) (plurality opinion). Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. See *id.*, at 362. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000). As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

The plurality suggests there is no place for the First Amendment in this area. See *ante*, at 294. The implication

is that under the First Amendment any and all consideration of political interests in an apportionment would be invalid. *Ibid.* ("Only an equal protection claim is before us in the present case—perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting"). That misrepresents the First Amendment analysis. The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest. Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters.

Where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause. The equal protection analysis puts its emphasis on the permissibility of an enactment's classifications. This works where race is involved since classifying by race is almost never permissible. It presents a more complicated question when the inquiry is whether a generally permissible classification has been used for an impermissible purpose. That question can only be answered in the affirmative by the subsidiary showing that the classification as applied imposes unlawful burdens. The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association. The analysis allows a pragmatic or functional assessment that accords some latitude to the States. See *Eu* v. *San Francisco*

County Democratic Central Comm., 489 U. S. 214 (1989); *Anderson* v. *Celebrezze*, 460 U. S. 780 (1983).

Finally, I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed, the plurality seems to acknowledge it is not. See *ante*, at 292 ("We do not disagree with [the] judgment" that "partisan gerrymanders [are incompatible] with democratic principles"); *ante*, at 293 (noting that it is the case, and that the plurality opinion assumes it to be the case, that "an *excessive* injection of politics [in districting] is *un*lawful"). This is all the more reason to admit the possibility of later suits, while holding just that the parties have failed to prove, under our "well developed and familiar" standard, that these legislative classifications "reflec[t] *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U. S., at 226. That said, courts must be cautious about adopting a standard that turns on whether the partisan interests in the redistricting process were excessive. Excessiveness is not easily determined. Consider these apportionment schemes: In one State, Party X controls the apportionment process and draws the lines so it captures every congressional seat. In three other States, Party Y controls the apportionment process. It is not so blatant or egregious, but proceeds by a more subtle effort, capturing less than all the seats in each State. Still, the total effect of Party Y's effort is to capture more new seats than Party X captured. Party X's gerrymander was more egregious. Party Y's gerrymander was more subtle. In my view, however, each is culpable.

* * *

The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the interests of our political order. Nor should it be thought to serve

our interest in demonstrating to the world how democracy works. Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: "'We are in the business of rigging elections.'" Hoeffel, Six Incumbents Are a Week Away from Easy Election, Winston-Salem Journal, Jan. 27, 1998, p. B1 (quoting a North Carolina state senator).

Still, the Court's own responsibilities require that we refrain from intervention in this instance. The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper. If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief. With these observations, I join the judgment of the Court.

JUSTICE STEVENS, dissenting.

The central question presented by this case is whether political gerrymandering claims are justiciable. Although our reasons for coming to this conclusion differ, five Members of the Court are convinced that the plurality's answer to that question is erroneous. Moreover, as is apparent from our separate writings today, we share the view that, even if these appellants are not entitled to prevail, it would be contrary to precedent and profoundly unwise to foreclose all judicial review of similar claims that might be advanced in the future. That we presently have somewhat differing views—concerning both the precedential value of some of our recent cases and the standard that should be applied in future cases—should not obscure the fact that the areas of agreement set forth in the separate opinions are of far greater significance.

The concept of equal justice under law requires the State to govern impartially. See *Romer* v. *Evans*, 517 U. S. 620, 623 (1996); *Lehr* v. *Robertson*, 463 U. S. 248, 265 (1983); *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 587

(1979). Today's plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and would give license, for the first time, to partisan gerrymanders that are devoid of any rational justification. In my view, when partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.

Although we reaffirm the central holding of the Court in *Davis* v. *Bandemer*, 478 U. S. 109 (1986), we have not reached agreement on the standard that should govern partisan gerrymandering claims. I would decide this case on a narrow ground. Plaintiffs-appellants urge us to craft new rules that in effect would authorize judicial review of statewide election results to protect the democratic process from a transient majority's abuse of its power to define voting districts. I agree with the plurality's refusal to undertake that ambitious project. *Ante*, at 284–290. I am persuaded, however, that the District Court failed to apply well-settled propositions of law when it granted the defendants' motion to dismiss plaintiff-appellant Susan Furey's gerrymandering claim.

According to the complaint, Furey is a registered Democrat who resides at an address in Montgomery County, Pennsylvania, that was located under the 1992 districting plan in Congressional District 13.[1] Under the new plan adopted by the General Assembly in 2002, Furey's address now places her in the "non-compact" District 6.[2] Furey alleges that the new districting plan was created "solely" to effectuate the interests of Republicans,[3] and that the General Assembly relied "exclusively" on a principle of "maximum partisan advantage" when drawing the plan.[4] In my judgment, Furey's

[1] App. to Juris. Statement 129a.
[2] *Ibid.*
[3] *Id.*, at 142a.
[4] *Id.*, at 143a.

allegations are plainly sufficient to establish: (1) that she has standing to challenge the constitutionality of District 6; (2) that her district-specific claim is not foreclosed by the *Bandemer* plurality's rejection of a statewide claim of political gerrymandering; and (3) that she has stated a claim that, at least with respect to District 6, Pennsylvania's redistricting plan violates the equal protection principles enunciated in our voting rights cases both before and after *Bandemer*. The District Court therefore erred when it granted the defendants' motion to dismiss Furey's claim.

I

Prior to our seminal decision in *Baker* v. *Carr*, 369 U. S. 186 (1962), a majority of this Court had heeded Justice Frankfurter's repeated warnings about the dire consequences of entering the "political thicket" of legislative districting. *Colegrove* v. *Green*, 328 U. S. 549, 556 (1946). As a result, even the most egregious gerrymanders were sheltered from judicial review.[5] It was after *Baker* that we first decided that the Constitution prohibits legislators from drawing district lines that diminish the value of individual votes in overpopulated districts. In reaching that conclu-

[5] In *Colegrove*, for example, the Illinois Legislature had drawn the State's district lines under the 1901 State Apportionment Act and had not reapportioned in the four ensuing decades, "despite census figures indicating great changes in the distribution of the population." 328 U. S., at 569 (Black, J., dissenting). The populations of Illinois' districts in 1945 consequently ranged from 112,000 in the least populous district to 900,000 in the most. *Ibid.* Nonetheless, the Court, per Justice Frankfurter, concluded that "due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." *Id.*, at 552. Fewer than 20 years later, the Court, confronted with a strikingly similar set of facts—a Tennessee apportionment plan set by a 1901 statute that had remained virtually unchanged despite dramatic population growth—held, in obvious tension with *Colegrove*, that the complaint stated a justiciable cause of action. *Baker*, 369 U. S., at 192, 197–198. The Court distinguished *Colegrove* as simply "a refusal to exercise equity's powers." 369 U. S., at 235.

sion, we explained that "legislatures . . . should be bodies which are collectively responsive to the popular will," *Reynolds* v. *Sims*, 377 U. S. 533, 565 (1964), and we accordingly described "the basic aim of legislative apportionment" as "achieving . . . fair and effective representation for all citizens," *id.*, at 565–566. Consistent with that goal, we also reviewed claims that the majority had discriminated against particular groups of voters by drawing multimember districts that threatened "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965). Such districts were "vulnerable" to constitutional challenge "if racial or political groups ha[d] been fenced out of the political process and their voting strength invidiously minimized." *Gaffney* v. *Cummings*, 412 U. S. 735, 754 (1973). See also *Whitcomb* v. *Chavis*, 403 U. S. 124, 143 (1971); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966).

Our holding in *Bandemer*, 478 U. S., at 118–127, that partisan gerrymandering claims are justiciable followed ineluctably from the central reasoning in *Baker*, 369 U. S. 186. What was true in *Baker* is no less true in this context:

> "The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with [Pennsylvania] as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply ar-

> bitrary and capricious action." *Id.*, at 226 (footnote omitted).

"[T]hat the [gerrymandering] claim is submitted by a political group, rather than a racial group, does not distinguish [the cases] in terms of justiciability." *Bandemer*, 478 U. S., at 125.

At issue in this case, as the plurality states, *ante*, at 278, is *Baker*'s second test—the presence or absence of judicially manageable standards. The judicial standards applicable to gerrymandering claims are deeply rooted in decisions that long preceded *Bandemer* and have been refined in later cases. Among those well-settled principles is the understanding that a district's peculiar shape might be a symptom of an illicit purpose in the line-drawing process. Most notably, in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 340 (1960), the Court invalidated an Alabama statute that altered the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure" for the sole purpose of preventing African-Americans from voting in municipal elections. The allegations of bizarre shape and improper motive, "if proven, would abundantly [have] establish[ed] that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering." *Id.*, at 341. Justice Fortas' concurring opinion in *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 538 (1969), which referred to gerrymandering as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes," also identified both shape and purpose as relevant standards. The maps attached as exhibits in *Gomillion*, 364 U. S., at 348 (Appendix to opinion of the Court), and in subsequent voting rights cases demonstrate that an "uncouth" or bizarre shape can easily identify a district designed for a single-minded, nonneutral purpose.

With purpose as the ultimate inquiry, other considerations have supplied ready standards for testing the lawfulness of a gerrymander. In his dissent in *Bandemer*, Justice Powell

explained that "the merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting." 478 U. S., at 165. Applying this three-part standard, Justice Powell first reviewed the procedures used in Indiana's redistricting process and noted that the party in power had excluded the opposition from its deliberations and had placed excessive weight on data concerning party voting trends. *Id.*, at 175–176. Second, Justice Powell pointed to the strange shape of districts that conspicuously ignored traditional districting principles. *Id.*, at 176–177. He noted the impact of such shapes on residents of the uncouth districts,[6] and he included in his opinion maps that illustrated the irregularity of the district shapes, *id.*, at 181, 183. Third and finally, Justice Powell reviewed other "substantial evidence," including contemporaneous statements and press accounts, demonstrating that the architects of the districts "were motivated solely by partisan considerations." *Id.*, at 177.

The Court has made use of all three parts of Justice Powell's standard in its recent racial gerrymandering jurisprudence. In those cases, the Court has examined claims that redistricting schemes violate the equal protection guarantee where they are "so highly irregular" on their face that they "rationally cannot be understood as anything other than an effort" to segregate voters by race, *Shaw* v. *Reno*, 509 U. S. 630, 646–647 (1993) *(Shaw I)*, or where "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Miller* v. *Johnson*, 515 U. S. 900, 913 (1995). See

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[6] "'[T]he potential for voter disillusion and nonparticipation is great,' as voters are forced to focus their political activities in artificial electoral units. Intelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose." 478 U. S., at 177 (citation omitted).

also *Easley* v. *Cromartie*, 532 U. S. 234, 241 (2001); *Shaw* v. *Hunt*, 517 U. S. 899, 905 (1996) *(Shaw II)*.[7] The *Shaw* line of cases has emphasized that "reapportionment is one area in which appearances do matter," *Shaw I*, 509 U. S., at 647, and has focused both on the shape of the challenged districts and the purpose behind the line-drawing in assessing the constitutionality of majority-minority districts under the Equal Protection Clause. These decisions, like Justice Powell's opinion in *Bandemer*, have also considered the process by which the districting schemes were enacted,[8] looked to other evidence demonstrating that purely improper considerations motivated the decision,[9] and included maps illustrating outlandish district shapes.[10]

Given this clear line of precedents, I should have thought the question of justiciability in cases such as this—where a set of plaintiffs argues that a single motivation resulted in a districting scheme with discriminatory effects—to be well settled. The plurality's contrary conclusion cannot be

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[7] The reasoning in these decisions followed not only from *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), see *Shaw I*, 509 U. S., at 644–645 (relying on *Gomillion*), but also from Justice Powell's observation in *Davis* v. *Bandemer*, 478 U. S. 109, 173, n. 12 (1986), that "[i]n some cases, proof of grotesque district shapes may, without more, provide convincing proof of unconstitutional gerrymandering."

[8] In *Miller* v. *Johnson*, 515 U. S. 900, 917–919 (1995), the Court reviewed the procedures followed by the Georgia Legislature in responding to the Justice Department's objections to its original plan, and the part that the operator of its "reapportionment computer" played in designing the districts, to support its conclusion "that the legislature subordinated traditional districting principles to race." See also *Bush* v. *Vera*, 517 U. S. 952, 961–962 (1996) (plurality opinion) (discussing use of computer program to manipulate district lines).

[9] In *Shaw II*, 517 U. S. 899, 910 (1996), for instance, the Court considered the fact that certain reports regarding the effects of past discrimination were not before the legislature and therefore could not have played a role in the districting process.

[10] *Hunt* v. *Cromartie*, 526 U. S. 541, 554 (1999); *Bush* v. *Vera*, 517 U. S., at 986 (plurality opinion); *Miller*, 515 U. S., at 928; *Shaw I*, 509 U. S., at 659.

squared with our long history of voting rights decisions. Especially perplexing is the plurality's *ipse dixit* distinction of our racial gerrymandering cases. Notably, the plurality does not argue that the judicially manageable standards that have been used to adjudicate racial gerrymandering claims would not be equally manageable in political gerrymandering cases. Instead, its distinction of those cases rests on its view that race as a districting criterion is "much more rarely encountered" than partisanship, *ante,* at 286, and that determining whether race—"a rare and constitutionally suspect motive"—dominated a districting decision "is quite different from determining whether [such a decision] is so substantially affected by the excess of an ordinary and lawful motive as to [be] invali[d]," *ibid.* But those considerations are wholly irrelevant to the issue of justiciability.

To begin with, the plurality errs in assuming that politics is "an ordinary and lawful motive." We have squarely rejected the notion that a "purpose to discriminate on the basis of politics," *ante,* at 286, 293, is never subject to strict scrutiny. On the contrary, "political belief and association constitute the core of those activities protected by the First Amendment," *Elrod* v. *Burns,* 427 U. S. 347, 356 (1976) (plurality opinion), and discriminatory governmental decisions that burden fundamental First Amendment interests are subject to strict scrutiny, *id.,* at 363; cf. *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 94–95 (1972). Thus, unless party affiliation is an appropriate requirement for the position in question, government officials may not base a decision to hire, promote, transfer, recall, discharge, or retaliate against an employee, or to terminate a contract, on the individual's partisan affiliation or speech. See *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr,* 518 U. S. 668, 674–675 (1996); *O'Hare Truck Service, Inc.* v. *City of Northlake,* 518 U. S. 712, 716–717 (1996); *Rutan* v. *Republican Party of Ill.,* 497 U. S. 62, 64–65 (1990); *Branti* v. *Finkel,* 445 U. S. 507,

519–520 (1980); *Elrod*, 427 U. S., at 355–363.[11] It follows that political affiliation is not an appropriate standard for excluding voters from a congressional district.

The plurality argues that our patronage cases do not support the proposition that strict scrutiny should be applied in political gerrymandering cases because "[i]t is elementary that scrutiny levels are claim specific." *Ante*, at 294. It is also elementary, however, that the level of scrutiny is relevant to the question whether there has been a constitutional violation, not the question of justiciability.[12] The standards outlined above are discernible and judicially manageable regardless of the number of cases in which they must be applied or the level of scrutiny at which the analysis occurs.[13] Thus, the dicta from *Shaw I* and *Bush* v. *Vera*, 517 U. S. 952 (1996), on which the plurality relies, *ante*, at 293–294, are beside the point, because they speak not at all to the subject of justiciability. And while of course a difference exists be-

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[11] The plurality opinion seems to assume that the dissenting opinions in *Umbehr*, 518 U. S., at 686 (SCALIA, J.), and *Rutan*, 497 U. S., at 92 (SCALIA, J.), correctly state the law—namely, that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down," *id.*, at 95. Cf. *ante*, at 274–275 (tracing the history of political gerrymanders to the beginning of the 18th century). But "[o]ur inquiry does not begin with the judgment of history"; "[r]ather, inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice." *Elrod*, 427 U. S., at 354–355.

[12] It goes without saying that a claim that otherwise would trigger strict scrutiny might nonetheless be nonjusticiable. See, *e. g.*, *Allen* v. *Wright*, 468 U. S. 737 (1984); *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974) *(per curiam)*.

[13] The plurality explains that it is willing to "accep[t] a modest degree of unmanageability" where the "constitutional command . . . is clear," but not where the "constitutional obligation . . . is both dubious and severely unmanageable." *Ante*, at 286. Not only does this statement cast doubt on the plurality's faith in our racial gerrymandering cases, but its reasoning is clearly tautological.

tween the constitutional interests protected by the First and Fourteenth Amendments, the relevant lesson of the patronage cases is that partisanship is not always as benign a consideration as the plurality appears to assume. In any event, as I understand the plurality's opinion, it seems to agree that if the State goes "too far"—if it engages in "political gerrymandering for politics' sake"—it violates the Constitution in the same way as if it undertakes "racial gerrymandering for race's sake." *Ante*, at 293. But that sort of constitutional violation cannot be touched by the courts, the plurality maintains, because the judicial obligation to intervene is "dubious." *Ante*, at 286.[14]

State action that discriminates against a political minority for the sole and unadorned purpose of maximizing the power of the majority plainly violates the decisionmaker's duty to remain impartial. See, *e. g.*, *Lehr*, 463 U. S., at 265. Gerrymanders necessarily rest on legislators' predictions that "members of certain identifiable groups . . . will vote in the same way." *Mobile* v. *Bolden*, 446 U. S. 55, 87 (1980) (STEVENS, J., concurring in judgment). "In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders." *Id.*, at 88. Thus, the critical issue in both racial and political gerrymandering cases is the same: whether a single nonneutral criterion controlled the districting process to such an extent that the Constitution was offended. This Court has treated that precise question as justiciable in *Gomillion* and in the *Shaw* line of cases, and today's plurality has supplied no persuasive reason

[14] The plurality's reluctance to recognize the justiciability of partisan gerrymanders seems driven in part by a fear that recognizing such claims will give rise to a flood of litigation. See *ante*, at 286. But the list of cases that it cites in its lengthy footnote 6, *ante*, at 280, suggests that in the two decades since *Bandemer*, there has been an average of just three or four partisan gerrymandering cases filed every year. That volume is obviously trivial when compared, for example, to the amount of litigation that followed our adoption of the "one-person, one-vote" rule. See *Reynolds* v. *Sims*, 377 U. S. 533 (1964).

for distinguishing the justiciability of partisan gerrymanders. Those cases confirm and reinforce the holding that partisan gerrymandering claims are justiciable.[15]

II

The plurality opinion in *Bandemer* dealt with a claim that the Indiana apportionment scheme for state legislative districts discriminated against Democratic voters on a statewide basis. 478 U. S., at 127. In my judgment, the *Bandemer* Court was correct to entertain that statewide challenge, because the plaintiffs in that case alleged a group harm that affected members of their party throughout the State. In the subsequent line of racial gerrymandering cases, however, the Court shifted its focus from statewide challenges and required, as a matter of standing, that plaintiffs stating race-based equal protection claims actually reside in the districts they are challenging. See *United States* v. *Hays*, 515 U. S. 737, 745 (1995). Because *Hays* has altered the standing rules for gerrymandering claims—and because, in my view, racial and political gerrymanders are species of the same constitutional concern—the *Hays* standing rule requires dismissal of the statewide claim.[16] But that does not

[15] Writing for the Court in *Bandemer*, Justice White put it well: "That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case." 478 U. S., at 125.

[16] The cases that the plurality cites today, *ante*, at 280, n. 6, support the conclusion that it would have been wise to endorse the views expressed in Justice Powell's dissent in *Bandemer*, 478 U. S., at 161, and my concurrence in *Karcher* v. *Daggett*, 462 U. S. 725, 744 (1983). I remain convinced that our opinions correctly interpreted the law. If that standard were applied to the statewide challenge in this case, a trial of the entire case would be required. For the purpose of deciding this case, even though I dissented from our decision in *Shaw I* and remain convinced that it was incorrectly decided, I would give the *Shaw* cases *stare decisis* effect in the political gerrymandering context. Given the Court's illogical disposition of this case, however, in future cases I would feel free to reexamine the

end the matter. Challenges to specific districts, such as those considered in the *Shaw* cases, relate to a different type of "representational" harm, and those allegations necessarily must be considered on a district-by-district basis. The complaint in this case alleges injuries of both types—a group harm to Democratic voters throughout Pennsylvania and a more individualized representational injury to Furey as a resident of District 6.

In a challenge to a statewide districting plan, plaintiffs-appellants complain that they have been injured because of their membership in a particular, identifiable group. The plaintiffs-appellees in *Bandemer*, for example, alleged "that Democratic voters over the State as a whole, not Democratic voters in particular districts, ha[d] been subjected to unconstitutional discrimination." 478 U. S., at 127 (citing complaint). They specifically claimed that they were injured as members of a group because the number of Democratic representatives was not commensurate with the number of Democratic voters throughout Indiana. Much like the plaintiffs-appellees in *Bandemer*, plaintiffs-appellants in this case allege that the statewide plan will enable Republicans, who constitute about half of Pennsylvania's voters, to elect 13 or 14 members of the State's 19-person congressional delegation.[17] Under *Hays*, however, plaintiffs-appellants lack standing to challenge the districting plan on a statewide basis. 515 U. S., at 744–745.[18]

A challenge to a specific district or districts, on the other hand, alleges a different type of injury entirely—one that

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standing issue. I surely would not suggest that a plaintiff would never have standing to litigate a statewide claim.

[17] App. to Juris. Statement 138a.

[18] As the Court explained in *Hays*, "[v]oters in [gerrymandered] districts may suffer the special representational harms [that constitutionally suspect] classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms . . . ." 515 U. S., at 745.

our recent racial gerrymandering cases have recognized as cognizable.[19] In *Shaw I* we held that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." 509 U. S., at 649. After describing the pernicious consequences of race-conscious districting—even when designed to enhance the representation of the minority—and after explaining why dramatically irregular shapes "'have sufficient probative force to call for an explanation,'" *id.*, at 647 (quoting *Karcher* v. *Daggett*, 462 U. S. 725, 755 (1983) (STEVENS, J., concurring)), we described the message a misshapen district sends to elected officials:

> "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy." *Shaw I*, 509 U. S., at 648.

Undergirding the *Shaw* cases is the premise that racial gerrymanders effect a constitutional wrong when they disrupt the representational norms that ordinarily tether elected officials to their constituencies as a whole.

"[L]egislatures," we have explained, "should be bodies which are collectively responsive to the popular will," *Reynolds*, 377 U. S., at 565, for "[l]egislators are elected by voters,

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[19] The plurality in *Bandemer*, 478 U. S., at 127, itself acknowledged that "the focus of the equal protection inquiry" in a statewide challenge "is necessarily somewhat different from that involved in the review of individual districts."

not farms or cities or economic interests," *id.*, at 562.[20] Gerrymanders subvert that representative norm because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles. The *Shaw* cases hold that this disruption of the representative process imposes a cognizable "representational har[m]." *Hays*, 515 U. S., at 745. Because that harm falls squarely on the voters in the district whose representative might or does misperceive the object of her fealty, the injury is cognizable only when stated by voters who reside in that particular district, see *Shaw II*, 517 U. S., at 904; otherwise the "plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve," *Hays*, 515 U. S., at 745. See also *Bush* v. *Vera*, 517 U. S., at 957–958 (plurality opinion).

Although the complaint in this case includes a statewide challenge, plaintiff-appellant Furey states a stronger claim as a resident of the misshapen District 6.[21] She complains not merely about the injury resulting from the probable election of a congressional delegation that does not fairly repre-

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[20] Cf. *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 153 (2003) ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder").

[21] Plaintiffs-appellants Richard and Norma Jean Vieth are registered Democrats who reside in District 16. App. to Juris. Statement 129a. The complaint does not claim that they resided in a different district under the old districting scheme, nor does it anywhere allege, as it does on Furey's behalf, that District 16 in particular is irregularly shaped. A glance at the appended map, *infra*, reveals that District 16 is not especially unusual in its contours. Without more specific allegations regarding District 16, I would limit the analysis to District 6.

sent the entire State, or about the harm flowing from the probable election of a Republican to represent District 6.[22] She also alleges that the grotesque configuration of that district itself imposes a special harm on the members of the political minority residing in District 6 that directly parallels the harm recognized in *Shaw I*. Officials elected by the majority party in such a district, she claims, "are more likely to believe that their primary obligation is to represent only the members of that group, rather than the constituency as a whole."[23] This is precisely the harm that the *Shaw* cases treat as cognizable in the context of racial gerrymandering. The same treatment is warranted in this case.

The risk of representational harms identified in the *Shaw* cases is equally great, if not greater, in the context of partisan gerrymanders. *Shaw I* was borne of the concern that an official elected from a racially gerrymandered district will feel beholden only to a portion of her constituents, and that those constituents will be defined by race. 509 U. S., at 648. The parallel danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all.[24] The problem, simply put, is that the will of the cartographers rather than the will of the people will govern.[25] As Judge

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[22] When her residence was located in District 13, Furey was represented by a Democrat. App. 261.

[23] App. to Juris. Statement 142a.

[24] "[A]mple evidence demonstrates that many of today's congressional representatives owe their election not to 'the People of the several states' but to the mercy of state legislatures." Note, 117 Harv. L. Rev. 1196, 1202 (2004).

[25] In this sense the partisan gerrymander is the American cousin of the English "rotten borough." In the English system, Members of Parliament were elected from geographic units that remained unchanged despite population changes wrought by the Industrial Revolution. "Because rep-

Ward recently wrote, "extreme partisan gerrymandering leads to a system in which the representatives choose their constituents, rather than vice-versa." *Session* v. *Perry*, 298 F. Supp. 2d 451, 516 (ED Tex. 2004) *(per curiam)* (concurring in part and dissenting in part).

III

Elected officials in some sense serve two masters: the constituents who elected them and the political sponsors who support them. Their primary obligations are, of course, to the public in general, but it is neither realistic nor fair to expect them wholly to ignore the political consequences of their decisions. "It would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U. S., at 752. Political factors are common and permissible elements of the art of governing a democratic society.

But while political considerations may properly influence the decisions of our elected officials, when such decisions dis-

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resentation was not based on population, vast inequities developed over time in the form of the so-called rotten boroughs. Old Sarum, for instance, had no human residents—only a few sheep—yet sent the same number of representatives to Parliament as Yorkshire, with nearly a million inhabitants." R. Zagarri, The Politics of Size: Representation in the United States, 1776–1850, p. 37 (1987). As a result of this system, "many insignificant places returned members, while many important towns did not," and "even in large towns the members were often elected by a tiny fraction of the population." J. Butler, The Passing of the Great Reform Bill 176 (1914). Meanwhile, "[t]he Government bribed the patron or member or both by means of distinctions and offices or by actual cash," and "[t]he patron and member bribed the electors in the same way." *Ibid.* The rotten boroughs clearly would violate our familiar one-person, one-vote rule, but they were also troubling because the representative of such a borough owed his primary loyalty to his patron and the government rather than to his constituents (if he had any). Similarly, in gerrymandered districts, instead of local groups defined by neutral criteria selecting their representatives, it is the architects of the districts who select the constituencies and, in effect, the representatives.

advantage members of a minority group—whether the minority is defined by its members' race, religion, or political affiliation—they must rest on a neutral predicate. See *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100 (1976) ("The federal sovereign, like the States, must govern impartially"); *Bandemer*, 478 U. S., at 166 (Powell, J., dissenting). The Constitution enforces "a commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 517 U. S., at 623. See also *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 375 (2001) (KENNEDY, J., concurring) ("States act as neutral entities, ready to take instruction and to enact laws when their citizens so demand"). Thus, the Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose.[26]

In evaluating a claim that a governmental decision violates the Equal Protection Clause, we have long required a showing of discriminatory purpose. See *Washington* v. *Davis*,

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[26] In the realm of federal elections, the requirement of governmental neutrality is buttressed by this Court's recognition that the Elections Clause is not "'a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.'" *Cook* v. *Gralike*, 531 U. S. 510, 523 (2001) (quoting *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 833–834 (1995)). And this duty to govern impartially extends to executive and legislative officials alike. Beginning as early as its first session in 1789, Congress has passed a number of statutes designed to guarantee that Executive Branch employees neutrally carry out their duties. See *Ex parte Curtis*, 106 U. S. 371, 372–373 (1882). Some of those laws avoided the danger that "the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage." *Id.*, at 375. It is "fundamental" that federal employees "are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 564–565 (1973). That expectation reflects the principle that "the impartial execution of the laws" is a "great end of Government." *Id.*, at 565.

426 U. S. 229 (1976).[27] That requirement applies with full force to districting decisions. The line that divides a racial or ethnic minority unevenly between school districts can be entirely legitimate if chosen on the basis of neutral factors—county lines, for example, or a natural boundary such as a river or major thoroughfare. But if the district lines were chosen for the purpose of limiting the number of minority students in the school, or the number of families holding unpopular religious or political views, that invidious purpose surely would invalidate the district. See *Gomillion* v. *Lightfoot*, 364 U. S., at 344–345; cf. *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 699–700 (1994).

Consistent with that principle, our recent racial gerrymandering cases have examined the shape of the district and the purpose of the districting body to determine whether race, above all other criteria, predominated in the line-drawing process. We began by holding in *Shaw I* that a districting scheme could be "so irrational on its face that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race." 509 U. S., at 658. Then, in *Miller*, we explained that *Shaw I*'s irrational-shape test did not treat the bizarreness of a district's lines itself as a constitutional violation; rather, the irregularity of the district's contours in *Shaw I* was "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." 515 U. S., at

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[27] In *Washington* v. *Davis*, we referred to an earlier challenge to a New York reapportionment statute that had failed because the plaintiffs had not shown that the statute was "'the product of a state contrivance to segregate on the basis of race or place of origin.'" 426 U. S., at 240 (quoting *Wright* v. *Rockefeller*, 376 U. S. 52, 58 (1964)). We emphasized that the Court in *Wright* had been unanimous in identifying the issue as "whether the 'boundaries . . . were purposefully drawn on racial lines.'" 426 U. S., at 240 (quoting *Wright*, 376 U. S., at 67).

913. Under the *Shaw* cases, then, the use of race as a criterion in redistricting is not *per se* impermissible, see *Shaw I*, 509 U. S., at 642; *Shaw II*, 517 U. S. 899, but when race is elevated to paramount status—when it is the be-all and end-all of the redistricting process—the legislature has gone too far. "Race must not simply have been *a* motivation . . . but the *predominant* factor motivating the legislature's districting decision." *Easley*, 532 U. S., at 241 (internal quotation marks and citations omitted).

Just as irrational shape can serve as an objective indicator of an impermissible legislative purpose, other objective features of a districting map can save the plan from invalidation. We have explained that "traditional districting principles," which include "compactness, contiguity, and respect for political subdivisions," are "important not because they are constitutionally required . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw I*, 509 U. S., at 647 (citing *Gaffney*, 412 U. S., at 752, n. 18; *Karcher*, 462 U. S., at 755 (STEVENS, J., concurring)). "Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines.'" *Miller*, 515 U. S., at 916 (quoting *Shaw I*, 509 U. S., at 647).

In my view, the same standards should apply to claims of political gerrymandering, for the essence of a gerrymander is the same regardless of whether the group is identified as political or racial. Gerrymandering always involves the drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of one or more groups of opponents. *Mobile*, 446 U. S., at 87 (STEVENS, J., concurring in judgment). In seeking the desired result, legislators necessarily make judgments about the probability that the members of identifiable

groups—whether economic, religious, ethnic, or racial—will vote in a certain way. The overriding purpose of those predictions is political. See *Karcher*, 462 U. S., at 749–750 (STEVENS, J., concurring); *Mobile*, 446 U. S., at 88 (STEVENS, J., concurring in judgment).[28] It follows that the standards that enable courts to identify and redress a racial gerrymander could also perform the same function for other species of gerrymanders. See *Bandemer*, 478 U. S., at 125; *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 853 (CA7 1972) (Stevens, J., dissenting).

The racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great of a role in the districting process. Just as race can be a factor in, but cannot dictate the outcome of, the districting process, so too can partisanship be a permissible consideration in drawing district lines, so long as it does not predominate. If, as plaintiff-appellant Furey has alleged, the predominant motive of the legislators who designed District 6, and the sole justification for its bizarre shape, was a purpose to discriminate against a political minority, that invidious purpose should invalidate the district.

The plurality reasons that the standards for evaluating racial gerrymanders are not workable in cases such as this because partisan considerations, unlike racial ones, are perfectly legitimate. *Ante*, at 285–286. Until today, however, there has not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose

[28] I have elsewhere explained my view that race as a factor in the districting process is no different from any other political consideration. Creating a majority-minority district is no better and no worse than creating an Irish-American, or Polish-American, or Italian-American district. In all events the relevant question is whether the sovereign abrogated its obligation to govern neutrally. See *Karcher*, 462 U. S., at 753–754 (STEVENS, J., concurring); *Mobile*, 446 U. S., at 88 (STEVENS, J., concurring in judgment); *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 850–853 (CA7 1972) (Stevens, J., dissenting).

to disadvantage a political minority would provide a rational basis for drawing a district line.[29] On the contrary, our opinions referring to political gerrymanders have consistently assumed that they were at least undesirable, and we always have indicated that political considerations are among those factors that may not dominate districting decisions.[30] Purely partisan motives are "rational" in a literal sense, but there must be a limiting principle. "[T]he word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 452 (1985) (STEVENS, J., concurring). A legislature controlled by one party could not, for instance, impose special taxes on members of the minority party, or use tax revenues to pay the majority party's campaign expenses. The rational basis for government decisions must satisfy a standard of legitimacy and

[29] The plurality's long discussion of the history of political gerrymanders is interesting, *ante*, at 274–277, but it surely is not intended to suggest that the vintage of an invidious practice—even "an American political tradition as old as the Republic," *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 688 (1996) (SCALIA, J., dissenting)—should insulate it from constitutional review. Compare, *e. g.*, *Bradwell* v. *State*, 16 Wall. 130 (1873), with *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 729 (2003). The historical discussion might be relevant if it attempted to justify political gerrymandering as an acceptable use of governmental power. In the end, however, the plurality's defense of its position comes down to the unconvincing assertion that it lacks the juridical capacity to administer the standards the Court fashioned in its recent racial gerrymandering jurisprudence.

[30] *Bandemer*, 478 U. S. 109 (plurality opinion); *Gaffney* v. *Cummings*, 412 U. S. 735, 754 (1973); *Whitcomb* v. *Chavis*, 403 U. S. 124, 143 (1971); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965). Consistent with these statements, the District Court in a recent case correctly described political gerrymandering as "a purely partisan exercise" and "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." App. to Juris. Statement in *Balderas* v. *Texas*, O. T. 2001, No. 01–1196, p. 10.

neutrality; an acceptable rational basis can be neither purely personal nor purely partisan. See *id.*, at 452–453.

The Constitution does not, of course, require proportional representation of racial, ethnic, or political groups. In that I agree with the plurality. *Ante*, at 288. We have held, however, that proportional representation of political groups is a permissible objective, *Gaffney*, 412 U. S., at 754, and some of us have expressed the opinion that a majority's decision to enhance the representation of a racial minority is equally permissible, particularly when the decision is designed to comply with the Voting Rights Act of 1965.[31] Thus, the view that the plurality implicitly embraces today—that a gerrymander contrived for the sole purpose of disadvantaging a political minority is less objectionable than one seeking to benefit a racial minority—is doubly flawed. It disregards the obvious distinction between an invidious and a benign purpose, and it mistakenly assumes that race cannot provide a legitimate basis for making political judgments.[32]

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[31] See *Shaw II*, 517 U. S., at 918 (STEVENS, J., dissenting); *Bush* v. *Vera*, 517 U. S., at 1033–1034 (STEVENS, J., dissenting); *Miller*, 515 U. S., at 947–948 (GINSBURG, J., dissenting).

[32] Because race so seldom provides a rational basis for a governmental decision, racial classifications almost always fail to survive "rational basis" scrutiny. But "[n]ot every decision influenced by race is equally objectionable." *Grutter* v. *Bollinger*, 539 U. S. 306, 327 (2003). When race is used as the basis for making predictive political judgments, it may be as reliable (or unreliable) as other group characteristics, such as political affiliation, economic status, or national origin. The fact that race is an immutable characteristic does not mean that there is anything immutable or certain about the political behavior of the members of any racial class. See *Mobile* v. *Bolden*, 446 U. S. 55, 88 (1980) (STEVENS, J., concurring in judgment). Registered Republicans of all races sometimes vote for Democratic candidates, and vice versa.

The plurality asserts that a person's politics, unlike her race, is not readily "discernible." *Ante*, at 287. But that assertion is belied by the evidence that the architects of political gerrymanders seem to have no difficulty in discerning the voters' political affiliation. After all, eligibility to vote in primary elections often requires the citizen to register her party affiliation, but it never requires her to register her race.

In sum, in evaluating a challenge to a specific district, I would apply the standard set forth in the *Shaw* cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles.[33] Under my analysis, if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge. Such a narrow test would cover only a few meritorious claims, but it would preclude extreme abuses, such as those disclosed by the record in *Badham* v. *Eu*, 694 F. Supp. 664 (ND Cal. 1988), summarily aff'd, 488 U. S. 1024 (1989),[34] and it would perhaps shorten the time period in which the pernicious effects of such a gerrymander are felt. This test would mitigate the current trend under which partisan considerations are becoming the be-all and end-all in apportioning representatives.

IV

Plaintiff-appellant Furey plainly has stated a claim that District 6 constitutes an unconstitutional partisan gerrymander. According to the complaint, Pennsylvania's 2002 redistricting plan splits "Montgomery County alone . . . into six

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[33] The one-person, one-vote rule obviously constitutes a neutral districting criterion, but our gerrymandering cases have never cited that principle as one of the traditional criteria "that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw I*, 509 U. S., at 647. Thus, I would require that a district be justified with reference to both the one-person, one-vote rule and some other neutral criterion. See *Bandemer*, 478 U. S., at 162, 168 (Powell, J., concurring in part and dissenting in part).

[34] The California districting scheme at issue in *Badham* featured a large number of districts with highly irregular shapes, all designed, the plaintiffs-appellants alleged, to dilute Republican voting strength throughout the State. See Juris. Statement in *Badham* v. *Eu*, O. T. 1987, No. 87–1818, Exh. D, p. 77a. Three Members of this Court dissented from the summary affirmance in *Badham* and would have noted probable jurisdiction. 488 U. S. 1024 (1989).

different congressional districts."[35] The new District 6 "looms like a dragon descending on Philadelphia from the west, splitting up towns and communities throughout Montgomery and Berks Counties."[36] Furey alleges that the districting plan was created "solely to effectuate the interests" of Republicans,[37] and that the General Assembly relied "exclusively on a principle of maximum partisan advantage" when drawing the plan,[38] "to the exclusion of all other criteria."[39] The 2002 plan "is so irregular on its face that it rationally can be viewed only as an effort . . . to advance the interests of one political party, without regard for traditional redistricting principles and without any legitimate or compelling justification."[40] "The problem," Furey claims, is that the legislature "subordinated—indeed ignored—all traditional redistricting principles and all legitimate bases for governmental decisionmaking, in order to favor those with one political viewpoint over another."[41] The plan "ignores all other traditional redistricting criteria," she alleges, "thus demonstrating that partisanship—and nothing else—was the rationale behind the plan."[42] Because this complaint states a claim under a judicially manageable standard for adjudicating partisan gerrymandering cases, I would reverse the judgment of the District Court and remand for further proceedings consistent with this opinion.

The plurality candidly acknowledges that legislatures can fashion standards to remedy political gerrymandering that are perfectly manageable and, indeed, that the legislatures in Iowa and elsewhere have done so. *Ante*, at 277, n. 4. If

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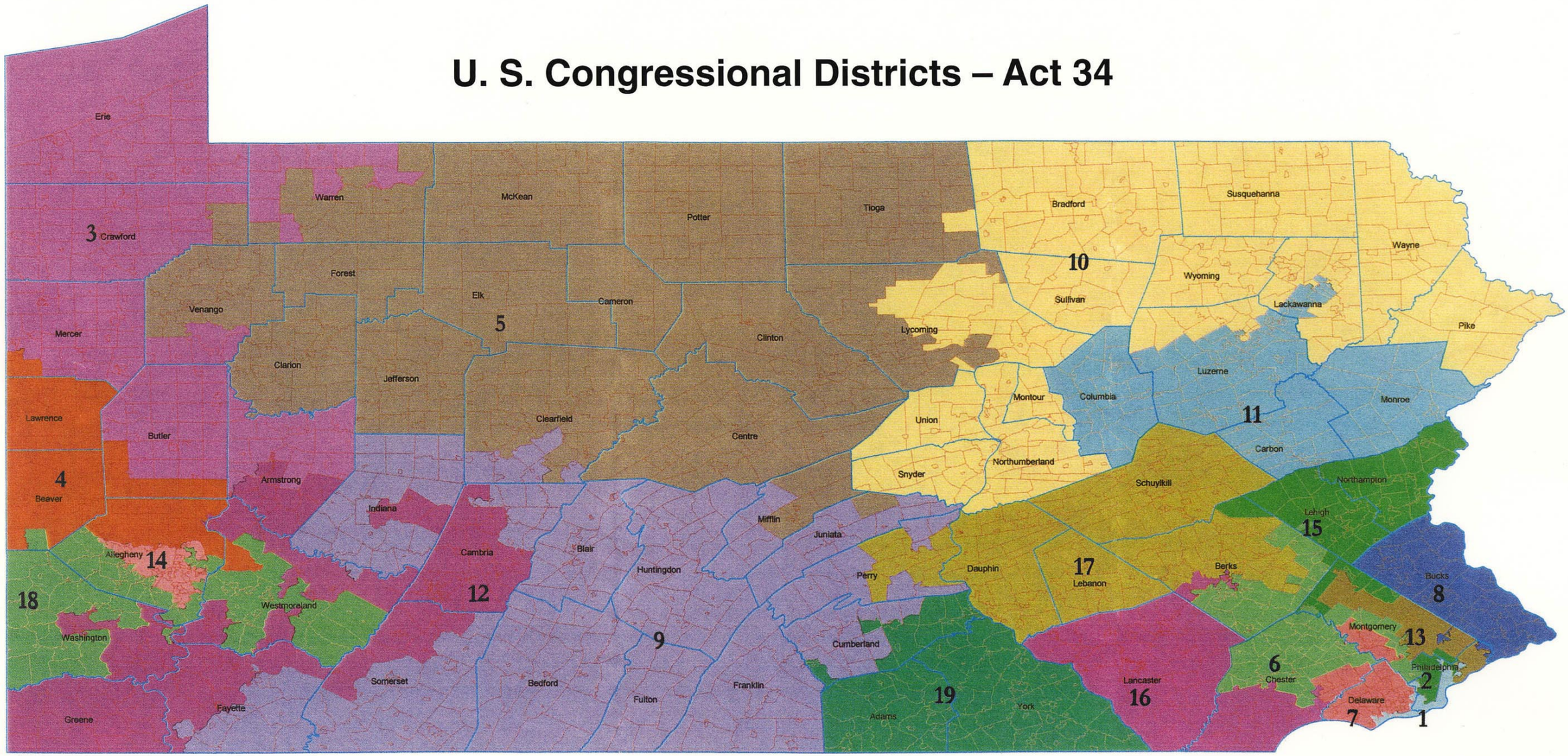
[35] App. to Juris. Statement 135a.
[36] *Id.*, at 136a.
[37] *Id.*, at 142a.
[38] *Id.*, at 143a.
[39] *Id.*, at 140a.
[40] *Id.*, at 143a.
[41] *Ibid.*
[42] *Id.*, at 135a.

a violation of the Constitution is found, a court could impose a remedy patterned after such a statute. Thus, the problem, in the plurality's view, is not that there is no judicially manageable standard to fix an unconstitutional partisan gerrymander, but rather that the Judiciary lacks the ability to determine when a state legislature has violated its duty to govern impartially.

Quite obviously, however, several standards for identifying impermissible partisan influence are available to judges who have the will to enforce them. We could hold that every district boundary must have a neutral justification; we could apply Justice Powell's three-factor approach in *Bandemer;* we could apply the predominant motivation standard fashioned by the Court in its racial gerrymandering cases; or we could endorse either of the approaches advocated today by JUSTICE SOUTER and JUSTICE BREYER. What is clear is that it is not the unavailability of judicially manageable standards that drives today's decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially.

Accordingly, I respectfully dissent.

[Appendix to opinion of STEVENS, J., follows this page.]


U. S. Congressional Districts – Act 34
Erie
3
Crawford
Warren
McKean
Potter
Tioga
Bradford
Susquehanna
Wayne
10
Wyoming
Sullivan
Lackawanna
Pike
Forest
Elk
5
Cameron
Venango
Mercer
Clinton
Lycoming
Clarion
Jefferson
Luzerne
Montour
Columbia
Monroe
11
Lawrence
Butler
Clearfield
Centre
Union
Carbon
4
Beaver
Armstrong
Snyder
Northumberland
Schuylkill
Northampton
Lehigh
15
Indiana
Mifflin
Juniata
Allegheny
14
Cambria
Blair
Huntingdon
Perry
Dauphin
17
Lebanon
Berks
Bucks
8
18
12
Montgomery
13
Westmoreland
Washington
9
Cumberland
6
Chester
Philadelphia
2
Somerset
Bedford
Franklin
Lancaster
16
Fulton
19
York
Delaware
7
1
Fayette
Greene
Adams

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

The Constitution guarantees both formal and substantial equality among voters. For 40 years, we have recognized that lines dividing a State into voting districts must produce divisions with equal populations: one person, one vote. *Reynolds* v. *Sims*, 377 U. S. 533, 568 (1964). Otherwise, a vote in a less populous district than others carries more clout.

Creating unequally populous districts is not, however, the only way to skew political results by setting district lines. The choice to draw a district line one way, not another, always carries some consequence for politics, save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity. The spectrum of opportunity runs from cracking a group into impotent fractions, to packing its members into one district for the sake of marginalizing them in another. However equal districts may be in population as a formal matter, the consequence of a vote cast can be minimized or maximized, *Karcher* v. *Daggett*, 462 U. S. 725, 734, n. 6 (1983), and if unfairness is sufficiently demonstrable, the guarantee of equal protection condemns it as a denial of substantial equality. *Davis* v. *Bandemer*, 478 U. S. 109, 129–134 (1986) (plurality opinion).

I

The notion of fairness assumed to be denied in these cases has been described as "each political group in a State [having] the same chance to elect representatives of its choice as any other political group," *id.*, at 124, and as a "right to 'fair and effective representation,'" *id.*, at 162 (Powell, J., concurring in part and dissenting in part). Cf. *Wells* v. *Rockefeller*, 394 U. S. 542, 551 (1969) (Harlan, J., dissenting) (describing the need for "a structure which will in fact as well as theory be responsive to the sentiments of the community"). It is undeniable that political sophisticates understand such

fairness and how to go about destroying it, see App. to Juris. Statement 134a, although it cannot possibly be described with the hard edge of one person, one vote. The difficulty has been to translate these notions of fairness into workable criteria, as distinct from mere opportunities for reviewing courts to make episodic judgments that things have gone too far, the sources of difficulty being in the facts that some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent. *Wells*, *supra*, at 554–555 (White, J., dissenting) ("In reality, of course, districting is itself a gerrymandering in the sense that it represents a complex blend of political, economic, regional, and historical considerations"). Thus, the issue is one of how much is too much, and we can be no more exact in stating a verbal test for too much partisanship than we can be in defining too much race consciousness when some is inevitable and legitimate. See *Bush* v. *Vera*, 517 U. S. 952, 1057–1062 (1996) (SOUTER, J., dissenting). Instead of coming up with a verbal formula for too much, then, the Court's job must be to identify clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness.

The plurality says, in effect, that courts have been trying to devise practical criteria for political gerrymandering for nearly 20 years, without being any closer to something workable than we were when *Davis* was decided. *Ante*, at 281.[1] While this is true enough, I do not accept it as sound counsel of despair. For I take it that the principal reason we have not gone from theoretical justiciability to practical administrability in political gerrymandering cases is the *Davis* plurality's specification that any criterion of forbidden gerrymandering must require a showing that members of the plaintiff's group had "essentially been shut out of the political process," 478 U. S., at 139. See, *e. g.*, *Badham* v. *Eu*, 694

[1] And the plurality says the dissenters labor still in vain today, *ante*, at 292; I join in JUSTICE BREYER's response, *post*, at 368.

F. Supp. 664, 670–671 (ND Cal. 1988) (three-judge court). That is, in order to avoid a threshold for relief so low that almost any electoral defeat (let alone failure to achieve proportionate results) would support a gerrymandering claim, the *Davis* plurality required a demonstration of such pervasive devaluation over such a period of time as to raise real doubt that a case could ever be made out. *Davis* suggested that plaintiffs might need to show even that their efforts to deliberate, register, and vote had been impeded. 478 U. S., at 133. This standard, which it is difficult to imagine a major party meeting, combined a very demanding burden with significant vagueness; and if appellants have not been able to propose a practical test for a *Davis* violation, the fault belongs less to them than to our predecessors. As Judge Higginbotham recently put it, "[i]t is now painfully clear that Justice Powell's concern that *[Davis]* offered a '"constitutional green light" to would-be gerrymanderers' has been realized." *Session* v. *Perry*, 298 F. Supp. 2d 451, 474 (ED Tex. 2004) *(per curiam)* (footnote omitted) (quoting *Davis*, *supra*, at 173 (Powell, J., concurring in part and dissenting in part)).

II

Since this Court has created the problem no one else has been able to solve, it is up to us to make a fresh start. There are a good many voices saying it is high time that we did, for in the years since *Davis*, the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine. *E. g.*, Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593, 624 (2002) (The "pattern of incumbent entrenchment has gotten worse as the computer technology for more exquisite gerrymandering has improved"); Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L. Rev. 731, 736 (1998) ("Finer-grained census data, better predictive methods, and more powerful computers allow for increasingly sophisticated equipopulous gerryman-

ders"); Pildes, Principled Limitations on Racial and Partisan Redistricting, 106 Yale L. J. 2505, 2553–2554 (1997) ("Recent cases now document in microscopic detail the astonishing precision with which redistricters can carve up individual precincts and distribute them between districts with confidence concerning the racial and partisan consequences"). See also Morrill, A Geographer's Perspective, in Political Gerrymandering and the Courts 213–214 (B. Grofman ed. 1990) (noting that gerrymandering can produce "high proportions of very safe seats"); Brief for Bernard Grofman et al. as *Amici Curiae* 5–8 (decline of competitive seats). Cf. *Wells*, 394 U. S., at 551 (Harlan, J., dissenting) ("A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues").

I would therefore preserve *Davis*'s holding that political gerrymandering is a justiciable issue, but otherwise start anew. I would adopt a political gerrymandering test analogous to the summary judgment standard crafted in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), calling for a plaintiff to satisfy elements of a prima facie cause of action, at which point the State would have the opportunity not only to rebut the evidence supporting the plaintiff's case, but to offer an affirmative justification for the districting choices, even assuming the proof of the plaintiff's allegations. My own judgment is that we would have better luck at devising a workable prima facie case if we concentrated as much as possible on suspect characteristics of individual districts instead of statewide patterns. It is not that a statewide view of districting is somehow less important; the usual point of gerrymandering, after all, is to control the greatest number of seats overall. But, as will be seen, we would be able to call more readily on some existing law when we defined what is suspect at the district level, and for now I would conceive of a statewide challenge as itself a function of claims that individual districts are illegitimately drawn. Finally, in the same interest of threshold simplicity, I would stick to prob-

lems of single-member districts; if we could not devise a workable scheme for dealing with claims about these, we would have to forget the complications posed by multimember districts.

III

A

For a claim based on a specific single-member district, I would require the plaintiff to make out a prima facie case with five elements. First, the resident plaintiff would identify a cohesive political group to which he belonged, which would normally be a major party, as in this case and in *Davis*. There is no reason in principle, however, to rule out a claimant from a minor political party (which might, if it showed strength, become the target of vigorous hostility from one or both major parties in a State) or from a different but politically coherent group whose members engaged in bloc voting, as a large labor union might do. The point is that it must make sense to speak of a candidate of the group's choice, easy to do in the case of a large or small political party, though more difficult when the organization is not defined by politics as such.[2]

Second, a plaintiff would need to show that the district of his residence, see *United States* v. *Hays*, 515 U. S. 737 (1995) (requiring residence in a challenged district for standing),

[2] The plurality says it would not be easy to define such a group, because "a person's politics is rarely as readily discernible—and *never* as permanently discernible—as a person's race," *ante*, at 287. But anytime political gerrymandering has been shown to occur, evidence must at least imply that the defendants themselves sat down, identified the relevant groups, and set out to concentrate the vote of one and dilute that of the others. If a plaintiff has the evidence, a court can figure out what was going on. In major-party cases I do not see any problem with permitting a plaintiff to allege that he is a registered Republican, for example, and that the state legislature set out through gerrymandering to minimize the number of Republicans elected. If references to registration will not serve, a plaintiff will need to show the criteria for partisan affiliation employed by the defendants in the challenged districting process.

paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains. Because such considerations are already relevant to justifying small deviations from absolute population equality, *Karcher*, 462 U. S., at 740, and because compactness in particular is relevant to demonstrating possible majority-minority districts under the Voting Rights Act of 1965, *Johnson* v. *De Grandy*, 512 U. S. 997, 1008 (1994), there is no doubt that a test relying on these standards would fall within judicial competence.

Indeed, although compactness is at first blush the least likely of these principles to yield precision, it can be measured quantitatively in terms of dispersion, perimeter, and population ratios, and the development of standards would thus be possible. See generally Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993); see also *Bush* v. *Vera*, 517 U. S., at 1057 (SOUTER, J., dissenting) (suggesting that such measuring formulas might have been applied to salvage *Shaw* v. *Reno*, 509 U. S. 630 (1993)).[3] It is not necessary now to say exactly

[3] Those measures, as defined by Professors Pildes and Niemi, include *dispersion*, the ratio of the area of the district to the area of the smallest circle that circumscribes the district, 92 Mich. L. Rev., at 554–555; *perimeter*, the ratio of the area of the district to the area of the circle whose diameter equals the length of the area's perimeter, *id.*, at 555–556; and *population*, the ratio of the district's population to the population contained by the minimum convex figure that encloses the district (or "rubber-band" area), *id.*, at 556–557, and n. 206. The population measure can also be taken using the district's circumscribing circle in the denominator. *Id.*, at 557. See also Polsby & Popper, The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering, 9 Yale L. & Pol'y Rev. 301, 339–351 (1991) (discussing quantitative measures of compactness, and favoring the perimeter measure as superior for anti-gerrymandering purposes); Schwartzberg, Reapportionment, Gerrymanders, and the Notion of "Compactness," 50 Minn. L. Rev. 443 (1966) (dis-

how a district court would balance a good showing on one of these indices against a poor showing on another, for that sort of detail is best worked out case by case.

Third, the plaintiff would need to establish specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group. For example, one of the districts to which appellants object most strongly in this case is District 6, which they say "looms like a dragon descending on Philadelphia from the west, splitting up towns and communities throughout Montgomery and Berks Counties." App. to Juris. Statement 136a. To make their claim stick, they would need to point to specific protuberances on the Draconian shape that reach out to include Democrats, or fissures in it that squirm away from Republicans. They would need to show that when towns and communities were split, Democrats tended to fall on one side and Republicans on the other. Although some counterexamples would no doubt be present in any complex plan, the plaintiff's showing as a whole would need to provide reasonable support for, if not compel, an inference that the district took the shape it did because of the distribution of the plaintiff's group. That would begin, but not complete, the plaintiff's case that the defendant had chosen either to pack the group (drawn a district in order to include a uselessly high number of the group) or to crack it (drawn it so as to include fatally few), the ordinary methods of vote dilution in single-member district systems. *Ante*, at 286, n. 7.

Fourth, a plaintiff would need to present the court with a hypothetical district including his residence, one in which the proportion of the plaintiff's group was lower (in a packing claim) or higher (in a cracking one) and which at the same time deviated less from traditional districting principles than the actual district. Cf. *Thornburg* v. *Gingles*, 478 U. S. 30,

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cussing proposed legislation that would have applied a variant of the perimeter measure).

50 (1986) (requiring a similar showing to demonstrate that a multimember district is "responsible for minority voters' inability to elect [their preferred] candidates"). This hypothetical district would allow the plaintiff to claim credibly that the deviations from traditional districting principles were not only correlated with, but also caused by, the packing or cracking of his group. Drawing the hypothetical district would, of course, necessarily involve redrawing at least one contiguous district,[4] and a plaintiff would have to show that this could be done subject to traditional districting principles without packing or cracking his group (or another) worse than in the district being challenged.

Fifth, and finally, the plaintiff would have to show that the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group. See *Washington* v. *Davis*, 426 U. S. 229 (1976). In substantiating claims of political gerrymandering under a plan devised by a single major party, proving intent should not be hard, once the third and fourth (correlation and cause) elements are established, politicians not being politically disinterested or characteristically naive. *Davis* v. *Bandemer*, 478 U. S., at 128 ("[W]e think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts"). I would, however, treat any showing of intent in a major-party case as too equivocal to count unless the entire legislature were controlled by the governor's party (or the dominant legislative party were vetoproof).[5]

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[4] It would not necessarily involve redrawing other noncontiguous districts, and I would not permit a plaintiff to ask for such a remedy unless he first made out a prima facie case as to multiple districts. See *infra*, at 353.

[5] *Amici* JoAnn Erfer et al. suggest that a political party strong enough to redistrict without the other's approval is analogous to a firm that exercises monopolistic control over a market, and that the ability to exercise such unilateral control should therefore trigger "heightened constitutional scrutiny." Brief 18–19 (citing *Terry* v. *Adams*, 345 U. S. 461 (1953), the Texas Jaybird primary case). See also Issacharoff, Gerrymandering and

If the affected group were not a major party, proof of intent could, admittedly, be difficult. It would be possible that a legislature might not even have had the plaintiff's group in mind, and a plaintiff would naturally have a hard time showing requisite intent behind a plan produced by a bipartisan commission.

B

A plaintiff who got this far would have shown that his State intentionally acted to dilute his vote, having ignored reasonable alternatives consistent with traditional districting principles. I would then shift the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage. They might show by rebuttal evidence that districting objectives could not be served by the plaintiff's hypothetical district better than by the district as drawn, or they might affirmatively establish legitimate objectives better served by the lines drawn than by the plaintiff's hypothetical.

The State might, for example, posit the need to avoid racial vote dilution. Cf. *Bush* v. *Vera*, 517 U. S., at 990 (O'CONNOR, J., concurring) (compliance with §2 of the Voting Rights Act of 1965 is a compelling state interest). It might plead one person, one vote, a standard compatible with gerrymandering but in some places perhaps unattainable without some lopsided proportions. The State might adopt the object of proportional representation among its political parties through its districting process. *Gaffney* v. *Cummings*, 412 U. S. 735, 754 (1973);[6] cf. *Johnson* v. *De Grandy*, 512 U. S., at

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Political Cartels, 116 Harv. L. Rev. 593 (2002); Issacharoff & Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643 (1998). The analogy to antitrust is an intriguing one that may prove fruitful, though I do not embrace it at this point out of caution about a wholesale conceptual transfer from economics to politics.

[6] Some commentators have criticized *Gaffney* itself for failing to account for the harm of bipartisan political gerrymandering to the political process. *E. g.*, Issacharoff, Political Cartels, *supra*, at 613 ("*Gaffney* illustrates the problem of the use of a discrimination model unmoored to any positive account of the electoral process"). *Gaffney* is settled law, and for today's

1024 (totality of the circumstances did not support finding of vote dilution where "minority groups constitute[d] effective voting majorities in a number of state Senate districts substantially proportional to their share in the population").[7]

This is not, however, the time or place for a comprehensive list of legitimate objectives a State might present. The point here is simply that the Constitution should not petrify traditional districting objectives as exclusive, and it is enough to say that the State would be required to explain itself, to demonstrate that whatever reasons it gave were more than a mere pretext for an old-fashioned gerrymander.

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purposes I would take as given its approval of bipartisan gerrymanders, with their associated goal of incumbent protection. The plurality may be correct, *ante*, at 297–298, that the test I propose could catch more objectionable gerrymanders if we rejected incumbent protection as an acceptable purpose of districting. But I am wary of lumping all measures aimed at incumbent protection together at this point, and I think we would gain a better sense of what to do if we waited upon the experience of the district courts in assessing particular efforts at incumbency protection offered by the States in responding to prima facie cases.

[7] It is worth a moment to address the plurality's charge that any judicial remedy for political gerrymandering necessarily assumes a right to proportional representation. *Ante*, at 288 ("Deny it as appellants may (and do), [their] standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation"). I agree with this Court's earlier statements that the Constitution guarantees no right to proportional representation. See *Davis* v. *Bandemer*, 478 U. S. 109, 130 (1986) (plurality opinion) (citing *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), and *White* v. *Regester*, 412 U. S. 755 (1973)). It does not follow that the Constitution permits every state action intended to achieve any extreme form of disproportionate representation. "Proportional representation" usually refers to a set of procedural mechanisms used to guarantee, with more or less precision, that a political party's seats in the legislature will be proportionate to its share of the vote. See generally S. Issacharoff, P. Karlan, & R. Pildes, The Law of Democracy 1089–1172 (rev. 2d ed. 2002) (discussing voting systems other than the single-member district). The Constitution requires a State to adopt neither those mechanisms nor their goal of giving a party seats proportionate to its vote.

C

As for a statewide claim, I would not attempt an ambitious definition without the benefit of experience with individual district claims, and for now I would limit consideration of a statewide claim to one built upon a number of district-specific ones. Each successful district-specific challenge would necessarily entail redrawing at least one contiguous district, and the more the successful claims, the more surrounding districts to be redefined. At a certain point, the ripples would reach the state boundary, and it would no longer make any sense for a district court to consider the problems piecemeal.

D

The plurality says that my proposed standard would not solve the essential problem of unworkability. It says that "[i]t does not solve [the] problem [of determining when gerrymandering has gone too far] to break down the original unanswerable question . . . into four more discrete but equally unanswerable questions." *Ante*, at 296–297. It is common sense, however, to break down a large and intractable issue into discrete fragments as a way to get a handle on the larger one, and the elements I propose are not only tractable in theory, but the very subjects that judges already deal with in practice. The plurality asks, for example, "[w]hat . . . a lower court [is] to do when, as will often be the case, the district adheres to some traditional criteria but not others?" *Ante*, at 296. This question already arises in cases under § 2 of the Voting Rights Act of 1965, and the district courts have not had the same sort of difficulty answering it as they have in applying the *Davis* v. *Bandemer* plurality. See, *e. g.*, *Johnson* v. *Hamrick*, 155 F. Supp. 2d 1355, 1362–1363 (ND Ga. 2001) (noncontiguity of a plaintiff's *Gingles* districts was not fatal to a § 2 claim against a municipal districting scheme because "the city's boundaries are rough and asymmetrical . . . [and] the non-contiguous por-

tions [of the proposed districts] are separated by unincorporated areas and are relatively near the districts to which they are joined"). The enquiries I am proposing are not, to be sure, as hard edged as I wish they could be, but neither do they have a degree of subjectivity inconsistent with the judicial function.

The plurality also says that my standard is destined to fail because I have not given a precise enough account of the extreme unfairness I would prevent. *Ante*, at 297–298. But this objection is more the reliable expression of the plurality's own discouragement than the description of an Achilles heel in my suggestion. The harm from partisan gerrymandering is (as I have said, *supra*, at 343, 349–350) a species of vote dilution: the point of the gerrymander is to capture seats by manipulating district lines to diminish the weight of the other party's votes in elections. To devise a judicial remedy for that harm, however, it is not necessary to adopt a full-blown theory of fairness, furnishing a precise measure of harm caused by divergence from the ideal in each case. It is sufficient instead to agree that gerrymandering is, indeed, unfair, as the plurality does not dispute; to observe the traditional methods of the gerrymanderer, which the plurality summarizes, *ante*, at 274–276; and to adopt a test aimed at detecting and preventing the use of those methods, which, I think, mine is. If those methods are unnecessary to effective gerrymandering, as the plurality implies, *ante*, at 297–298, it is hard to explain why they have been so popular down through the ages of American politics. My test would no doubt leave substantial room for a party in power to seek advantage through its control of the districting process; the only way to prevent all opportunism would be to remove districting wholly from legislative control, which I am not prepared to say the Constitution requires. But that does not make it impossible for courts to identify at least the worst cases of gerrymandering, and to provide a remedy. The most the plurality can show is that my approach would

not catch them all. Cf. Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1178 (1989) ("To achieve what is, from the standpoint of the substantive policies involved, the 'perfect' answer is nice—but it is just one of a number of competing values").

IV

In drafting the complaint for this case, appellants' counsel naturally proceeded on the assumption that they had to satisfy the *Davis* v. *Bandemer* plurality, or some revision in light of *Shaw*, but not the prima facie case I have in mind. Richard and Norma Jean Vieth make only statewide claims, for which the single district claim brought by Susan Furey provides insufficient grounding. As for Furey's own claim, her allegations fall short, for example, on the feasibility of an alternative district superior to her own, as I would require. But she might well be able to allege what I would require, if given leave to amend. I would grant her that leave, and therefore would vacate the judgment of the District Court and remand for further proceedings. From the Court's judgment denying her that opportunity, I respectfully dissent.

JUSTICE BREYER, dissenting.

The use of purely political considerations in drawing district boundaries is not a "necessary evil" that, for lack of judicially manageable standards, the Constitution inevitably must tolerate. Rather, pure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political "gerrymandering" will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. And sometimes when that is so, courts can identify an equal protection violation and provide a remedy. Because the plaintiffs could claim (but have not yet proved) that such circumstances exist here, I would reverse the District Court's dismissal of their complaint.

The plurality focuses directly on the most difficult issue before us. It says, "[n]o test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing *for*." *Ante*, at 297 (emphasis in original). That is true. Thus, I shall describe a set of circumstances in which the use of purely political districting criteria could conflict with constitutionally mandated democratic requirements—circumstances that the courts should "test for." I shall then explain why I believe it possible to find applicable judicially manageable standards. And I shall illustrate those standards.

I

I start with a fundamental principle. "We the People," who "ordain[ed] and establish[ed]" the American Constitution, sought to create and to protect a workable form of government that is in its "'principles, structure, and whole mass,'" basically democratic. G. Wood, The Creation of the American Republic, 1776–1787, p. 595 (1969) (quoting W. Murray, Political Sketches, Inscribed to His Excellency John Adams 5 (1787)). See also, *e. g.*, A. Meiklejohn, Free Speech and Its Relation to Self-Government 14–15 (1948). In a modern Nation of close to 300 million people, the workable democracy that the Constitution foresees must mean more than a guaranteed opportunity to elect legislators representing equally populous electoral districts. *Reynolds* v. *Sims*, 377 U. S. 533, 568 (1964); *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 530–531 (1969); *Karcher* v. *Daggett*, 462 U. S. 725, 730 (1983). There must also be a method for transforming the will of the majority into effective government.

This Court has explained that political parties play a necessary role in that transformation. At a minimum, they help voters assign responsibility for current circumstances, thereby enabling those voters, through their votes for individual candidates, to express satisfaction or dissatisfaction with the political status quo. Those voters can either vote to support that status quo or vote to "throw the rascals out."

See generally *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 188 (2003); *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000); *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 615–616 (1996). A party-based political system that satisfies this minimal condition encourages democratic responsibility. It facilitates the transformation of the voters' will into a government that reflects that will.

Why do I refer to these elementary constitutional principles? Because I believe they can help courts identify at least one abuse at issue in this case. To understand how that is so, one should begin by asking why single-member electoral districts are the norm, why the Constitution does not insist that the membership of legislatures better reflect different political views held by different groups of voters. History, of course, is part of the answer, but it does not tell the entire story. The answer also lies in the fact that a single-member-district system helps to ensure certain democratic objectives better than many "more representative" (*i. e.*, proportional) electoral systems. Of course, single-member districts mean that only parties with candidates who finish "first past the post" will elect legislators. That fact means in turn that a party with a bare majority of votes or even a plurality of votes will often obtain a large legislative majority, perhaps freezing out smaller parties. But single-member districts thereby diminish the need for coalition governments. And that fact makes it easier for voters to identify which party is responsible for government decision-making (and which rascals to throw out), while simultaneously providing greater legislative stability. Cf. C. Mershon, The Costs of Coalition: Coalition Theories and Italian Governments, 90 Am. Pol. Sci. Rev. 534 (1996) (noting that from 1946 to 1992, under proportional systems "almost no [Italian] government stayed in office more than a few years, and many governments collapsed after only a few months"); Hermens, Representation and Proportional Representation,

in Choosing an Electoral System: Issues and Alternatives 15, 24 (A. Lijphart & B. Grofman eds. 1984) (describing the "political paralysis which had become the hallmark of the Fourth Republic" under proportional representation). See also Duverger, Which is the Best Electoral System? in Choosing an Electoral System, *supra*, at 31, 32 (arguing that proportional systems "preven[t] the citizens from expressing a clear choice for a governmental team," and that nonproportional systems allow voters to "choose governments with the capacity to make decisions"). This is not to say that single-member districts are preferable; it is simply to say that single-member-district systems and more-directly-representational systems reflect different conclusions about the proper balance of different elements of a workable democratic government.

If single-member districts are the norm, however, then political considerations will likely play an important, and proper, role in the drawing of district boundaries. In part, that is because politicians, unlike nonpartisan observers, normally understand how "the location and shape of districts" determine "the political complexion of the area." *Gaffney* v. *Cummings*, 412 U. S. 735, 753 (1973). It is precisely *because* politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense. See, *e. g.*, Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649, 678, and nn. 94–95 (2002) (recounting the author's experience as a neutral court-appointed boundary drawer, in which the plan he helped draw moved an uninhabited swamp from one district to another, thereby inadvertently disrupting environmental projects that were important to the politician representing the swamp's former district).

More important for present purposes, the role of political considerations reflects a surprising mathematical fact. Given a fairly large state population with a fairly large con-

gressional delegation, districts assigned so as to be perfectly random in respect to politics would translate a small shift in political sentiment, say a shift from 51% Republican to 49% Republican, into a seismic shift in the makeup of the legislative delegation, say from 100% Republican to 100% Democrat. See M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 Pol. Geography 989, 1002 (1998) (suggesting that, where the state population is large enough, even randomly selected compact districts will generally elect *no* politicians from the party that wins fewer votes statewide). Any such exaggeration of tiny electoral changes—virtually wiping out legislative representation of the minority party—would itself seem highly undemocratic.

Given the resulting need for single-member districts with nonrandom boundaries, it is not surprising that "traditional" districting principles have rarely, if ever, been politically neutral. Rather, because, in recent political memory, Democrats have often been concentrated in cities while Republicans have often been concentrated in suburbs and sometimes rural areas, geographically drawn boundaries have tended to "pac[k]" the former. See *ante*, at 290 (plurality opinion) (citing *Davis* v. *Bandemer*, 478 U. S. 109, 159 (1986) (O'CONNOR, J., concurring in judgment)); Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory? 33 UCLA L. Rev. 1, 9 (1985) (explaining that the "'formal' criteria . . . do not live up to their advance billing as 'fair' or 'neutral'"). Neighborhood or community-based boundaries, seeking to group Irish, Jewish, or African-American voters, often did the same. All this is well known to politicians, who use their knowledge about the effects of the "neutral" criteria to partisan advantage when drawing electoral maps. And were it not so, the iron laws of mathematics would have worked their extraordinary volatility-enhancing will.

This is to say that traditional or historically based boundaries are not, and should not be, "politics free." Rather, those boundaries represent a series of compromises of principle—among the virtues of, for example, close representation of voter views, ease of identifying "government" and "opposition" parties, and stability in government. They also represent an uneasy truce, sanctioned by tradition, among different parties seeking political advantage.

As I have said, reference back to these underlying considerations helps to explain why the legislature's use of political boundary-drawing considerations ordinarily does *not* violate the Constitution's Equal Protection Clause. The reason lies not simply in the difficulty of identifying abuse or finding an appropriate judicial remedy. The reason is more fundamental: Ordinarily, there simply is no abuse. The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as maintaining relatively stable legislatures in which a minority party retains significant representation.

II

At the same time, these considerations can help identify at least one circumstance where use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse, namely, the *unjustified* use of political factors to entrench a minority in power. By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power. By *unjustified* entrenchment I mean that the minority's hold on power is purely the result of partisan manipulation and not other factors. These "other" factors that could lead to "justified" (albeit temporary) minority entrenchment include sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bod-

ies such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria.

The democratic harm of unjustified entrenchment is obvious. As this Court has written in respect to popularly based electoral districts:

> "Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will." *Reynolds*, 377 U. S., at 565.

Where unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and these democratic values are dishonored.

The need for legislative stability cannot justify entrenchment, for stability is compatible with a system in which the loss of majority support implies a loss of power. The need to secure minority representation in the legislature cannot justify entrenchment, for minority party representation is also compatible with a system in which the loss of minority support implies a loss of representation. Constitutionally specified principles of representation, such as that of two Senators per State, cannot justify entrenchment where the House of Representatives or similar state legislative body is at issue. Unless some other justification can be found in particular circumstances, political gerrymandering that so entrenches a minority party in power violates basic democratic norms and lacks countervailing justification. For this

reason, whether political gerrymandering does, or does not, violate the Constitution in other instances, gerrymandering that leads to entrenchment amounts to an abuse that violates the Constitution's Equal Protection Clause.

III

Courts need not intervene often to prevent the kind of abuse I have described, because those harmed constitute a political majority, and a majority normally can work its political will. Where a State has improperly gerrymandered legislative or congressional districts to the majority's disadvantage, the majority should be able to elect officials in statewide races—particularly the Governor—who may help to undo the harm that districting has caused the majority's party, in the next round of districting if not sooner. And where a State has improperly gerrymandered congressional districts, Congress retains the power to revise the State's districting determinations. See U. S. Const., Art. I, § 4; *ante,* at 275–277 (plurality opinion) (discussing the history of Congress' "power to check partisan manipulation of the election process by the States").

Moreover, voters in some States, perhaps tiring of the political boundary-drawing rivalry, have found a procedural solution, confiding the task to a commission that is limited in the extent to which it may base districts on partisan concerns. According to the National Conference of State Legislatures, 12 States currently give "first and final authority for [state] legislative redistricting to a group other than the legislature." National Conference of State Legislatures, Redistricting Commissions and Alternatives to the Legislature Conducting Redistricting (2004), available at http://www.ncsl.org/programs/legman/Redistrict/Com&alter.htm (all Internet materials as visited Mar. 29, 2004, and available in Clerk of Court's case file). A number of States use a commission for congressional redistricting: Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington, with Indiana

using a commission if the legislature cannot pass a plan and Iowa requiring the district-drawing body not to consider political data. *Ibid.;* Iowa General Assembly, Legislative Service Bureau, Legislative Guide to Redistricting (Dec. 2000), available at http://www.legis.state.ia.us/Central/LSB/Guides/redist.htm. Indeed, where state governments have been unwilling or unable to act, "an informed, civically militant electorate," *Baker* v. *Carr*, 369 U. S. 186, 270 (1962) (Frankfurter, J., dissenting), has occasionally taken matters into its own hands, through ballot initiatives or referendums. Arizona voters, for example, passed Proposition 106, which amended the State's Constitution and created an independent redistricting commission to draw legislative and congressional districts. Ariz. Const., Art. 4, pt. 2, § 1 (West 2001). Such reforms borrow from the systems used by other countries utilizing single-member districts. See, *e. g.*, Administration and Cost of Elections Project, Boundary Delimitation (hereinafter ACE Project), Representation in the Canadian Parliament, available at http://www.aceproject.org/main/english/bd/bdy_ca.htm (describing Canada's independent boundary commissions, which draft maps based on equality of population, communities of interest, and geographic factors); ACE Project, The United Kingdom Redistribution Process, available at http://www.aceproject.org/main/english/bd/bdy_gb.htm (describing the United Kingdom's independent boundary commissions, which make recommendations to Parliament after consultation with the public); G. Gudgin & P. Taylor, Seats, Votes, and the Spatial Organisation of Elections 8 (1979) (noting that the United Kingdom's boundary commissions are "explicitly neutral in a party political sense").

But we cannot always count on a severely gerrymandered legislature itself to find and implement a remedy. See *Bandemer*, 478 U. S., at 126. The party that controls the process has no incentive to change it. And the political advantages of a gerrymander may become ever greater in the future.

The availability of enhanced computer technology allows the parties to redraw boundaries in ways that target individual neighborhoods and homes, carving out safe but slim victory margins in the maximum number of districts, with little risk of cutting their margins too thin. See generally Handley, A Guide to 2000 Redistricting Tools and Technology, in The Real Y2K Problem: Census 2000 Data and Redistricting Technology (N. Persily ed. 2000); Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L. Rev. 731, 736 (1998); *ante*, at 345–346 (SOUTER, J., dissenting). By redrawing districts every 2 years, rather than every 10 years, a party might preserve its political advantages notwithstanding population shifts in the State. The combination of increasingly precise map-drawing technology and increasingly frequent map drawing means that a party may be able to bring about a gerrymander that is not only precise, but virtually impossible to dislodge. Thus, court action may prove necessary.

When it is necessary, a court should prove capable of finding an appropriate remedy. Courts have developed districting remedies in other cases. See, *e. g.*, *Branch* v. *Smith*, 538 U. S. 254 (2003) (affirming the District Court's injunction of use of state court's redistricting plan and order that its own plan be used until a state plan could be precleared under the Voting Rights Act of 1965); *Karcher*, 462 U. S. 725 (upholding the District Court's holding that a congressional reapportionment plan was unconstitutional); *Reynolds*, 377 U. S., at 586–587 (upholding the District Court's actions in ordering into effect a reapportionment of both houses of the state legislature). See also Issacharoff, Judging Politics: The Elusive Quest for Judicial Review of Political Fairness, 71 Texas L. Rev. 1643, 1688–1690, and nn. 227–233 (1993) (reporting that, in the wake of the 1980 census, there were 13 court-ordered plans for congressional redistricting, 5 plans that the courts rejected and returned to state legislatures for redrafting, 7 court-ordered state senate plans, 8 state senate

plans rejected and sent back to the state legislatures, 6 court-ordered state house plans, and 9 state house plans sent back for further legislative action—all of which meant that, leaving aside the preclearance provisions of § 5 of the Voting Rights Act of 1965, about one-third of all redistricting was done either directly by the federal courts or under courts' injunctive authority (citing cases)). Moreover, if the dangers of inadvertent political favoritism prove too great, a procedural solution, such as the use of a politically balanced boundary-drawing commission, may prove possible.

The bottom line is that courts should be able to identify the presence of one important gerrymandering evil, the unjustified entrenching in power of a political party that the voters have rejected. They should be able to separate the unjustified abuse of partisan boundary-drawing considerations to achieve that end from their more ordinary and justified use. And they should be able to design a remedy for extreme cases.

IV

I do not claim that the problem of identification and separation is easily solved, even in extreme instances. But courts can identify a number of strong indicia of abuse. The presence of actual entrenchment, while not always unjustified (being perhaps a chance occurrence), is such a sign, particularly when accompanied by the use of partisan boundary-drawing criteria in the way that JUSTICE STEVENS describes, *i. e.*, a use that both departs from traditional criteria and cannot be explained other than by efforts to achieve partisan advantage. Below, I set forth several sets of circumstances that lay out the indicia of abuse I have in mind. The scenarios fall along a continuum: The more permanently entrenched the minority's hold on power becomes, the less evidence courts will need that the minority engaged in gerrymandering to achieve the desired result.

Consider, for example, the following sets of circumstances. First, suppose that the legislature has proceeded to redraw

boundaries in what seem to be ordinary ways, but the entrenchment harm has become obvious. *E. g.*, (a) the legislature has not redrawn district boundaries more than once within the traditional 10-year period; and (b) no radical departure from traditional districting criteria is alleged; but (c) a majority party (as measured by the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections; *i. e.*, in congressional elections if a congressional map is being challenged) has *twice* failed to obtain a majority of the relevant legislative seats in elections; and (d) the failure cannot be explained by the existence of multiple parties or in other neutral ways. In my view, these circumstances would be sufficient to support a claim of unconstitutional entrenchment.

Second, suppose that plaintiffs could point to more serious departures from redistricting norms. *E. g.*, (a) the legislature has not redrawn district boundaries more than once within the traditional 10-year period; but (b) the boundary-drawing criteria depart radically from previous or traditional criteria; (c) the departure cannot be justified or explained other than by reference to an effort to obtain partisan political advantage; and (d) a majority party (as defined above) has once failed to obtain a majority of the relevant seats in election using the challenged map (which fact cannot be explained by the existence of multiple parties or in other neutral ways). These circumstances could also add up to unconstitutional gerrymandering.

Third, suppose that the legislature clearly departs from ordinary districting norms, but the entrenchment harm, while seriously threatened, has not yet occurred. *E. g.*, (a) the legislature has redrawn district boundaries more than once within the traditional 10-year census-related period—either, as here, at the behest of a court that struck down an initial plan as unlawful, see *Vieth* v. *Pennsylvania*, 195 F. Supp. 2d 672 (MD Pa. 2002) *(per curiam)* (finding that Pennsylvania's first redistricting plan violated the one-

person, one-vote mandate), or of its own accord; (b) the boundary-drawing criteria depart radically from previous traditional boundary-drawing criteria; (c) strong, objective, unrefuted statistical evidence demonstrates that a party with a minority of the popular vote within the State in all likelihood will obtain a majority of the seats in the relevant representative delegation; and (d) the jettisoning of traditional districting criteria cannot be justified or explained other than by reference to an effort to obtain partisan political advantage. To my mind, such circumstances could also support a claim, because the presence of midcycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map-drawing process. Where such an inference is accompanied by statistical evidence that entrenchment will be the likely result, a court may conclude that the map crosses the constitutional line we are describing.

The presence of these, or similar, circumstances—where the risk of entrenchment is demonstrated, where partisan considerations render the traditional district-drawing compromises irrelevant, where no justification other than party advantage can be found—seem to me extreme enough to set off a constitutional alarm. The risk of harm to basic democratic principle is serious; identification is possible; and remedies can be found.

V

The plurality sets forth several criticisms of my approach. Some of those criticisms are overstated. Compare *ante*, at 300 ("[O]f course there *always is* a neutral explanation [of gerrymandering]—if only the time-honored criterion of incumbent protection"), with Brief for Appellants 13 (pointing to examples of efforts to gerrymander an incumbent of the opposition party out of office and elect a new member of the controlling party); compare *ante*, at 300 (complaining of "the difficulties of assessing partisan strength statewide"), with *supra*, at 366 (identifying the "majority party" simply by

adding up "the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections").

Other criticisms involve differing judgments. Compare *ante*, at 299 (complaining about the vagueness of *unjustified* political machination, "whatever that means," and of *unjustified* entrenchment), with *supra*, at 360–361 (detailed discussion of "justified" and *Reynolds* v. *Sims*); compare *ante*, at 301 (finding costs of judicial intervention too high), with *supra*, at 364–365 (finding costs warranted to ensure majority rule).

But the plurality makes one criticism that warrants a more elaborate response. It observes "that the mere fact that these four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitutionally discernible standard." *Ante*, at 292.

Does it? The dissenting opinions recommend sets of standards that differ in certain respects. Members of a majority might well seek to reconcile such differences. But dissenters might instead believe that the more thorough, specific reasoning that accompanies separate statements will stimulate further discussion. And that discussion could lead to change in the law, where, as here, one member of the majority, disagreeing with the plurality as to justiciability, remains in search of appropriate standards. See *ante*, at 311–312 (KENNEDY, J., concurring in judgment).

VI

In the case before us, there is a strong likelihood that the plaintiffs' complaint could be amended readily to assert circumstances consistent with those I have set forth as appropriate for judicial intervention. For that reason, I would authorize the plaintiffs to proceed; and I dissent from the majority's contrary determination.

Syllabus

JONES ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED *v.* R. R. DONNELLEY & SONS CO.

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

No. 02–1205. Argued February 24, 2004—Decided May 3, 2004

After this Court held that federal courts should apply the most appropriate state statute of limitations to claims arising under 42 U. S. C. § 1981, which contains no statute of limitations, see *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 660, Congress enacted a 4-year statute of limitations for causes of action "arising under an Act of Congress enacted after [December 1, 1990]," 28 U. S. C. § 1658. Petitioners, African-American former employees of respondent, filed a class action alleging violations of § 1981, as amended by the Civil Rights Act of 1991. Respondent sought summary judgment, claiming that the applicable state 2-year statute of limitations barred their claims, but the District Court held that petitioners' wrongful discharge, refusal to transfer, and hostile work environment claims arose under the 1991 Act and therefore are governed by § 1658. The Seventh Circuit reversed, concluding that § 1658 does not apply to a cause of action based on a post-1990 amendment to a pre-existing statute.

Held: Petitioners' causes of action are governed by § 1658. Pp. 375–385.

(a) Because the meaning of "arising under" in § 1658 is ambiguous, Congress' intent must be ascertained by looking beyond the section's bare text to the context in which it was enacted and the purposes it was designed to accomplish. Pp. 375–377.

(b) Before § 1658's enactment, Congress' failure to pass a uniform limitations statute for federal causes of action had created a void that spawned a vast amount of litigation. The settled practice of borrowing state statutes of limitations generated a host of issues, such as which of the forum State's statutes was the most appropriate, whether the forum State's law or that of the situs of the injury controlled, and when a statute of limitations could be tolled. Congress was keenly aware of these problems, and a central purpose of § 1658 was to minimize the need for borrowing. That purpose would not be served if § 1658 were interpreted to reach only entirely new sections of the United States Code. An amendment to an existing statute is no less an "Act of Congress" than a new, stand-alone statute. What matters is the new rights of action and corresponding liabilities created by the enactment. Thus,

a cause of action "aris[es] under an Act of Congress enacted" after December 1, 1990—and therefore is governed by § 1658's 4-year statute of limitations—if the plaintiff's claim against the defendant was made possible by a post-1990 enactment. This construction best serves Congress' interest in alleviating the uncertainty inherent in the practice of borrowing state statutes of limitations, while protecting litigants' settled expectations by applying only to causes of actions not available until after December 1, 1990. It also is consistent with the common usage of "arise" and with this Court's interpretations of "arising under" as it is used in statutes governing the scope of federal subject-matter jurisdiction. Pp. 377–383.

(c) Petitioners' hostile work environment, wrongful termination, and failure to transfer claims all "ar[ose] under" the 1991 Act in the sense that they were made possible by that Act. The 1991 Act overturned this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 171, which held that racial harassment relating to employment conditions was not actionable under § 1981. The Act redefined § 1981's key "make and enforce contracts" language to include the "termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," § 1981(b). In *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, this Court held that the amendment enlarged the category of conduct subject to § 1981 liability, *id.*, at 303, and thus did not apply to a case that arose before it was enacted, *id.*, at 300. *Rivers'* reasoning supports the conclusion that the 1991 Act qualifies as an "Act of Congress enacted after [December 1, 1990]." Petitioners' causes of action clearly arose under the 1991 Act, and the hypothetical problems posited by respondent and the Seventh Circuit pale in comparison with the difficulties that federal courts faced for decades in trying to answer questions raised by borrowing state limitations rules. Pp. 383–385.

305 F. 3d 717, reversed and remanded.

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

H. Candace Gorman argued the cause and filed briefs for petitioners.

Gregory G. Garre argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson, Acting Assistant Attorney General Wiggins, Deputy Solicitor General Clement, Dennis J. Dimsey,* and *Linda F. Thome.*

Carter G. Phillips argued the cause for respondent. With him on the brief were *Virginia A. Seitz*, *Jonathan F. Cohn*, *Richard H. Schnadig*, *Thomas G. Abram*, and *Lawrence L. Summers*.

Kevin Newsom, Solicitor General of Alabama, argued the cause for the State of Alabama et al. as *amici curiae* urging affirmance. On the brief were *William H. Pryor, Jr.*, Attorney General, *Nathan A. Forrester*, former Solicitor General, and the Attorneys General for their respective States as follows: *Mark J. Bennett* of Hawaii, *Richard P. Ieyoub* of Louisiana, *Thomas F. Reilly* of Massachusetts, *Greg Abbott* of Texas, and *Mark L. Shurtleff* of Utah.*

JUSTICE STEVENS delivered the opinion of the Court.

Like many federal statutes, 42 U. S. C. § 1981 does not contain a statute of limitations. We held in *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 660 (1987), that federal courts should apply "the most appropriate or analogous state statute of limitations" to claims based on asserted violations of § 1981. Three years after our decision in *Goodman*, Congress enacted a catchall 4-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990. 28 U. S. C. § 1658. The question in this case is whether petitioners' causes of action, which allege violations of § 1981, as amended by the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071, are governed by § 1658 or by the personal injury statute of limitations of the forum State.

I

Petitioners are African-American former employees of respondent's Chicago manufacturing division. On November

**Barbara R. Arnwine*, *Thomas J. Henderson*, *Michael L. Foreman*, *Kristin M. Dadey*, *Dennis Courtland Hayes*, and *Vincent A. Eng* filed a brief for the Lawyers' Committee for Civil Rights Under Law et al. as *amici curiae* urging reversal.

Ann Elizabeth Reesman filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

25, 1996, petitioners filed this class action alleging violations of their rights under § 1981, as amended by the 1991 Act. Specifically, the three classes of plaintiffs alleged that they were subjected to a racially hostile work environment, given an inferior employee status, and wrongfully terminated or denied a transfer in connection with the closing of the Chicago plant. Respondent sought summary judgment on the ground that petitioners' claims are barred by the applicable Illinois statute of limitations because they arose more than two years before the complaint was filed. Petitioners responded that their claims are governed by § 1658, which provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."[1] Section 1658 was enacted on December 1, 1990. Thus, petitioners' claims are subject to the 4-year statute of limitations if they arose under an Act of Congress enacted after that date.

The original version of the statute now codified at Rev. Stat. § 1977, 42 U. S. C. § 1981, was enacted as § 1 of the Civil Rights Act of 1866, 14 Stat. 27. It was amended in minor respects in 1870 and recodified in 1874, see *Runyon* v. *McCrary*, 427 U. S. 160, 168–169, n. 8 (1976), but its basic coverage did not change prior to 1991. As first enacted, § 1981 provided in relevant part that "all persons [within the jurisdiction of the United States] shall have the same right, in every State and Territory . . . to make and enforce contracts . . . as is enjoyed by white citizens." 14 Stat. 27. We held in *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989),

[1] In 2002, Congress amended § 1658 to add a separate provision (subsection (b)) specifying the statute of limitations for certain securities law claims. Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. 107–204, § 804(a), 116 Stat. 801. The original language of § 1658 (quoted above) was left unchanged but is now set forth in subsection (a). See 28 U. S. C. § 1658(a) (2000 ed., Supp. III).

that the statutory right "to make and enforce contracts" did not protect against harassing conduct that occurred after the formation of the contract. Under that holding, it is clear that petitioners' hostile work environment, wrongful discharge, and refusal to transfer claims do not state violations of the original version of § 1981. In 1991, however, Congress responded to *Patterson* by adding a new subsection to § 1981 that defines the term "'make and enforce contracts'" to include the "termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U. S. C. § 1981(b).[2] It is undisputed that petitioners have alleged violations of the amended statute. The critical question, then, is whether petitioners' causes of action "ar[ose] under" the 1991 Act or under § 1981 as originally enacted.

The District Court determined that petitioners' wrongful termination, refusal to transfer, and hostile work environment claims arose under the 1991 Act and therefore are governed by § 1658. *Adams* v. *R. R. Donnelley & Sons*, 149

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[2] The current version of § 1981 reads as follows:

"(a) Statement of equal rights

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"(b) 'Make and enforce contracts' defined

"For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) Protection against impairment

"The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

F. Supp. 2d 459 (ND Ill. 2001).[3] In its view, the plain text of § 1658 compels the conclusion that, "whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action." *Id.*, at 464. The 1991 amendment to § 1981 falls within that category, the court reasoned, because it opened the door to claims of postcontract discrimination that, under *Patterson*, could not have been brought under § 1981 as enacted. 149 F. Supp. 2d, at 464.

The District Court certified its ruling for an interlocutory appeal pursuant to 28 U. S. C. § 1292(b), and the Court of Appeals reversed. 305 F. 3d 717 (CA7 2002). It concluded that § 1658 "applies only when an act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment." *Id.*, at 726. The 1991 amendment does not satisfy that test, the court explained, because the text of § 1981(b) "simply cannot stand on its own"; instead, it merely redefines a term in the original statute without altering the text that "provides the basic right of recovery for an individual whose constitutional rights have been violated." *Id.*, at 727.

The Court of Appeals' conclusion that § 1658 does not apply to a cause of action based on a post-1990 amendment to a pre-existing statute is consistent with decisions from the Third and Eighth Circuits. See *Zubi* v. *AT&T Corp.*, 219 F. 3d 220, 224 (CA3 2000); *Madison* v. *IBP, Inc.*, 257 F. 3d 780, 798 (CA8 2001). Conversely, the Courts of Appeals for the Sixth and Tenth Circuits have held that § 1658 applies "whenever Congress, after December 1990, passes legislation

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[3] The court found matters somewhat less clear with respect to petitioners' claims regarding their employee status (which involved allegations that respondent has a practice of using its African-American employees as "'temporary'" or "'casual'" employees), and directed the parties to "sort out this question amongst themselves in light of" its ruling. 149 F. Supp. 2d, at 460, 465.

that creates a new cause of action," whether or not the legislation amends a pre-existing statute. *Harris* v. *Allstate Insurance Co.*, 300 F. 3d 1183, 1190 (CA10 2002); accord, *Anthony* v. *BTR Automotive Sealing Systems, Inc.*, 339 F. 3d 506, 514 (CA6 2003). We granted certiorari to resolve the conflict in the Circuits, 538 U. S. 1030 (2003), and now reverse.

II

Petitioners, supported by the United States as *amicus curiae*, argue that reversal is required by the "plain language" of § 1658, which prescribes a 4-year statute of limitations for "civil action[s] arising under an Act of Congress enacted after" December 1, 1990. They point out that the 1991 Act is, by its own terms, an "Act" of Congress that was "enacted" after December 1, 1990. See Pub. L. 102–166, 105 Stat. 1071. Moreover, citing our interpretations of the term "arising under" in other federal statutes and in Article III of the Constitution, petitioners maintain that their causes of action arose under the 1991 Act.

Respondent concedes that the 1991 Act qualifies as an "Act of Congress enacted" after 1991, but argues that the meaning of the term "arising under" is not so clear. We agree. Although our expositions of the "arising under" concept in other contexts are helpful in interpreting the term as it is used in § 1658, they do not point the way to one obvious answer. For example, Chief Justice Marshall's statement that a case arises under federal law for purposes of Article III jurisdiction whenever federal law "forms an ingredient of the original cause," *Osborn* v. *Bank of United States*, 9 Wheat. 738, 823 (1824), supports petitioners' view that their causes of action arose under the 1991 amendment to § 1981, because the 1991 Act clearly "forms an ingredient" of petitioners' claims.[4] But the same could be said of the

[4] Indeed, the same would appear to be true of virtually *any* substantive amendment, whether or not the plaintiff could have stated a claim preamendment.

original version of § 1981. Thus, reliance on *Osborn* would suggest that petitioners' causes of action arose under the pre-1991 version of § 1981 as well as under the 1991 Act, just as a cause of action may arise under both state and federal law. As the Court of Appeals observed, however, § 1658 does not expressly "address the eventuality when a cause of action 'aris[es] under' two different 'Acts,' one enacted before and one enacted after the effective date of § 1658." 305 F. 3d, at 724.

Petitioners argue that we should look not at Article III, but at how Congress has used the term "arising under" in federal legislation. They point in particular to the statutes in Title 28 that define the scope of federal subject-matter jurisdiction.[5] We have interpreted those statutes to mean that a claim arises under federal law if federal law provides a necessary element of the plaintiff's claim for relief.[6] Petitioners recognize that we have construed the term more broadly in other statutes,[7] but argue that the placement of § 1658 in Title 28 suggests that Congress meant to invoke our interpretation of the neighboring jurisdictional rules. We hesitate to place too much significance on the location of a statute in the United States Code. But even if we accepted

[5] See, *e. g.*, 28 U. S. C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"); § 1338(a) ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks").

[6] See, *e. g.*, *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 808 (1988) (a case may "'aris[e] under'" federal law if "'federal law is a necessary element of [a claim]'"); *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U. S. 826, 830 (2002) (a claim "'arises under'" patent law if either "'federal patent law creates the cause of action'" or "'the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law'").

[7] See, *e. g.*, *Heckler* v. *Ringer*, 466 U. S. 602, 615 (1984) (a claim arises under the Medicare Act for purposes of 42 U. S. C. § 405(h) when "'both the standing and the substantive basis for the presentation'" of the claim is the Medicare Act).

the proposition that Congress intended the term "arising under" to have the same meaning in § 1658 as in other sections of Title 28, it would not follow that the text is unambiguous. We have said that "[t]he most familiar definition of the statutory 'arising under' limitation" is the statement by Justice Holmes that a suit "'arises under the law that creates the cause of action,'" *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 8–9 (1983) (quoting *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 260 (1916)). On one hand, that statement could support petitioners' view that their causes of action arose under the 1991 Act, which created a statutory right that did not previously exist. On the other hand, it also could support respondent's claim that petitioners' causes of action arose under the original version of § 1981, which contains the operative language setting forth the elements of their claims. Justice Holmes' formulation even could support the view that petitioners' claims arose under both versions of the statute. Cf. *T. B. Harms Co.* v. *Eliscu*, 339 F. 2d 823, 827 (CA2 1964) (Friendly, J.) ("It has come to be realized that Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended"). In order to ascertain Congress' intent, therefore, we must look beyond the bare text of § 1658 to the context in which it was enacted and the purposes it was designed to accomplish.

III

In *Board of Regents of Univ. of State of N. Y.* v. *Tomanio*, 446 U. S. 478, 483 (1980), we observed that Congress' failure to enact a uniform statute of limitations applicable to federal causes of action created a "void which is commonplace in federal statutory law." Over the years that void has spawned a vast amount of litigation. Prior to the enactment of § 1658, the "settled practice [was] to adopt a local time limitation as federal law if it [was] not inconsistent with federal law or policy to do so." *Wilson* v. *Garcia*, 471 U. S. 261,

266–267 (1985). Such "[l]imitation borrowing," *Board of Regents* v. *Tomanio*, 446 U. S., at 484, generated a host of issues that required resolution on a statute-by-statute basis. For example, it often was difficult to determine which of the forum State's statutes of limitations was the most appropriate to apply to the federal claim. We wrestled with that issue in *Wilson* v. *Garcia*, in which we considered which state statute provided the most appropriate limitations principle for claims arising under 42 U. S. C. § 1983. 471 U. S., at 268, 276–279 (resolving split of authority over whether the closest state analogue to an action brought under § 1983 was an action for tortious injury to the rights of another, an action on an unwritten contract, or an action for a liability on a statute). Before reaching that question, however, we first had to determine whether the characterization of a § 1983 claim for statute of limitations purposes was an issue of state or federal law and whether all such claims should be characterized in the same way. *Ibid.* Two years later, in *Goodman* v. *Lukens Steel Co.*, we answered the same three questions for claims arising under § 1981. 482 U. S., at 660, 661–662. Both decisions provoked dissent[8] and further litigation.[9]

The practice of borrowing state statutes of limitations also forced courts to address the "frequently present problem of a conflict of laws in determining which State statute [was] controlling, the law of the forum or that of the situs of the injury." S. Rep. No. 619, 84th Cong., 1st Sess., 4–6 (1955) (discussing problems caused by borrowing state statutes of

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[8] See *Wilson* v. *Garcia*, 471 U. S. 261, 280 (1985) (O'Connor, J., dissenting); *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 669 (1987) (Brennan, J., concurring in part and dissenting in part); *id.*, at 680 (Powell, J., concurring in part and dissenting in part).

[9] See, *e. g.*, *Smith* v. *Firestone Tire & Rubber Co.*, 875 F. 2d 1325, 1326–1328 (CA7 1989) (concluding that the rule established in *Goodman* did not apply retroactively).

limitations for antitrust claims).[10] Even when courts were able to identify the appropriate state statute, limitations borrowing resulted in uncertainty for both plaintiffs and defendants, as a plaintiff alleging a federal claim in State A would find herself barred by the local statute of limitations while a plaintiff raising precisely the same claim in State B would be permitted to proceed. *Ibid.* Interstate variances of that sort could be especially confounding in class actions because they often posed problems for joint resolution. See Memorandum from R. Marcus, Assoc. Reporter to Workload Subcommittee (Sept. 1, 1989), reprinted in App. to Vol. 1 Federal Courts Study Committee, Working Papers and Subcommittee Reports (1990), Doc. No. 5, p. 10 (hereinafter Marcus Memorandum). Courts also were forced to grapple with questions such as whether federal or state law governed when an action was "commenced," or when service of process had to be effectuated. See *Sentry Corp.* v. *Harris*, 802 F. 2d 229 (CA7 1986) (addressing those issues in the wake of our decision in *Wilson*). And the absence of a uniform federal limitations period complicated the development of federal law on the question when, or under what circumstances, a statute of limitations could be tolled. See 802 F. 2d, at 234–242 (discussing conflicting authority on whether tolling was a matter of state or federal law); *Board of Regents* v. *Tomanio*, 446 U. S., at 485 (explaining that "'borrowing' logically included [state] rules of tolling").

Those problems led both courts and commentators to "cal[l] upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that

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[10] The problems associated with borrowing state statutes of limitations prompted Congress in 1955 to enact a federal period of limitations governing treble damages actions under the antitrust laws. 15 U. S. C. § 15b. See S. Rep. No. 619, at 5 (explaining that "[i]t is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our Federal laws").

do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action." *Sentry Corp.* v. *Harris,* 802 F. 2d, at 246.[11] Congress answered that call by creating the Federal Courts Study Committee, which recommended the enactment of a retroactive, uniform federal statute of limitations.[12] As we have noted, § 1658 applies only to claims arising under statutes enacted after December 1, 1990, but it otherwise follows the Committee's recommendation. The House Report accompanying the final bill confirms that Congress was keenly aware of the problems associated with the practice of borrowing state statutes of limitations, and that a central purpose of § 1658 was to minimize the occasions for that practice.[13]

The history that led to the enactment of § 1658 strongly supports an interpretation that fills more rather than less of the void that has created so much unnecessary work for federal judges.[14] The interpretation favored by respondent

[11] See also, *e. g.,* Lowenthal, Pastuszenski, & Greenwald, Special Project, Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations, 65 Cornell L. Rev. 1011, 1105 (1980); Blume & George, Limitations and the Federal Courts, 49 Mich. L. Rev. 937, 992–993 (1951); Note, Federal Statutes Without Limitations Provisions, 53 Colum. L. Rev. 68, 77–78 (1953); Note, Disparities in Time Limitations on Federal Causes of Action, 49 Yale L. J. 738, 745 (1940).

[12] A report prepared for the Committee concluded that "there is little to be said in favor of the current situation and there seems to be no identifiable support for continuing this situation." Marcus Memorandum 1.

[13] The House Report notes "a number of practical problems" created by the practice of borrowing statutes of limitations: "'It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.'" H. R. Rep. No. 101–734, p. 24 (1990).

[14] A few years after § 1658 was enacted, we described it as supplying "a general, 4-year limitations period for any federal statute subsequently enacted without one of its own." *North Star Steel Co.* v. *Thomas,* 515 U. S. 29, 34, n. (1995). In his separate opinion in that case, JUSTICE SCALIA captured the basic purpose of § 1658 when he observed that

and the Court of Appeals subverts that goal by restricting § 1658 to cases in which the plaintiff's cause of action is based solely on a post-1990 statute that "'establishes a new cause of action without reference to preexisting law.'" 305 F. 3d, at 727 (quoting *Zubi* v. *AT&T Corp.*, 219 F. 3d, at 225). On that view, § 1658 would apply only to a small fraction of post-1990 enactments. Congress routinely creates new rights of action by amending existing statutes, and "[a]ltering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes." *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 308 (1994). Nothing in the text or history of § 1658 supports an interpretation that would limit its reach to entirely new sections of the United States Code. An amendment to an existing statute is no less an "Act of Congress" than a new, stand-alone statute. What matters is the substantive effect of an enactment—the creation of new rights of action and corresponding liabilities—not the format in which it appears in the Code.

The Court of Appeals reasoned that § 1658 must be given a narrow scope lest it disrupt litigants' settled expectations. The court observed that Congress refused to make § 1658 retroactive because, "'with respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision,'" and "'retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one [State], and a ten year period in another, would threaten to disrupt the settled expectations of . . . many parties.'" 305 F. 3d, at 725–726 (quoting H. R. Rep. No. 101–734, p. 24 (1990)). Concerns about settled expectations provide a valid reason to reject an interpretation of § 1658 under which

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"a uniform nationwide limitations period for a federal cause of action is *always* significantly more appropriate" than a rule that applies in some States but not in others. *Id.*, at 37 (opinion concurring in judgment).

any new amendment to federal law would suffice to trigger the 4-year statute of limitations, regardless of whether the plaintiff's claim would have been available—and subject to a state statute of limitations—prior to December 1, 1990. Such concerns do not, however, carry any weight against the reading of § 1658 adopted by the District Court and urged by petitioners, under which the catchall limitations period applies only to causes of action that *were not available* until after § 1658 was enacted. If a cause of action did not exist prior to 1990, potential litigants could not have formed settled expectations as to the relevant statute of limitations that would then be disrupted by application of § 1658.

We conclude that a cause of action "aris[es] under an Act of Congress enacted" after December 1, 1990—and therefore is governed by § 1658's 4-year statute of limitations—if the plaintiff's claim against the defendant was made possible by a post-1990 enactment. That construction best serves Congress' interest in alleviating the uncertainty inherent in the practice of borrowing state statutes of limitations while at the same time protecting settled interests. It spares federal judges and litigants the need to identify the appropriate state statute of limitations to apply to new claims but leaves in place the "borrowed" limitations periods for pre-existing causes of action, with respect to which the difficult work already has been done.

Interpreting § 1658 to apply whenever a post-1990 enactment creates a new right to maintain an action also is consistent with the common usage of the word "arise" to mean "come into being; originate"[15] or "spring up."[16] Finally, that construction is consistent with our interpretations of

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[15] American Heritage Dictionary 96 (4th ed. 2000); Black's Law Dictionary 138 (rev. 4th ed. 1968).

[16] Oxford English Dictionary 629 (2d ed. 1989); Black's Law Dictionary, at 138.

the term "arising under" as it is used in statutes governing the scope of federal subject-matter jurisdiction. By contrast, nothing in our case law supports an interpretation as narrow as that endorsed by the Court of Appeals, under which "arising under" means something akin to "based solely upon." We should avoid reading § 1658 in such a way as to give the familiar statutory language a meaning foreign to every other context in which it is used.

IV

In this case, petitioners' hostile work environment, wrongful termination, and failure to transfer claims "ar[ose] under" the 1991 Act in the sense that petitioners' causes of action were made possible by that Act. *Patterson* held that "racial harassment relating to the conditions of employment is *not actionable* under § 1981." 491 U. S., at 171 (emphasis added). The 1991 Act overturned *Patterson* by defining the key "make and enforce contracts" language in § 1981 to include the "termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U. S. C. § 1981(b). In *Rivers* v. *Roadway Express, Inc.*, we recognized that the 1991 amendment "enlarged the category of conduct that is subject to § 1981 liability," 511 U. S., at 303, and we therefore held that the amendment does not apply "to a case that arose before it was enacted," *id.*, at 300. Our reasoning in *Rivers* supports the conclusion that the 1991 Act fully qualifies as "an Act of Congress enacted after [December 1, 1990]" within the meaning of § 1658. Because petitioners' hostile work environment, wrongful termination, and failure to transfer claims did not allege a violation of the pre-1990 version of § 1981 but did allege violations of the amended statute, those claims "ar[ose] under" the amendment to § 1981 contained in the 1991 Act.

While that conclusion seems eminently clear in this case,[17] respondent has posited various hypothetical cases in which it might be difficult to determine whether a particular claim arose under the amended or the unamended version of a statute. Similarly, the Court of Appeals reasoned that applying § 1658 to post-1990 amendments could be problematic in some cases because "'the line between an amendment that modifies an existing right and one that creates a new right is often difficult to draw.'" 305 F. 3d, at 725 (quoting *Zubi* v. *AT&T Corp.*, 219 F. 3d, at 224). We are not persuaded that any "guess work," 305 F. 3d, at 725, is required to determine whether the plaintiff has alleged a violation of the relevant statute as it stood prior to December 1, 1990, or whether her claims necessarily depend on a subsequent amendment. Courts routinely make such determinations when dealing with amendments (such as the 1991 amendment to § 1981) that do not apply retroactively.[18] In any event, such hypothetical problems pale in comparison with the difficulties that federal courts faced for decades in trying

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[17] Indeed, respondent concedes that, "[i]n this case, the nature of the 'new' claim is clear. It is recognized that liability under § 1981 was expanded, because this Court had spoken on the scope of § 1981 and Congress reversed the Court's interpretation in the Civil Rights Act of 1991." Brief for Respondent 26.

[18] Respondent argues that the question whether a plaintiff's cause of action would have been viable prior to a post-1991 amendment will be particularly complicated in cases in which there was a split of authority regarding the scope of the original statute. In such cases, courts will have to determine whether the amendment clarified existing law or created new rights and liabilities. Such analysis is hardly beyond the judicial ken: Courts must answer precisely the same question when deciding whether an amendment may be applied retrospectively. See, *e. g.*, *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 948–950 (1997). The substantial overlap between the retroactivity and statute-of-limitations inquiries undermines respondent's claim that application of § 1658 to post-1991 amendments will generate additional work for federal judges.

to answer all the questions raised by borrowing appropriate limitations rules from state statutes.

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.

Syllabus

DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION *v.* HALEY

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

No. 02–1824. Argued March 2, 2004—Decided May 3, 2004

Respondent was charged with and convicted of felony theft. Based on two prior convictions, he was also charged as a habitual offender. Under Texas' habitual offender statute, a defendant convicted of a felony is subject to a sentence of 2 to 20 years if (1) he has two prior felony convictions, and (2) the conviction for the first prior offense became final before commission of the second. Texas law requires the State to prove the habitual offender allegations to a jury beyond a reasonable doubt at a separate penalty hearing. The jury here convicted respondent of the habitual offender charge, and the judge sentenced him to 16½ years. As it turned out, the evidence presented at the penalty phase showed that respondent had committed his second offense three days *before* his first conviction became final, meaning that he was not eligible for the habitual offender enhancement. No one, including defense counsel, noted the discrepancy—either at trial or on direct appeal. Respondent first raised the issue in a request for state postconviction relief, arguing that the evidence at the penalty hearing was insufficient to support the habitual offender conviction. The state court rejected his sufficiency of the evidence claim on procedural grounds, because he had not raised the issue earlier; the state court likewise rejected respondent's claim that counsel had been ineffective for failing to object. Respondent renewed his sufficiency of the evidence and ineffective assistance claims in a subsequent federal habeas application. Conceding that respondent was not, in fact, eligible for the habitual offender enhancement, the State nevertheless argued that respondent had procedurally defaulted his sufficiency of the evidence claim. The District Court excused the procedural default because respondent was actually innocent of the enhanced sentence; it thus did not reach the ineffective assistance claim. The Fifth Circuit affirmed, holding that the actual innocence exception applies to noncapital sentencing procedures involving career offenders and habitual felony offenders.

Held: A federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to ex-

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cuse the procedural default. Normally, a federal court will not entertain a procedurally defaulted constitutional claim in a habeas petition absent a showing of cause and prejudice to excuse the default. However, this Court recognizes a narrow exception to the general rule when the applicant can demonstrate actual innocence of the substantive offense, *Murray* v. *Carrier*, 477 U. S. 478, 496, or, in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty, *Sawyer* v. *Whitley*, 505 U. S. 333. The Court declines to answer the question presented here, whether this exception should be extended to noncapital sentencing error, because the District Court failed first to consider alternative grounds for relief urged by respondent. This avoidance principle was implicit in *Carrier* itself, where the Court expressed confidence that, "for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard,'" 477 U. S., at 495–496, particularly given the availability of ineffective assistance of counsel claims, *id.*, at 496. Petitioner concedes that respondent has a viable and significant ineffective assistance of counsel claim. Success on the merits would give respondent all of the relief that he seeks, *i. e.*, resentencing, and also would provide cause to excuse the procedural default of his sufficiency of the evidence claim. The many threshold legal questions often accompanying actual innocence claims provide additional reason for restraint. For instance, respondent's claim raises the question whether the holding of *In re Winship*, 397 U. S. 358—that each element of a criminal offense must be proved beyond a reasonable doubt—should be extended to proof of prior convictions used to support recidivist enhancements. Not all actual innocence claims will involve threshold constitutional questions, but, as this case illustrates, such claims are likely to present equally difficult questions regarding the scope of the actual innocence exception itself. Pp. 392–396.

306 F. 3d 257, vacated and remanded.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Scalia, Thomas, Ginsburg, and Breyer, JJ., joined. Stevens, J., filed a dissenting opinion, in which Kennedy and Souter, JJ., joined, *post*, p. 396. Kennedy, J., filed a dissenting opinion, *post*, p. 399.

R. Ted Cruz, Solicitor General of Texas, argued the cause for petitioner. With him on the briefs were *Greg Abbott*, Attorney General, *Barry R. McBee*, First Assistant Attorney General, and *Danica L. Milios*, Assistant Solicitor General.

Matthew D. Roberts argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Wray*, and *Deputy Solicitor General Dreeben.*

Eric M. Albritton, by appointment of the Court, 540 U. S. 1044, argued the cause for respondent. With him on the brief was *Jeffrey L. Bleich.**

JUSTICE O'CONNOR delivered the opinion of the Court.

Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default. We have recognized a narrow exception to the general rule when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense or, in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty. *Murray* v. *Carrier*, 477 U. S. 478 (1986); *Sawyer* v. *Whitley*, 505 U. S. 333 (1992). The question before us is whether this exception applies where an applicant asserts "actual innocence" of a noncapital sentence. Because the District Court failed first to consider alternative grounds for relief urged

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*A brief of *amici curiae* urging reversal was filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Gary Feinerman*, Solicitor General, *Linda D. Woloshin* and *Domenica A. Osterberger*, Assistant Attorneys General, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Bill Pryor* of Alabama, *Terry Goddard* of Arizona, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Jon Bruning* of Nebraska, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, and *Patrick J. Crank* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for Zachary W. Carter et al. by *James Orenstein* and *Alison Tucher;* and for James S. Liebman et al. by *Edward C. DuMont.*

by respondent, grounds that might obviate any need to reach the actual innocence question, we vacate the judgment and remand.

I

In 1997, respondent Michael Wayne Haley was arrested after stealing a calculator from a local Wal-Mart and attempting to exchange it for other merchandise. Respondent was charged with, and found guilty at trial of, theft of property valued at less than $1,500, which, because respondent already had two prior theft convictions, was a "state jail felony" punishable by a maximum of two years in prison. App. 8; Tex. Penal Code Ann. § 31.03(e)(4)(D) (Supp. 2004). The State also charged respondent as a habitual felony offender. The indictment alleged that respondent had two prior felony convictions and that the first—a 1991 conviction for delivery of amphetamine—"became final prior to the commission" of the second—a 1992 robbery. App. 9. The timing of the first conviction and the second offense is significant: Under Texas' habitual offender statute, only a defendant convicted of a felony who "has previously been finally convicted of two felonies, *and* the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, . . . shall be punished for a second-degree felony." § 12.42(a)(2) (emphasis added). A second degree felony carries a minimum sentence of 2 and a maximum sentence of 20 years in prison. § 12.33(a) (2003).

Texas provides for bifurcated trials in habitual offender cases. Tex. Code Crim. Proc. Ann., Art. 37.07, § 3 (Vernon Supp. 2004). If a defendant is found guilty of the substantive offense, the State, at a separate penalty hearing, must prove the habitual offender allegations beyond a reasonable doubt. *Ibid.* During the penalty phase of respondent's trial, the State introduced records showing that respondent had been convicted of delivery of amphetamine on October 18, 1991, and attempted robbery on September 9, 1992. The record of the second conviction, however, showed that re-

spondent had committed the robbery on October 15, 1991—three days *before* his first conviction became final. Neither the prosecutor, nor the defense attorney, nor the witness tendered by the State to authenticate the records, nor the trial judge, nor the jury, noticed the 3-day discrepancy. Indeed, the defense attorney chose not to cross-examine the State's witness or to put on any evidence.

The jury returned a verdict of guilty on the habitual offender charge and recommended a sentence of 16½ years; the court followed the recommendation. Respondent appealed. Appellate counsel did not mention the 3-day discrepancy nor challenge the sufficiency of the penalty-phase evidence to support the habitual offender enhancement. The State Court of Appeals affirmed respondent's conviction and sentence; the Texas Court of Criminal Appeals refused respondent's petition for discretionary review.

Respondent thereafter sought state postconviction relief, arguing for the first time that he was ineligible for the habitual offender enhancement based on the timing of his second conviction. App. 83, 87–88. The state habeas court refused to consider the merits of that claim because respondent had not raised it, as required by state procedural law, either at trial or on direct appeal. *Id.*, at 107, 108. The state habeas court rejected respondent's related ineffective assistance of counsel claim, saying only that "counsel was not ineffective" for failing to object to or to appeal the enhancement. *Id.*, at 108. The Texas Court of Criminal Appeals summarily denied respondent's state habeas application. *Id.*, at 109.

In August 2000, respondent filed a timely *pro se* application for a federal writ of habeas corpus pursuant to 28 U. S. C. § 2254, renewing his sufficiency of the evidence and ineffective assistance of counsel claims. App. 110, 118–119; *id.*, at 122, 124, 126–127. The State conceded that respondent was "correct in his assertion that the enhancement paragraphs as alleged in the indictment do not satisfy section 12.42(a)(2) of the Texas Penal Code." *Id.*, at 132, 140.

Rather than agree to resentencing, however, the State argued that respondent had procedurally defaulted the sufficiency of the evidence claim by failing to raise it before the state trial court or on direct appeal. *Id.*, at 142–144. The Magistrate Judge, to whom the habeas application had been referred, recommended excusing the procedural default and granting the sufficiency of the evidence claim because respondent was "'actually innocent' of a sentence for a second-degree felony." *Haley* v. *Director, Texas Dept. of Criminal Justice, Institutions Div.*, Civ. No. 6:00cv518 (ED Tex., Sept. 13, 2001), p. 10, App. to Pet. for Cert. 49a (citing *Sones* v. *Hargett*, 61 F. 3d 410, 419 (CA5 1995)). Because she recommended relief on the erroneous enhancement claim, the Magistrate Judge did not address respondent's related ineffective assistance of counsel challenges. App. to Pet. for Cert. 50a–52a. The District Court adopted the Magistrate Judge's report, granted the application, and ordered the State to resentence respondent "without the improper enhancement." *Id.*, at 36a–37a (Oct. 27, 2001).

The Court of Appeals for the Fifth Circuit affirmed, holding narrowly that the actual innocence exception "applies to noncapital sentencing procedures involving a career or habitual felony offender." *Haley* v. *Cockrell*, 306 F. 3d 257, 264 (2002). The Fifth Circuit thus joined the Fourth Circuit in holding that the exception should not extend beyond allegedly erroneous recidivist enhancements to other claims of noncapital factual sentencing error: "[T]o broaden the exception further would 'swallow' the 'cause portion of the cause and prejudice requirement' and it 'would conflict squarely with Supreme Court authority indicating that generally more than prejudice must exist to excuse a procedural default.'" *Id.*, at 266 (quoting *United States* v. *Mikalajunas*, 186 F. 3d 490, 494–495 (CA4 1999)). Finding the exception satisfied, the panel then granted relief on the merits of respondent's otherwise defaulted sufficiency of the evidence claim. In so doing, the panel assumed that challenges to the

sufficiency of noncapital sentencing evidence are cognizable on federal habeas under *Jackson* v. *Virginia*, 443 U. S. 307 (1979). 306 F. 3d, at 266–267 (citing *French* v. *Estelle*, 692 F. 2d 1021, 1024–1025 (CA5 1982)).

The Fifth Circuit's decision exacerbated a growing divergence of opinion in the Courts of Appeals regarding the availability and scope of the actual innocence exception in the noncapital sentencing context. Compare *Embrey* v. *Hershberger*, 131 F. 3d 739 (CA8 1997) (en banc) (no actual innocence exception for noncapital sentencing error); *Reid* v. *Oklahoma*, 101 F. 3d 628 (CA10 1996) (same), with *Spence* v. *Superintendent, Great Meadow Correctional Facility*, 219 F. 3d 162 (CA2 2000) (actual innocence exception applies in noncapital sentencing context when error is related to finding of predicate act forming the basis for enhancement), and *Mikalajunas*, *supra* (actual innocence exception applies in noncapital sentencing context where error relates to a recidivist enhancement). We granted the State's request for a writ of certiorari, 540 U. S. 945 (2003), and now vacate and remand.

II

The procedural default doctrine, like the abuse of writ doctrine, "refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *McCleskey* v. *Zant*, 499 U. S. 467, 489 (1991). A corollary to the habeas statute's exhaustion requirement, the doctrine has its roots in the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds. *Wainwright* v. *Sykes*, 433 U. S. 72, 81 (1977); *Brown* v. *Allen*, 344 U. S. 443, 486–487 (1953). But, while an adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment, it provides only a strong prudential reason, grounded in "considerations of comity and concerns for the orderly administration of criminal justice,"

not to pass upon a defaulted constitutional claim presented for federal habeas review. *Francis* v. *Henderson*, 425 U. S. 536, 538–539 (1976); see also *Fay* v. *Noia*, 372 U. S. 391, 399 (1963) ("[T]he doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute"). That being the case, we have recognized an equitable exception to the bar when a habeas applicant can demonstrate cause and prejudice for the procedural default. *Wainwright*, *supra*, at 87. The cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that "fundamental fairness [remains] the central concern of the writ of habeas corpus." *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984).

The cause and prejudice standard is not a perfect safeguard against fundamental miscarriages of justice. *Murray* v. *Carrier*, 477 U. S. 478 (1986), thus recognized a narrow exception to the cause requirement where a constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense. *Id.*, at 496; accord, *Schlup* v. *Delo*, 513 U. S. 298 (1995). We subsequently extended this exception to claims of capital sentencing error in *Sawyer* v. *Whitley*, 505 U. S. 333 (1992). Acknowledging that the concept of "'actual innocence'" did not translate neatly into the capital sentencing context, we limited the exception to cases in which the applicant could show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.*, at 336.

We are asked in the present case to extend the actual innocence exception to procedural default of constitutional claims challenging noncapital sentencing error. We decline to answer the question in the posture of this case and instead hold that a federal court faced with allegations of actual inno-

cence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default.

This avoidance principle was implicit in *Carrier* itself, where we expressed confidence that, "for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.' " 477 U. S., at 495–496 (quoting *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982)). Our confidence was bolstered by the availability of ineffective assistance of counsel claims—either as a ground for cause or as a freestanding claim for relief—to safeguard against miscarriages of justice. The existence of such safeguards, we observed, "may properly inform this Court's judgment in determining '[w]hat standards should govern the exercise of the habeas court's equitable discretion' with respect to procedurally defaulted claims." *Carrier*, *supra*, at 496 (quoting *Reed* v. *Ross*, 468 U. S. 1, 9 (1984)).

Petitioner here conceded at oral argument that respondent has a viable and "significant" ineffective assistance of counsel claim. Tr. of Oral Arg. 18 ("[W]e agree at this point there is a very significant argument of ineffective assistance of counsel"); see also *id.*, at 7 (agreeing "not [to] raise any procedural impediment" to consideration of the merits of respondent's ineffective assistance claim on remand). Success on the merits would give respondent all of the relief that he seeks—*i. e.*, resentencing. It would also provide cause to excuse the procedural default of his sufficiency of the evidence claim. *Carrier*, *supra*, at 488.

Contrary to the dissent's view, see *post*, at 397 (opinion of STEVENS, J.), it is precisely because the various exceptions to the procedural default doctrine are judge-made rules that courts as their stewards must exercise restraint, adding to or expanding them only when necessary. To hold otherwise would be to license district courts to riddle the cause and prejudice standard with ad hoc exceptions whenever they perceive an error to be "clear" or departure from the rules

expedient. Such an approach, not the rule of restraint adopted here, would have the unhappy effect of prolonging the pendency of federal habeas applications as each new exception is tested in the courts of appeals. And because petitioner has assured us that the State will not seek to reincarcerate respondent during the pendency of his ineffective assistance claim, Tr. of Oral Arg. 52 ("[T]he state is willing to allow the ineffective assistance case to be litigated before proceeding to reincarcerate [respondent]"), the negative consequences for respondent of our judgment to vacate and remand in this case are minimal.

While availability of other remedies alone would be sufficient justification for a general rule of avoidance, the many threshold legal questions often accompanying claims of actual innocence provide additional reason for restraint. For instance, citing *Jackson* v. *Virginia*, 443 U. S. 307 (1979), respondent here seeks to bring through the actual innocence gateway his constitutional claim that the State's penalty-phase evidence was insufficient to support the recidivist enhancement. But the constitutional hook in *Jackson* was *In re Winship*, 397 U. S. 358 (1970), in which we held that due process requires proof of each element of a criminal offense beyond a reasonable doubt. We have not extended *Winship*'s protections to proof of prior convictions used to support recidivist enhancements. *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998); see also *Apprendi* v. *New Jersey*, 530 U. S. 466, 488–490 (2000) (reserving judgment as to the validity of *Almendarez-Torres*); *Monge* v. *California*, 524 U. S. 721, 734 (1998) (Double Jeopardy Clause does not preclude retrial on a prior conviction used to support recidivist enhancement). Respondent contends that *Almendarez-Torres* should be overruled or, in the alternative, that it does not apply because the recidivist statute at issue required the jury to find not only the existence of his prior convictions but also the additional fact that they were sequential. Brief for Respondent 30–31. These difficult

constitutional questions, simply assumed away by the dissent, see *post*, at 397 (citing *Jackson*, *supra*, and *Thompson* v. *Louisville*, 362 U. S. 199 (1960)), are to be avoided if possible.

To be sure, not all claims of actual innocence will involve threshold constitutional issues. Even so, as this case and the briefing illustrate, such claims are likely to present equally difficult questions regarding the scope of the actual innocence exception itself. Whether and to what extent the exception extends to noncapital sentencing error is just one example. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE KENNEDY and JUSTICE SOUTER join, dissenting.

The unending search for symmetry in the law can cause judges to forget about justice. This should be a simple case.

Respondent was convicted of the theft of a calculator. Because of his prior theft convictions, Texas law treated respondent's crime as a "state jail felony," which is punishable by a maximum sentence of two years in jail. Tex. Penal Code Ann. § 12.35(a) (2003). But as a result of a congeries of mistakes made by the prosecutor, the trial judge, and his attorney, respondent was also erroneously convicted and sentenced under Texas' habitual offender law, § 12.42(a)(2) (Supp. 2004). Respondent consequently received a sentence of more than 16 years in the penitentiary. The State concedes that respondent does not qualify as a habitual offender and that the 16-year sentence was imposed in error.[1] Respondent has already served more than 6 years of that sentence—a sentence far in excess of the 2-year maximum that Texas law authorizes for respondent's crime.

[1] Brief for Petitioner 4; Tr. of Oral Arg. 4 ("[I]t's almost a law school hypothetical, because the error is so clean").

Because, as all parties agree, there is no factual basis for respondent's conviction as a habitual offender, it follows inexorably that respondent has been denied due process of law. *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Jackson* v. *Virginia*, 443 U. S. 307 (1979). And because that constitutional error clearly and concededly resulted in the imposition of an unauthorized sentence, it also follows that respondent is a "victim of a miscarriage of justice," *Wainwright* v. *Sykes*, 433 U. S. 72, 91 (1977), entitled to immediate and unconditional release.

The Magistrate Judge, the District Court, and the Court of Appeals all concluded that respondent is entitled to such relief. Not a word in any federal statute or any provision of the Federal Rules of Procedure provides any basis for challenging that conclusion. The Court's contrary determination in this case rests entirely on a procedural rule of its own invention. But having also invented the complex jurisprudence that requires a prisoner to establish "cause and prejudice" as a basis for overcoming procedural default, the Court unquestionably has the authority to recognize a narrow exception for the unusual case that is as clear as this one.

Indeed, in the opinion that first adopted the cause and prejudice standard, the Court explained its purpose as providing "an adequate guarantee" that a procedural default would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." *Ibid.* The Court has since held that in cases in which the cause and prejudice standard is inadequate to protect against fundamental miscarriages of justice, the cause and prejudice requirement "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982).

If there were some uncertainty about the merits of respondent's claim that he has been incarcerated unjustly, it

might make sense to require him to pursue other avenues for comparable relief before deciding the claim.[2] But in this case, it is universally acknowledged that respondent's incarceration is unauthorized. The miscarriage of justice is manifest. Since the "imperative of correcting a fundamentally unjust incarceration" will lead to the issuance of the writ regardless of the outcome of the cause and prejudice inquiry, the Court's ruling today needlessly postpones final adjudication of respondent's claim and perversely prolongs the very injustice that the cause and prejudice standard was designed to prevent.

That the State has decided to oppose the grant of habeas relief in this case, even as it concedes that respondent has already served more time in prison than the law authorized, might cause some to question whether the State has forgotten its overriding "obligation to serve the cause of justice." *United States* v. *Agurs*, 427 U. S. 97, 111 (1976); see *post*, p. 399 (KENNEDY, J., dissenting). But this Court is surely no less at fault. In its attempt to refine the boundaries of the judge-made doctrine of procedural default, the Court has lost sight of the basic reason why the "writ of habeas corpus indisputably holds an honored position in our jurisprudence." *Engle*, 456 U. S., at 126. Habeas corpus is, and has for centuries been, a "bulwark against convictions that violate fun-

[2] Because it is not always easy to discern the difference between "constitutional claims that call into question the reliability of an adjudication of legal guilt," to which the cause and prejudice requirement applies, and claims that a constitutional violation "probably resulted in the conviction of one who is actually innocent," for which failure to show cause is excused, *Murray* v. *Carrier*, 477 U. S. 478, 495–496 (1986), a court reviewing a claim of actual innocence must generally proceed with caution. But that type of caution is plainly unwarranted in a case in which constitutional error has concededly resulted in the imposition of an unlawful sentence. In such a case, there is simply no risk that entertaining the habeas applicant's procedurally defaulted claim will result in an unwarranted encroachment on the principles of comity and finality that underlie the procedural default doctrine.

damental fairness." *Ibid.* (internal quotation marks omitted). Fundamental fairness should dictate the outcome of this unusually simple case.

I respectfully dissent.

JUSTICE KENNEDY, dissenting.

For the reasons JUSTICE STEVENS sets forth, the respondent should be entitled to immediate relief, and I join his dissenting opinion. The case also merits this further comment concerning the larger obligation of state or federal officials when they know an individual has been sentenced for a crime he did not commit.

In 1997, Michael Haley was sentenced to serve 16 years and 6 months in prison for violating the Texas habitual offender law. Texas officials concede Haley did not violate this law. They agree that Haley is guilty only of theft, a crime with a 2-year maximum sentence. Yet, despite the fact that Haley served more than two years in prison for his crime, Texas officials come before our Court opposing Haley's petition for relief. They wish to send Haley back to prison for a crime they agree he did not commit.

The rigors of the penal system are thought to be mitigated to some degree by the discretion of those who enforce the law. See, *e. g.*, Jackson, The Federal Prosecutor, 31 J. Am. Inst. Crim. L. & C. 3, 6 (1940–1941). The clemency power is designed to serve the same function. Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider. These mechanisms hold out the promise that mercy is not foreign to our system. The law must serve the cause of justice.

These mitigating elements seem to have played no role in Michael Haley's case. Executive discretion and clemency can inspire little confidence if officials sworn to fight injustice choose to ignore it. Perhaps some would say that Haley's innocence is a mere technicality, but that would miss the

point. In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail.

It may be that Haley's case provides a convenient mechanism to vindicate an important legal principle. Beyond that, however, Michael Haley has a greater interest in knowing that he will not be reincarcerated for a crime he did not commit. It is not clear to me why the State did not exercise its power and perform its duty to vindicate that interest in the first place.

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SCARBOROUGH *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS

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

No. 02–1657. Argued February 23, 2004—Decided May 3, 2004

The Equal Access to Justice Act (EAJA) authorizes the payment of attorney's fees to a prevailing party in an action against the United States absent a showing by the Government that its position in the underlying litigation "was substantially justified." 28 U. S. C. § 2412(d)(1)(A). Section 2412(d)(1)(B) sets a deadline of 30 days after final judgment for the filing of a fee application and directs that the application include: (1) a showing that the applicant is a "prevailing party"; (2) a showing that the applicant is "eligible to receive an award"; and (3) a statement of "the amount sought, including an itemized statement from any attorney . . . stating the actual time expended and the rate" charged. Section 2412(d)(1)(B)'s second sentence further requires the applicant to "allege that the position of the United States was not substantially justified."

Petitioner Scarborough prevailed before the Court of Appeals for Veterans Claims (CAVC) in an action for disability benefits against respondent Secretary of Veterans Affairs. Scarborough's counsel filed a timely application for attorney's fees and costs pursuant to § 2412(d), showing that Scarborough was the prevailing party in the underlying litigation and was eligible to receive an award. Counsel also stated the total amount sought, and itemized hours and rates of work. But counsel failed initially to allege, in addition, that "the position of the United States was not substantially justified." § 2412(d)(1)(B). The Secretary moved to dismiss the application on the ground that the CAVC lacked subject-matter jurisdiction to award fees because Scarborough's counsel had failed to make the required no-substantial-justification allegation. Scarborough's counsel immediately filed an amended application adding that allegation. In the interim between the initial filing and the amendment, however, the 30-day fee application filing period had expired. For that sole reason, the CAVC dismissed Scarborough's fee application.

In affirming, the Federal Circuit initially held that EAJA plainly and unambiguously requires a party seeking fees under § 2412(d) to submit an application, including all enumerated allegations, within the 30-day time limit. This Court granted certiorari, vacated the judgment, and remanded the case in light of *Edelman* v. *Lynchburg College*, 535 U. S.

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106. In *Edelman*, the Court had upheld an Equal Employment Opportunity Commission (EEOC) regulation allowing amendment of an employment discrimination charge, timely filed under Title VII of the Civil Rights Act of 1964, to add, after the filing deadline, the required, but initially absent, verification. Title VII, the Court explained, permitted "relation back" of a verification missing from an original filing. *Id.*, at 115–118. On remand, the Federal Circuit adhered to its earlier decision, distinguishing *Edelman* on the ground that, in Title VII's remedial scheme, laypersons often initiate the process, whereas EAJA is directed to attorneys. The appeals court also observed that the timely filing and verification requirements at issue in *Edelman* appear in separate statutory provisions, while EAJA's 30-day filing deadline and the contents required for a fee application are detailed in the same statutory provision. The Federal Circuit also distinguished the holding in *Becker* v. *Montgomery*, 532 U. S. 757, that a *pro se* litigant's failure to hand sign a timely filed notice of appeal is a nonjurisdictional, and therefore curable, defect. This Court had noted in *Becker*, the Federal Circuit pointed out, that the timing and signature requirements there at issue were found in separate rules.

Held: A timely fee application, pursuant to § 2412(d), may be amended after the 30-day filing period has run to cure an initial failure to allege that the Government's position in the underlying litigation lacked substantial justification. Thus, Scarborough's fee application, as amended, qualifies for consideration and determination on the merits. Pp. 413–423.

(a) Whether Scarborough is time barred by § 2412(d)(1)(B) from gaining the fee award authorized by § 2412(d)(1)(A) does not concern the federal courts' "subject-matter jurisdiction." Rather, it concerns a mode of relief (costs including legal fees) ancillary to the judgment of a court that has plenary "jurisdiction of [the civil] action" in which the fee application is made. See §§ 2412(b) and (d)(1)(A); 38 U. S. C. § 7252(a). More particularly, the current dispute presents a question of time. The issue is not whether, but when, §§ 2412(d)(1)(A) and (B) require a fee applicant to "allege that the position of the United States was not substantially justified." Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for such claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority. *Kontrick* v. *Ryan*, 540 U. S. 443, 454–455. Section 2412(d)(1)(B) does not describe what classes of cases the CAVC is competent to adjudicate, but relates only to postjudgment proceedings auxiliary to cases already within that court's adjudicatory authority. Pp. 413–414.

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(b) Unlike the § 2412(d)(1)(B) prescriptions on what the applicant must *show* (his "prevailing party" status, "eligib[ility] to receive an award," and "the amount sought, including an itemized statement"), the required "not substantially justified" allegation imposes no proof burden on the fee applicant, but is simply an allegation or pleading requirement. So understood, the applicant's pleading burden is akin to *Becker*'s signature requirement and *Edelman*'s verification requirement. Like those requirements, EAJA's ten-word "not substantially justified" allegation is a "think twice" prescription that "stem[s] the urge to litigate irresponsibly," *Edelman*, 535 U. S., at 116; at the same time, the allegation functions to shift the burden to the Government to prove that its position in the underlying litigation "was substantially justified," § 2412(d)(1)(A). The allegation does not serve an essential notice-giving function; the Government is aware, from the moment a fee application is filed, that to defeat the application on the merits, it will have to prove its position "was substantially justified." A failure to make the allegation, therefore, should not be fatal where no genuine doubt exists about who is applying for fees, from what judgment, and to which court. *Becker*, 532 U. S., at 767. Moreover, because Scarborough's lawyer's statutory contingent fee would be reduced dollar for dollar by an EAJA award, see 38 U. S. C. § 5904(d)(1); Fee Agreements, note following 28 U. S. C. § 2412, allowing the curative amendment benefits the complainant directly, and is not fairly described as simply a boon for his counsel.

The Court rejects the Government's assertion that the relation-back regime, as now codified in Federal Rule of Civil Procedure 15(c), is out of place in this context because that Rule governs "pleadings," a term that does not encompass fee applications. In *Becker* and *Edelman*, the Court approved application of the relation-back doctrine to a notice of appeal and an EEOC discrimination charge, neither of which is a "pleading" under the Federal Rules. Moreover, "relation back" was not an invention of the federal rulemakers. This Court applied the doctrine well before the Federal Rules became effective, see, *e. g.*, *New York Central & Hudson River R. Co.* v. *Kinney*, 260 U. S. 340, 346. Thus, the relation-back doctrine properly guides the Court's determination here: The amended application "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth" in the initial application. Fed. Rule Civ. Proc. 15(c)(2). Pp. 414–419.

(c) The Court rejects the Government's argument that § 2412's waiver of sovereign immunity from liability for fees is conditioned on the fee applicant's meticulous compliance with each and every § 2412(d)(1)(B) requirement within 30 days of final judgment, including the allegation that the United States' position "was not substantially justified." *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95, and *Franco-*

nia Associates v. *United States*, 536 U. S. 129, 145—in which the Court recognized that limitation principles generally apply to the Government in the same way they apply to private parties—are enlightening on this issue. The Government asserts unpersuasively that *Irwin* and *Franconia* do not bear on this case because § 2412(d) authorizes fee awards against it under rules that have no analogue in private litigation. Because many statutes that create claims for relief against the United States or its agencies apply only to Government defendants, *Irwin*'s reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent. In any event, § 2412(d) is analogous to federal "prevailing party" fee-shifting statutes that are applicable to suits between private litigants. Finally, the Court's conclusion will not expose the Government to any unfair imposition. The Government has never argued that it will be prejudiced if Scarborough's "not substantially justified" allegation is permitted to relate back to his timely filed fee application. Moreover, a showing of prejudice should preclude operation of the relation-back doctrine in the first place. EAJA itself also has a built-in check: Section 2412(d)(1)(A) disallows fees where "special circumstances make an award unjust." Pp. 419–423.

319 F. 3d 1346, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 423.

Brian Wolfman argued the cause for petitioner. With him on the briefs were *Scott L. Nelson*, *Alan B. Morrison*, and *Peter J. Sarda*.

Jeffrey P. Minear argued the cause for respondent. On the brief were *Solicitor General Olson*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Clement*, *Austin C. Schlick*, *William Kanter*, *August E. Flentje*, and *Tim S. McClain*.

JUSTICE GINSBURG delivered the opinion of the Court.

The Equal Access to Justice Act (EAJA or Act) departs from the general rule that each party to a lawsuit pays his or her own legal fees. See *Alyeska Pipeline Service Co.* v.

Wilderness Society, 421 U. S. 240, 257 (1975). Relevant here, EAJA authorizes the payment of fees to a prevailing party in an action against the United States; the Government may defeat this entitlement by showing that its position in the underlying litigation "was substantially justified." 28 U. S. C. § 2412(d)(1)(A). In a further provision, § 2412(d)(1)(B), the Act prescribes the timing and content of applications seeking fees authorized by § 2412(d)(1)(A). Section 2412(d)(1)(B) specifies as the time for filing the application "within thirty days of final judgment in the action." In the same sentence, the provision identifies the application's contents, in particular, a showing that the applicant is a "prevailing party" who meets the financial eligibility condition (in this case, a net worth that "did not exceed $2,000,000 at the time the . . . action was filed," § 2412(d)(2)(B)); and a statement of the amount sought, with an accompanying itemization. The fee application instruction adds in the next sentence: "The [applicant] shall also allege that the position of the United States was not substantially justified."

Petitioner Randall C. Scarborough was the prevailing party in an action against the Department of Veterans Affairs for disability benefits. His counsel filed a timely application for fees showing Scarborough's "eligib[ility] to receive an award" and "the amount sought, including [the required] itemized statement." § 2412(d)(1)(B). But counsel failed initially to allege, in addition, that "the position of the United States was not substantially justified." Pointing to that omission, the Government moved to dismiss the fee application. Scarborough's counsel immediately filed an amended application adding that the Government's opposition to the underlying claim for benefits "was not substantially justified." In the interim between the initial filing and the amendment, however, the 30-day fee application filing period had expired. For that sole reason, the United States Court of Appeals for Veterans Claims granted the Government's

motion to dismiss the application and the Federal Circuit affirmed that disposition.

Scarborough's petition for certiorari presents this question: May a timely fee application, pursuant to § 2412(d), be amended after the 30-day filing period has run to cure an initial failure to allege that the Government's position in the underlying litigation lacked substantial justification? We hold that a curative amendment is permissible and that Scarborough's fee application, as amended, qualifies for consideration and determination on the merits.

I

A

Congress enacted EAJA, Pub. L. 96–481, Tit. II, 94 Stat. 2325, in 1980 "to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights in civil actions and administrative proceedings brought by or against the Federal Government." H. R. Rep. No. 96–1005, p. 9; see Congressional Findings and Purposes, 94 Stat. 2325, note following 5 U. S. C. § 504 ("It is the purpose of this title . . . to diminish the deterrent effect of seeking review of, or defending against, governmental action . . . ."). Among other reforms, EAJA amended 28 U. S. C. § 2412, which previously had authorized courts to award costs, but not attorney's fees and expenses, to prevailing parties in civil litigation against the United States. EAJA added two new prescriptions to § 2412 that expressly authorize attorney's fee awards against the Federal Government. First, § 2412(b) made the United States liable for attorney's fees and expenses "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." Second, § 2412(d) rendered the Government liable for a prevailing private party's attorney's fees and expenses in cases in which suit would lie only against the United States or an

agency of the United States. This case concerns the construction of § 2412(d).

Congress initially adopted § 2412(d) for a trial period of three years, Pub. L. 96–481, § 204(c); in 1985, Congress substantially reenacted the measure, this time without a sunset provision, Pub. L. 99–80, 99 Stat. 183. See *id.*, § 6(b)(2), 99 Stat. 186. Congress' aim, in converting § 2412(d) from a temporary measure to a permanent one, was "to ensure that certain individuals, partnerships, corporations . . . or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved." H. R. Rep. No. 99–120, p. 4.

Section 2412(d) currently provides, in relevant part:

> "(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a),[1] incurred by that party in any civil action (other than cases sounding in tort), . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> "(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness . . . stating the actual time expended and the rate at which fees and other expenses were computed. The party

[1] Subsection (a) states: "Except as otherwise specifically provided by statute, a judgment for costs . . . may be awarded to the prevailing party in any civil action brought by or against the United States . . . in any court having jurisdiction of such action." § 2412(a)(1).

> shall also allege that the position of the United States was not substantially justified."

Section 2412(d)(1)(A) thus entitles a prevailing party to fees absent a showing by the Government that its position in the underlying litigation "was substantially justified," while § 2412(d)(1)(B) sets a deadline of 30 days after final judgment for the filing of a fee application and directs that the application shall include: (1) a showing that the applicant is a prevailing party; (2) a showing that the applicant is eligible to receive an award (in Scarborough's case, that the applicant's "net worth did not exceed $2,000,000 at the time the civil action was filed," § 2412(d)(2)(B)); and (3) a statement of the amount sought together with an itemized account of time expended and rates charged. The second sentence of § 2412(d)(1)(B) adds a fourth instruction, requiring the applicant simply to "allege" that the position of the United States was not substantially justified.

B

On July 9, 1999, petitioner Scarborough, a United States Navy veteran, prevailed before the Court of Appeals for Veterans Claims (CAVC) on a claim for disability benefits. App. to Pet. for Cert. 41a–44a. Eleven days later, Scarborough's counsel applied, on Scarborough's behalf, for attorney's fees and costs pursuant to § 2412(d). App. 4–5. Scarborough himself would gain from any fee recovery because his lawyer's statutory contingent fee, ordinarily 20% of the veteran's past-due benefits, 38 U. S. C. § 5904(d)(1), would be reduced dollar for dollar by an EAJA award. See Federal Courts Administration Act of 1992, 106 Stat. 4513, Fee Agreements, note following 28 U. S. C. § 2412; Tr. of Oral Arg. 6.[2]

[2] The same reduction applies in Social Security cases, see Pub. L. 99–80, § 3, 99 Stat. 186, which account for the large majority of EAJA awards. L. Mecham, Annual Report of the Director of the Administrative Office of the United States Courts 35–37 (1990).

The Clerk of the CAVC returned Scarborough's initial fee application on the ground that it was filed too soon. App. 6–7. After the CAVC issued a judgment noting that the time for filing postdecision motions had expired, Scarborough's counsel filed a second EAJA application (the one at issue here) setting forth, as did the first application, that Scarborough was the prevailing party in the underlying litigation; that his net worth did not exceed $2 million; and a description of work counsel performed for Scarborough since counsel's retention in August 1998. *Id.*, at 8–9. The application requested $19,333.75 in attorney's fees and $117.80 in costs. *Id.*, at 9. Scarborough's applications, both the first and the second, failed to allege "that the position of the United States [in the underlying litigation] was not substantially justified," § 2412(d)(1)(B). In all other respects, it is not here disputed, Scarborough's filings met the § 2412(d)(1)(B) application-content requirements.

Again, the Clerk of the CAVC found the application premature, but this time retained it, unfiled, until the time to appeal the CAVC's judgment had expired. The Clerk then filed the fee application and notified the respondent Secretary of Veterans Affairs that his response was due within 30 days. *Id.*, at 10. After receiving and exhausting a 30-day extension of time to respond, the Secretary moved to dismiss the fee application. *Id.*, at 2. The CAVC lacked subject-matter jurisdiction to award fees under § 2412(d), the Secretary maintained, because Scarborough's counsel had failed to allege, within 30 days of the final judgment, "that the position of the United States was not substantially justified," § 2412(d)(1)(B). CAVC Record, Doc. 12, pp. 4–5.

Scarborough's counsel promptly filed an amendment to the fee application, stating in a new paragraph that "the government's defense of the Appellant's claim was not substantially justified." App. 11. Simultaneously, Scarborough opposed the Secretary's motion to dismiss, urging that the omission initially to plead "no substantial justification" could be cured

by amendment and was not a jurisdictional defect. CAVC Record, Doc. 13, pp. 1–2. On June 14, 2000, the CAVC dismissed Scarborough's fee application on the ground asserted by the Government. *Scarborough* v. *West*, 13 Vet. App. 530 *(per curiam)*.

A year-and-a-half later, the Court of Appeals for the Federal Circuit affirmed. 273 F. 3d 1087 (2001). EAJA must be construed strictly in favor of the Government, the Court of Appeals stated, because the Act effects a partial waiver of sovereign immunity, rendering the United States liable for attorney's fees when the Government otherwise would not be required to pay. *Id.*, at 1089–1090. In the court's view, "[t]he language of the EAJA statute is plain and unambiguous"; it requires a party seeking fees under § 2412(d) to submit an application, including all enumerated allegations, within the 30-day time limit. *Id.*, at 1090 (citing § 2412(d)(1)(B)). The court acknowledged that the Courts of Appeals for the Third and Eleventh Circuits read § 2412(d)(1)(B) to require only that the fee application be *filed* within 30 days; those Circuits allow later amendments to perfect the application-content specifications set out in § 2412(d)(1)(B). *Id.*, at 1090–1091 (citing *Dunn* v. *United States*, 775 F. 2d 99, 104 (CA3 1985) (applicant need not submit within 30 days an itemized statement accounting for the amount sought), and *Singleton* v. *Apfel*, 231 F. 3d 853, 858 (CA11 2000) (applicant need not allege within 30 days that her net worth did not exceed $2 million or that the Government's position was not substantially justified)).

The Federal Circuit also distinguished its own decision in *Bazalo* v. *West*, 150 F. 3d 1380 (1998), which had held that an applicant may supplement an EAJA application to cure an initial failure to show eligibility for fees. The applicant in *Bazalo* had failed to allege and establish, within the 30-day period, that he was a qualified "party" within the meaning of § 2412(d), *i. e.*, that his "net worth did not exceed $2,000,000 at the time the civil action was filed,"

§ 2412(d)(2)(B). *Id.*, at 1381. *Bazalo* differed from Scarborough's case, the Court of Appeals said, because the *Bazalo* applicant had essentially complied with the basic pleading requirements and simply needed to "fles[h] out . . . the details." 273 F. 3d, at 1092.

We granted Scarborough's initial petition for a writ of certiorari, vacated the judgment of the Court of Appeals, and remanded the case in light of this Court's decision in *Edelman* v. *Lynchburg College*, 535 U. S. 106 (2002). See 536 U. S. 920 (2002). *Edelman* concerned an Equal Employment Opportunity Commission (EEOC) regulation relating to Title VII of the Civil Rights Act of 1964; the regulation allowed amendment of an employment discrimination charge, timely filed with the EEOC, to add, after the filing deadline had passed, the required, but initially absent, verification. See 42 U. S. C. § 2000e–5(b) (requiring charges to "be in writing under oath or affirmation"). We upheld the regulation. Title VII, we explained, in line with "a long history of practice," 535 U. S., at 116, permitted "relation back" of a verification missing from an original filing, *id.*, at 115–118.

On remand of Scarborough's case to the same Federal Circuit panel, two of the three judges adhered to the panel's unanimous earlier decision and distinguished *Edelman*. 319 F. 3d 1346 (2003). Unlike the civil rights statute in *Edelman*, the Court of Appeals majority said, a "remedial scheme" in which laypersons often initiate the process, EAJA is directed to attorneys, who do not need "paternalistic protection." 319 F. 3d, at 1353 (internal quotation marks omitted). The Federal Circuit's majority further observed that the two requirements at issue in *Edelman*—the timely filing of a discrimination charge and the verification of that charge—appear in separate statutory provisions. In contrast, EAJA's 30-day filing deadline and the contents required for a fee application are detailed in the same statutory provision. 319 F. 3d, at 1353. The majority also distinguished *Becker* v. *Montgomery*, 532 U. S. 757 (2001), in which

we held that a *pro se* litigant's failure to hand sign a timely filed notice of appeal is a nonjurisdictional, and therefore curable, defect. This Court had noted in *Becker*, the Federal Circuit majority pointed out, that the timing and signature requirements there at issue were found in separate rules. See 319 F. 3d, at 1353. The Federal Circuit's opinion next distinguished *Edelman*'s verification requirement and *Becker*'s signature requirement from EAJA's no-substantial-justification-allegation requirement on this additional ground: "[The] . . . substantial justification [allegation] is not a pro forma requirement," for it "requires an applicant to analyze the case record" and "is one portion of the basis of the award itself." 319 F. 3d, at 1353. Reiterating that the no-substantial-justification allegation is "jurisdictional," the Federal Circuit held that Scarborough's "[n]oncompliance [was] fatal" and dismissed the application. *Id.*, at 1355.

Chief Judge Mayer dissented. The no-substantial-justification allegation, he found, "is akin to the verification requirement of *Edelman* and the signature requirement of *Becker*." *Id.*, at 1356. In addition to the pathmarking *Edelman* and *Becker* decisions, he regarded this case as "substantially the same case as *Bazalo*." 319 F. 3d, at 1356. In light of EAJA's purpose "to eliminate the financial disincentive for those who would defend against unjustified governmental action and thereby deter it," Chief Judge Mayer concluded, "it is apparent that Congress did not intend the EAJA application process to be an additional deterrent to the vindication of rights because of a missing averment." *Ibid.*

We granted certiorari, 539 U. S. 986 (2003), in view of the division of opinion among the Circuits on the question whether an EAJA application may be amended, outside the 30-day period, to allege that the Government's position in the underlying litigation was not substantially justified, compare *Singleton*, 231 F. 3d 853, with 319 F. 3d 1346. We now reverse the judgment of the Court of Appeals.

II

A

We clarify, first, that the question before us—whether Scarborough is time barred by § 2412(d)(1)(B) from gaining the fee award authorized by § 2412(d)(1)(A)—does not concern the federal courts' "subject-matter jurisdiction." Rather, it concerns a mode of relief (costs including legal fees) ancillary to the judgment of a court that has plenary "jurisdiction of [the civil] action" in which the fee application is made. See §§ 2412(b) and (d)(1)(A) (costs including fees awardable "in any civil action" brought against the United States "in any court having jurisdiction of [that] action"); 38 U. S. C. § 7252(a) ("The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals.").[3] More particularly, the current dispute between Scarborough and the Government presents a question of time. The issue is not whether, but when, §§ 2412(d)(1)(A) and (B) require a fee applicant to "allege that the position of the United States was not substantially justified." As we recently observed:

> "Courts, including this Court, . . . have more than occasionally [mis]used the term 'jurisdictional' to describe emphatic time prescriptions in [claim processing] rules . . . . Classifying time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction' can be confounding. Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating

[3] Scarborough had already invoked the CAVC's exclusive jurisdiction—by appealing the Board of Veterans' Appeals' July 1998 decision denying his claim for disability benefits—well before he applied for fees; this distinguishes his case from *Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312 (1988), on which the Government relies. See Brief for Respondent 11, 20, n. 3. *Torres* involved the omission of required content (each applicant's name) in a notice of appeal, the filing that triggers appellate-court jurisdiction over the case. See 487 U. S., at 315, 317.

> the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick* v. *Ryan*, 540 U. S. 443, 454–455 (2004) (citation, some internal quotation marks, and brackets omitted).

In short, § 2412(d)(1)(B) does not describe what "classes of cases," *id.*, at 455, the CAVC is competent to adjudicate; instead, the section relates only to postjudgment proceedings auxiliary to cases already within that court's adjudicatory authority. Accordingly, as *Kontrick* indicates, the provision's 30-day deadline for fee applications and its application-content specifications are not properly typed "jurisdictional."

B

We turn next to the reason why Congress required the fee applicant to "allege" that the Government's position "was not substantially justified," § 2412(d)(1)(B).[4] Unlike the § 2412(d)(1)(B) prescriptions on what the applicant must *show* (his "prevailing party" status and "eligib[ility] to receive an award," and "the amount sought, including an itemized statement" reporting "the actual time expended and the rate at which fees and other expenses were computed"), the required "not substantially justified" allegation imposes no proof burden on the fee applicant. It is, as its text conveys, nothing more than an allegation or pleading requirement. The burden of establishing "that the position of the United States was substantially justified," § 2412(d)(1)(A) indicates and courts uniformly have recognized, must be shouldered by the Government. See, *e. g.*, *Pierce* v. *Underwood*, 487

[4] All agree that § 2412(d)(1)(B) requires a fee applicant to *allege* that the Government's position "was not substantially justified." In this regard, the dissent sees fire where there is no flame. The guides the dissent sets out, *post*, at 424–425, nn. 2 and 3—court rules and agency regulations—address only what the applicant must *plead*, not the question of time presented here.

U. S. 552, 567 (1988); *id.*, at 575 (Brennan, J., concurring in part and concurring in judgment); *Davidson* v. *Veneman*, 317 F. 3d 503, 506 (CA5 2003); *Lauer* v. *Barnhart*, 321 F. 3d 762, 764 (CA8 2003); *Libas, Ltd.* v. *United States*, 314 F. 3d 1362, 1365 (CA Fed. 2003). See also H. R. Rep. No. 96–1005, at 10 ("[T]he strong deterrents to contesting Government action that currently exis[t] require that the burden of proof rest with the Government.").

Congress did not, however, want the "substantially justified" standard to "be read to raise a presumption that the Government position was not substantially justified simply because it lost the case . . . ." *Ibid.* By allocating the burden of pleading "that the position of the United States was not substantially justified"—and that burden only—to the fee applicant, Congress apparently sought to dispel any assumption that the Government must pay fees each time it loses. Complementarily, the no-substantial-justification-allegation requirement serves to ward off irresponsible litigation, *i. e.*, unreasonable or capricious fee-shifting demands. As counsel for the Government stated at oral argument, allocating the pleading burden to fee applicants obliges them "to examine the Government's position and make a determination . . . whether it is substantially justified or not." Tr. of Oral Arg. 31; see *id.*, at 19 (petitioner recognizes that "the purpose of this allegation [is to make] a lawyer think twice"). So understood, the applicant's burden to plead that the Government's position "was not substantially justified" is akin to the signature requirement in *Becker* and the oath or affirmation requirement in *Edelman*.

In *Becker*, a *pro se* litigant had typed, but had neglected to hand sign, his name, as required by Federal Rule of Civil Procedure 11(a), on his timely filed notice of appeal. 532 U. S., at 760–761, 763; see *supra*, at 411–412. Although we called the rules on the timing and content of notices of appeal "linked jurisdictional provisions," *Becker*, 532 U. S., at 765 (referring to Fed. Rules App. Proc. 3 and 4), we concluded

that a litigant could add the signature required by Rule 11(a) even after the time for filing the notice had expired, 532 U. S., at 766–767. Rule 11(a), we observed, provides that "omission of the signature" on any "pleading, written motion, [or] other paper" may be "corrected promptly after being called to the attention of the attorney or party." See 532 U. S., at 764. Permitting a late signature to perfect an appeal, we explained, was hardly pathbreaking, for "[o]ther opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Id.*, at 767–768 (citing *Smith* v. *Barry*, 502 U. S. 244, 245, 248–249 (1992), and *Foman* v. *Davis*, 371 U. S. 178, 181 (1962)).

The next Term, in *Edelman*, we described our decision in *Becker* as having allowed "relation back" of the late signature to the timely filed notice of appeal. 535 U. S., at 116. *Edelman* involved an EEOC regulation permitting a Title VII discrimination charge timely filed with the agency to be amended, outside the charge-filing period, to include an omitted, but required, verification. *Id.*, at 109; see *supra*, at 411. "There is no reason," we observed in sustaining the regulation, "to think that relation back of the oath here is any less reasonable than relation back of the signature in *Becker*. Both are aimed at stemming the urge to litigate irresponsibly . . . ." 535 U. S., at 116.

Becker and *Edelman* inform our judgment in this case. Like the signature and verification requirements, EAJA's ten-word "not substantially justified" allegation is a "think twice" prescription that "stem[s] the urge to litigate irresponsibly," *Edelman*, 535 U. S., at 116; at the same time, the allegation functions to shift the burden to the Government to prove that its position in the underlying litigation "was substantially justified," § 2412(d)(1)(A). We note, too, that the allegation does not serve an essential notice-giving function; the Government is aware, from the moment a fee appli-

cation is filed, that to defeat the application on the merits, it will have to prove its position "was substantially justified." As *Becker* indicates, the lapse here "should not be fatal where no genuine doubt exists about who is app[lying] [for fees], from what judgment, to which . . . court." 532 U. S., at 767. Moreover, because Scarborough's lawyer's statutory contingent fee would be reduced dollar for dollar by an EAJA award, see 38 U. S. C. § 5904(d)(1); Fee Agreements, note following 28 U. S. C. § 2412, allowing the curative amendment benefits the complainant directly, and is not fairly described as simply a boon for his counsel. Permitting amendment thus advances Congress' purpose, in enacting EAJA, to reduce the "emphasi[s], virtually to the exclusion of all other issues, [on] the cost of potential litigation" in a party's decision whether to challenge unjust governmental action. H. R. Rep. No. 96–1005, at 7.

The Government, however, maintains that the relation-back regime, as now codified in Rule 15(c) of the Federal Rules of Civil Procedure, is out of place in this context, for that Rule governs "pleadings," a term that does not encompass fee applications. Brief for Respondent 21; see Fed. Rule Civ. Proc. 15(c)(2) (permitting relation back of amendments to pleadings when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original [timely filed] pleading"). See also Rule 7(a) (enumerating permitted "pleadings"). Scarborough acknowledges that Rule 15(c) itself is directed to federal district court "pleadings," but urges that this Court has approved application of the relation-back doctrine in analogous settings. Brief for Petitioner 28. Most recently, as just related, we applied the doctrine in *Becker* and *Edelman* to, respectively, a notice of appeal and an EEOC discrimination charge, neither of which is a "pleading" under the Federal Rules. As the Government concedes, moreover, see Tr. of Oral Arg. 35–36, "relation back" was not an invention of the

federal rulemakers. We applied the doctrine well before 1938, the year the Federal Rules became effective. See, *e. g.*, *New York Central & Hudson River R. Co.* v. *Kinney*, 260 U. S. 340, 346 (1922); *Seaboard Air Line R. Co.* v. *Renn*, 241 U. S. 290, 293–294 (1916); *Missouri, K. & T. R. Co.* v. *Wulf*, 226 U. S. 570, 575–576 (1913). With a view to then-existing practice, the original Rules Advisory Committee described "relation back" as "a well recognized doctrine." Advisory Committee's 1937 Note on Subd. (c) of Fed. Rule Civ. Proc. 15, 28 U. S. C. App., p. 686. Commentators have observed that the doctrine Rule 15(c) embraces "has its roots in the former federal equity practice and a number of state codes." 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1496, p. 64 (2d ed. 1990).[5]

The relation-back doctrine, we accordingly hold, properly guides our determination that Scarborough's fee application could be amended, after the 30-day filing period, to include the "not substantially justified" allegation: The amended application "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth" in the initial applica-

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[5] See, *e. g.*, Fed. Equity Rule 19 (1912) ("The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); Ill. Rev. Stat., ch. 110, §§ 170(1)–(2) (Smith-Hurd 1935) ("At any time before final judgment in a civil action, amendments may be allowed . . . in any process, pleading or proceedings . . . . The cause of action, cross demand or defense set up in any amended pleading shall not be barred by, lapse of time . . . if the time prescribed or limited had not expired when the original pleading was filed, and if . . . the amended pleading grew out of the same transaction or occurrence set up in the original pleading . . . ."); 2 Wash. Rev. Stat. § 308–3(4) (Remington 1932) ("A cause of action which would not have been barred by the statute of limitations if stated in the original complaint or counterclaim shall not be so barred if introduced by amendment at any later stage of the action, if the adverse party was fairly apprised of its nature by the original pleading . . . .").

tion. Fed. Rule Civ. Proc. 15(c)(2). Just as failure initially to verify a charge or sign a "pleading, written motion, [or] other paper," Fed. Rule Civ. Proc. 11(a), was not fatal to the petitioners' cases in *Edelman* and *Becker*, so here, counsel's initial omission of the assertion that the Government's position lacked substantial justification is not beyond repair.[6]

C

The Government insists most strenuously that § 2412's waiver of sovereign immunity from liability for fees is condi-

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[6] Scarborough also urges that, regardless of the availability of "relation back," § 2412(d)(1)(B)'s 30-day deadline does not apply to the no-substantial-justification-allegation requirement. Brief for Petitioner 36–39. In support, Scarborough points out that Congress easily could have placed the allegation requirement in the first sentence of § 2412(d)(1)(B), together with the 30-day deadline and the other application-content specifications. Congress' decision, instead, to set forth the allegation requirement in a separate, second sentence, which contains no time limitation, Scarborough asserts, is significant. *Id.*, at 39. Moreover, Scarborough contends, the fact that § 2412(d)(1)(B)'s second sentence is structured differently from the section's first sentence (requiring the "party" to "allege," rather than directing "the application" to "sho[w]") further indicates that Congress viewed the "not substantially justified" allegation as separate from the fee application's requirements more closely linked to the filing deadline. *Id.*, at 38. We do not think that this question, as the Government suggests, was answered in *Commissioner, INS* v. *Jean*, 496 U. S. 154 (1990). See Brief for Respondent 15, 24; Tr. of Oral Arg. 28, 45. In *Jean*, we held that a party who prevails in fee litigation under EAJA may recover fees for legal services rendered during the fee litigation even if some of the Government's positions regarding the proper fee were "substantially justified," *i. e.*, the district court need not make a second finding of no substantial justification before awarding fees for the fee contest itself. 496 U. S., at 160–162. The sentence in *Jean* on which the Government relies, stating that "[a] fee application must contain an allegation 'that the position of the United States was not substantially justified,'" *id.*, at 160, like *Jean*'s holding, did not concern the timing question we here confront. In any event, because our decision rests on the applicability of the relation-back doctrine, we do not further explore the debatable question whether § 2412(d)(1)(B)'s 30-day deadline even applies to the "not substantially justified" allegation requirement.

tioned on the fee applicant's meticulous compliance with each and every requirement of § 2412(d)(1)(B) within 30 days of final judgment. Brief for Respondent 18–19; Tr. of Oral Arg. 28, 31; see *Ardestani* v. *INS*, 502 U. S. 129, 137 (1991) ("EAJA renders the United States liable for attorney's fees for which it would otherwise not be liable, and thus amounts to a partial waiver of sovereign immunity."). In the Government's view, a failure to allege that the position of the United States "was not substantially justified" before the 30-day clock has run is as fatal as an omission of any other § 2412(d)(1)(B) specification. Brief for Respondent 15; Tr. of Oral Arg. 45.[7]

We observe, first, that the Federal Circuit's reading of § 2412(d)(1)(B) is not as unyielding as the Government's. Indeed, the Federal Circuit has held that a fee application may be amended, out of time, to show that the applicant "is eligible to receive an award," § 2412(d)(1)(B). See *Bazalo*, 150 F. 3d, at 1383–1384 (amendment made after 30-day filing period cured failure initially to establish that fee applicant's net worth did not exceed $2 million). As earlier noted, see *supra*, at 412, the dissenting judge in Scarborough's case found *Bazalo* indistinguishable. 319 F. 3d, at 1355–1356 (opinion of Mayer, C. J.).

Our decisions in *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89 (1990), and *Franconia Associates* v. *United States*, 536 U. S. 129 (2002), are enlightening on this issue. *Irwin* involved an untimely filed Title VII employment discrimination complaint against the Government. Although the petitioner had missed the filing deadline, we held that Title VII's statutory time limits are subject to equitable

[7] The question whether a fee application may be amended after the 30-day filing period to cure an initial failure to make the "show[ings]" set forth in the first sentence of § 2412(d)(1)(B) is not before us. We offer no view on the applicability of "relation back" in that situation.

tolling, even against the Government. 498 U. S., at 95.[8] Similarly, in *Franconia*, we rejected an "unduly restrictive" construction of the statute of limitations for claims filed against the United States under the Tucker Act, 28 U. S. C. § 1491. See 536 U. S., at 145 (internal quotation marks and brackets omitted); *ibid.* (refusing to adopt "special accrual rule" for commencement of limitations period against the Government).

In those decisions, we recognized that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Ibid.* (quoting *Irwin*, 498 U. S., at 95). Once Congress waives sovereign immunity, we observed, judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, "amounts to little, if any, broadening of the congressional waiver." *Irwin*, 498 U. S., at 95. We further stated in *Irwin* that holding the Government responsible "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Ibid.*[9]

The Government nevertheless maintains that *Irwin* and *Franconia* do not bear on this case, for "[§]2412(d) author-

[8] Although we held that equitable tolling could be applied in Title VII claims against the Government, we further determined that the doctrine's requirements were not met on the specific facts of *Irwin*. The *Irwin* petitioner's excuse for the late complaint—his lawyer's absence from the office when the EEOC notice that triggered the complaint-filing deadline was received—ranked "at best [as] a garden variety claim of excusable neglect." 498 U. S., at 96. In this case, we note, the Government extensively argues against recourse to *Irwin*'s "rebuttable presumption" that equitable tolling is available in litigation Congress has authorized against the United States. *Id.*, at 95; see Brief for Respondent 32–41. Because our decision rests on other grounds, we express no opinion on the applicability of equitable tolling in the circumstances here presented.

[9] Indeed, in enacting EAJA, Congress expressed its belief that "at a minimum, the United States should be held to the same standards in litigating as private parties." H. R. Rep. No. 96–1418, p. 9 (1980).

izes fee awards against the government under rules that have no analogue in private litigation." Brief for Respondent 39. But it is hardly clear that *Irwin* demands a precise private analogue. Litigation against the United States exists because Congress has enacted legislation creating rights against the Government, often in matters peculiar to the Government's engagements with private persons—matters such as the administration of benefit programs. Because many statutes that create claims for relief against the United States or its agencies apply only to Government defendants, *Irwin*'s reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent.

In any event, § 2412(d) is analogous to other fee-shifting provisions abrogating the general rule that each party to a lawsuit pays his own legal fees. The provision resembles "prevailing party" fee-shifting statutes that are applicable to suits between private litigants. See, *e. g.*, 15 U. S. C. § 1692k(a)(3) (Fair Debt Collection Practices Act); 29 U. S. C. § 2617(a)(3) (Family and Medical Leave Act of 1993); 42 U. S. C. § 2000e–5(k) (Title VII); cf. *Franconia*, 536 U. S., at 145 (comparing Tucker Act statute of limitations to "contemporaneous state statutes of limitations applicable to suits between private parties [that] also tie the commencement of the limitations period to the date a claim 'first accrues' ").

We note, finally, that the Government has never argued that it will be prejudiced if Scarborough's "not substantially justified" allegation is permitted to relate back to his timely filed fee application. Moreover, a showing of prejudice should preclude operation of the relation-back doctrine in the first place. See *Singleton*, 231 F. 3d, at 858 ("The interests of the government and the courts will be served, however, if district courts are empowered to . . . outright deny a request to supplement [a fee application] if the government would be prejudiced."). In addition, EAJA itself has a built-in check: Section 2412(d)(1)(A) disallows fees where

"special circumstances make an award unjust." See H. R. Rep. No. 96–1418, p. 11 (1980) (§ 2412(d)(1)(A)'s "safety valve" gives "the court discretion to deny awards where equitable considerations dictate an award should not be made"). Our conclusion that a timely filed EAJA fee application may be amended, out of time, to allege "that the position of the United States was not substantially justified," § 2412(d)(1)(B), therefore will not expose the Government to any unfair imposition.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Without deciding that the statutorily mandated 30-day deadline "even applies to the 'not substantially justified' allegation requirement," *ante,* at 419, n. 6, the Court, nonetheless, applies the relation-back doctrine to cure the omitted no-substantial-justification allegation in petitioner's Equal Access to Justice Act (EAJA) fee application. The Court should have first addressed whether, as a textual matter, the no-substantial-justification allegation must be made within the 30-day deadline. I conclude that it must. The question then becomes whether the judicial application of the relation-back doctrine is appropriate in a case such as this where the statute defines the scope of the Government's waiver of sovereign immunity. Because there is no express allowance for relation back in EAJA, I conclude that the sovereign immunity canon applies to construe strictly the scope of the Government's waiver. The Court reaches its holding today by distorting the scope of *Irwin* v. *Department of Vet-*

erans Affairs, 498 U. S. 89 (1990), and by eviscerating that case's doctrinal underpinnings.

I

In my view, the better reading of the text of the statute is that the 30-day deadline applies to the no-substantial-justification-allegation requirement. The first sentence of 28 U. S. C. § 2412(d)(1)(B) states that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees . . . which shows": (1) the applicant's status as a prevailing party; (2) that the applicant is eligible to receive fees under § 2412(d)(2)(B); and (3) the itemized amount sought. The second sentence of § 2412(d)(1)(B) provides: "The party shall also allege that the position of the United States was not substantially justified." *Ibid.* In stating that the applicant "shall *also*" make the no-substantial-justification allegation, the second sentence links the allegation requirement with the timing and other content requirements of the first sentence.[1] Indeed, there is only one deadline expressly contained in the provision. That 30-day deadline imposes a limitation on a set of requirements that petitioner must satisfy in order to receive an EAJA fee award. Immediately following the deadline is another sentence that requires the petitioner to make the no-substantial-justification allegation. Taking the provision as a whole, it is quite natural to read it as applying the 30-day deadline to all of its requirements.[2] And, this reading is

[1] "Also" is defined as "likewise," Webster's Ninth New Collegiate Dictionary 75 (1991), or "in like manner," Black's Law Dictionary 77 (6th ed. 1990).

[2] Several Courts of Appeals explicitly require an applicant to include the no-substantial-justification allegation in an EAJA fee application. See Federal Court of Appeals Manual: Local Rules 344–345 (West 2004) (CA2 "Local Form for EAJA Fee Application"); *id.*, at 1474–1475 (CA Fed. form "Application for Fees and Other Expenses Under the [EAJA]"); *id.*, at 244–245 (CA1 Rule 39(a)(2)(D) (2004) ("The application shall . . . identify

confirmed by numerous federal agency regulations,[3] which have interpreted a nearly identical EAJA provision allowing for fees in adversary adjudications conducted before federal agencies.[4]

II

Because I conclude that the no-substantial-justification allegation must be made within the 30-day deadline, the ques-

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the specific position of the United States that the party alleges was not substantially justified")); *id.*, at 699 (CA5 Rule 47.8.2(a) (2004) ("The application . . . must identify the position of the United States or an agency thereof that the applicant alleges was not substantially justified")); *id.*, at 1103 (CA9 Rule 39–2.1 (2004) ("The application . . . shall identify the position of the United States Government or an agency thereof in the proceeding that the applicant alleges was not substantially justified")).

[3] See, *e. g.*, 49 CFR § 6.17(a) (2003) ("The application shall . . . identify the position of an agency or agencies in the proceeding that the applicant alleges was not substantially justified"); 40 CFR § 17.11(a) (2003) ("The application shall . . . identify the position of [the Environmental Protection Agency] in the proceeding that the applicant alleges was not substantially justified"); 15 CFR § 18.11(a) (2003) ("The application shall . . . identify the position of the Department [of Commerce] . . . that the applicant alleges was not substantially justified"); 34 CFR § 21.31 (2003) ("In its application for an award of fees and other expenses, an applicant shall include . . . [a]n allegation that the position of the Department [of Education] was not substantially justified, including a description of the specific position"); 24 CFR § 14.200(a) (2003) ("An application for an award of fees and expenses under the Act shall . . . identify the position of the Department [of Housing and Urban Development] or other agencies that the applicant alleges was not substantially justified"); 39 CFR § 960.9(a) (2003) ("The application shall . . . identify the position of the Postal Service in the proceeding that the applicant alleges was not substantially justified").

[4] See 5 U. S. C. § 504(a)(2) ("A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified").

tion becomes whether the relation-back doctrine should apply here. The EAJA requirement for filing a timely fee application with the statutorily prescribed content is a condition on the United States' waiver of sovereign immunity in § 2412(d)(1)(A). See *Ardestani* v. *INS*, 502 U. S. 129, 137 (1991). As such, the scope of the waiver must be strictly construed. See, *e. g.*, *Irwin*, 498 U. S., at 94; *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34 (1992) (stating that a waiver of sovereign immunity "must be construed strictly in favor of the sovereign" and "not enlarge[d] . . . beyond what the language requires" (internal quotation marks omitted)); *Library of Congress* v. *Shaw*, 478 U. S. 310, 318 (1986) (same); *Lehman* v. *Nakshian*, 453 U. S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" (internal quotation marks omitted)). Since the relation-back doctrine relied upon by the Court is not present in the text of the statute, under a simple application of the sovereign immunity canon, petitioner is not entitled to "relate-back" his allegation beyond the 30-day deadline.

The only way the Court avoids this straightforward conclusion is by applying *Irwin*. *Ante*, at 420–422. Although *Irwin* does perhaps narrow the scope of the sovereign immunity canon, it does so only in limited circumstances. In particular, where the Government is made subject to suit to the same extent and in the same manner as private parties are, *Irwin* holds that the Government is subject to the rules that are "applicable to private suits." 498 U. S., at 95. The Court in *Irwin*, addressing equitable tolling, explained that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling,'" and that "[o]nce Congress has made . . . a waiver [of sovereign immunity], . . . making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening

of the congressional waiver." *Ibid.* The Court determined that "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Ibid.*

Notwithstanding *Irwin*'s limited scope, the Court concludes: "*Irwin*'s reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent." *Ante*, at 422. The existence of this "private-litigation equivalent," however, formed the very basis for the Court's holding in *Irwin*.

I agree with the Government that there is "no analogue in private litigation," Brief for Respondent 39, for the EAJA fee awards at issue here. Section 2412(d) authorizes fee awards against the Government when there is no basis for recovery under the rules for private litigation.[5] *Irwin*'s analysis simply cannot apply to a proceeding against the Government when there is no analogue for it in private litigation. Accordingly, I would apply the sovereign immunity canon to construe strictly the scope of the Government's waiver and, therefore, against allowing an applicant to avoid the express statutory limitation through judicial application of the relation-back doctrine. For these reasons, I respectfully dissent.

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[5] Compare 28 U. S. C. §2412(d)(1)(A) ("Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust") with §2412(b) ("The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award").

Syllabus

JOHNSON *v.* CALIFORNIA

CERTIORARI TO THE SUREME COURT OF CALIFORNIA

No. 03–6539. Argued March 30, 2004—Decided May 3, 2004

In reversing petitioner's conviction, the California Court of Appeal held that he was entitled to relief under *California* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748, and *Batson* v. *Kentucky*, 476 U. S. 79, but did not determine whether his separate evidentiary and prosecutorial misconduct claims would independently support the conviction's reversal. The State Supreme Court addressed only the *Wheeler/Batson* claim in reversing and remanding the case for further proceedings.

Held: The case is dismissed for want of jurisdiction. This Court's jurisdiction is limited to review of "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had." 28 U. S. C. § 1257. The instant case falls outside of the exceptional categories of cases that can be regarded as "final" under § 1257 despite the ordering of further proceedings. Because compliance with § 1257 is an essential prerequisite to this Court's deciding a case's merits, the Court has an obligation to raise any such compliance question on its own. However, the Court is not always successful in policing this gatekeeping function without counsel's aid. Part of the problem here was that the portion of the State Court of Appeal's decision certified for publication addressed the *Wheeler/Batson* claim, but the unpublished portion addressed petitioner's evidentiary claims to provide guidance for the trial court on retrial. Petitioner appended only the opinion's published portion to his certiorari petition. Had the full opinion been brought to this Court's attention, it might have been more evident that the State Supreme Court's decision was not final under § 1257. Attention to whether a decision is indeed a "[f]inal judgmen[t]" is mandated by this Court's Rules and will avoid expenditure of resources of both counsel and the Court on an abortive proceeding such as this.

Certiorari dismissed. Reported below: 30 Cal. 4th 1302, 71 P. 3d 270.

Stephen B. Bedrick, by appointment of the Court, 540 U. S. 1102, argued the cause for petitioner. With him on the briefs was *Eric Schnapper*.

Seth K. Schalit, Supervising Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Bill Lockyer*, Attorney General, *Manuel Me-*

deiros, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Gerald A. Engler*, Senior Assistant Attorney General, and *Laurence K. Sullivan*, Supervising Deputy Attorney General.*

PER CURIAM.

We granted certiorari in this case to review a decision of the Supreme Court of California interpreting *Batson* v. *Kentucky*, 476 U. S. 79 (1986). 540 U. S. 1045 (2003). The case was briefed and argued, but we now conclude that we are without jurisdiction in the matter.

The California Supreme Court reversed the California Court of Appeal's decision reversing petitioner's conviction. 30 Cal. 4th 1302, 71 P. 3d 270 (2003). The Court of Appeal held that petitioner was entitled to relief under *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), and *Batson* v. *Kentucky*, *supra*. 105 Cal. Rptr. 2d 727 (2001). It also noted petitioner's separate evidentiary and prosecutorial misconduct claims, App. 87, but did not determine whether those claims would independently support reversal of petitioner's conviction. The California Supreme Court addressed only the *Wheeler/Batson* claim, and, after reversing on that ground, remanded "for further proceedings consistent with [its] opinion." 30 Cal. 4th, at 1328, 71 P. 3d, at 287.

Under 28 U. S. C. § 1257, our jurisdiction is limited to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." In *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), we described four exceptional categories of cases to be regarded

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*A brief of *amici curiae* urging reversal was filed for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Elaine R. Jones*, *Theodore M. Shaw*, *Norman J. Chachkin*, *Miriam Gohara*, *Christina A. Swarns*, *Steven R. Shapiro*, *Alan L. Schlosser*, *David M. Porter*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Michael L. Foreman*, *Audrey Wiggins*, *Sarah Crawford*, and *Barry Sullivan*.

A brief of *amicus curiae* urging affirmance was filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson*.

as "final" on the federal issue despite the ordering of further proceedings in the lower state courts. In a post-oral-argument supplemental brief, petitioner argues that the fourth of these categories fits this case. That category involves situations

> "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.*, at 482–483.

Here, petitioner can make no convincing claim of erosion of federal policy that is not common to all decisions rejecting a defendant's *Batson* claim. The fourth category therefore does not apply. See *Florida* v. *Thomas*, 532 U. S. 774, 780 (2001). "A contrary conclusion would permit the fourth exception to swallow the rule." *Flynt* v. *Ohio*, 451 U. S. 619, 622 (1981) *(per curiam)*.

The present case comes closest to fitting in the third *Cox* category, but ultimately falls outside of it. That category involves "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, *supra*, at 481. In the event that the California

Court of Appeal on remand affirms the judgment of conviction, petitioner could once more seek review of his *Batson* claim in the Supreme Court of California—albeit unsuccessfully—and then seek certiorari on that claim from this Court.

Compliance with the provisions of § 1257 is an essential prerequisite to our deciding the merits of a case brought here under that section. It is our obligation to raise any question of such compliance on our own motion, even though counsel has not called our attention to it. See, *e. g.*, *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 384 (1884). But as the present case illustrates, we are not always successful in policing this gatekeeping function without the aid of counsel.

Part of the problem was that the California Court of Appeal's decision was certified by that court for partial publication. It addressed the *Wheeler/Batson* claim in the published portion. 105 Cal. Rptr. 2d 727 (2001). In the unpublished portion, the court briefly addressed petitioner's evidentiary claims to provide guidance for the trial court on retrial, and noted that it would not address whether petitioner's objections were properly preserved or consider petitioner's prosecutorial misconduct claim. App. 58. Petitioner appended only the published portion of the California Court of Appeal's decision to his petition for a writ of certiorari. This Court's Rule 14.1(i) instructs petitioners to include, *inter alia*, any "relevant opinions . . . entered in the case" in the appendix to the petition for certiorari. The full opinion of the California Court of Appeal was not filed in this Court until the joint appendix to the briefs on the merits was filed. App. 58–112. Had the full opinion been brought to this Court's attention, it might have been more evident to us that the Supreme Court of California's decision was not final for the purposes of § 1257.

A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment. This Court's Rule 14.1(g). And a respondent has a duty to "address any perceived misstatement of fact or law in the peti-

tion that bears on what issues properly would be before the Court if certiorari were granted." Rule 15.2. Our Rules also require that each party provide a statement for the basis of our jurisdiction in its brief on the merits. Rule 24.1(e). At all stages in this case, both parties represented that our jurisdiction was proper pursuant to § 1257(a). Pet. for Cert. 1; Brief in Support 1; Brief for Petitioner 1; Brief for Respondent 1.

It behooves counsel for both petitioner and respondent to assure themselves that the decision for which review is sought is indeed a "[f]inal judgmen[t]" under § 1257. Such attention is mandated by our Rules and will avoid the expenditure of resources of both counsel and of this Court on an abortive proceeding such as the present one.

We dismiss the case for want of jurisdiction.

It is so ordered.

Syllabus

MIDDLETON, WARDEN *v.* McNEIL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1028. Decided May 3, 2004

Respondent was charged with murdering her husband after an argument. Under California law, the malice element needed for a murder conviction is negated if one kills out of fear of imminent peril. If that fear is unreasonable but genuine, California's "imperfect self-defense" doctrine reduces the crime to voluntary manslaughter. The voluntary manslaughter jury instruction in this case erroneously defined imminent peril, but the prosecutor's closing statement correctly stated the law. Respondent was convicted of second-degree murder. In affirming, the California Court of Appeal acknowledged the erroneous instruction, but found that the instructions as a whole and the prosecutor's argument made the correct standard clear. The Federal District Court later denied respondent federal habeas relief, but the Ninth Circuit reversed.

Held: The Ninth Circuit erred in finding that the erroneous instruction eliminated respondent's imperfect self-defense claim and that the state appellate court unreasonably applied federal law by ignoring the unchallenged and uncorrected instruction. A state prisoner is entitled to federal habeas relief if a state court's adjudication of his constitutional claim was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). When a jury instruction fails to give effect to the requirement that a State prove every element of a criminal offense, the question is whether the instruction so infected the entire trial that the conviction violates due process. *Estelle* v. *McGuire*, 502 U. S. 62, 72. Here, the question is whether there is a "'reasonable likelihood that the jury has applied the . . . [ambiguous] instruction in a way' that violates the Constitution." *Ibid.* Given that there were three correct instructions and one contrary one, the state court did not unreasonably apply federal law when it found no reasonable likelihood that the jury was misled by the erroneous instruction. Though the Ninth Circuit also faulted the state court for relying on the prosecutor's argument, nothing in *Boyde* v. *California*, 494 U. S. 370, precludes a state court from assuming that counsel's arguments clarified an ambiguous jury charge, particularly when they resolve the ambiguity in the defendant's favor.

Certiorari granted; 344 F. 3d 988, reversed and remanded.

PER CURIAM.

I

Respondent Sally Marie McNeil killed her husband after an argument over his infidelity and spending habits. The State of California charged her with murder. Respondent's theory at trial was that her husband had tried to strangle her during the argument, but that she had escaped, fetched a shotgun from the bedroom, and killed him out of fear for her life. Fingernail marks were indeed found on her neck after the shooting. She testified that her husband had been abusive, and a defense expert opined that she suffered from Battered Women's Syndrome. The State countered with forensic evidence showing that the fingernail marks were not her husband's and may have been self-inflicted, and with the testimony of a 911 operator who overheard respondent tell her husband she had shot him because she would no longer tolerate his behavior.

Under California law, "[m]urder is the unlawful killing of a human being . . . with malice aforethought." Cal. Penal Code Ann. § 187(a) (West 1999). The element of malice is negated if one kills out of fear of imminent peril. *In re Christian S.*, 7 Cal. 4th 768, 773, 872 P. 2d 574, 576 (1994). Where that fear is unreasonable (but nevertheless genuine), it reduces the crime from murder to voluntary manslaughter—a doctrine known as "imperfect self-defense." *Ibid.* At respondent's trial, the judge instructed the jury on these concepts as follows:

> "'The specific intent for voluntary manslaughter, as opposed to murder, must arise upon one of [the] following circumstances:
>
> . . . . .
>
> "'[A]n honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. That would be imperfect self-defense.
>
> . . . . .

> "'To establish that a killing is murder [and] not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done . . . in the honest, even though unreasonable, belief in the necessity to defend against imminent peril to life or to great bodily injury.
>
> . . . . .
>
> "'A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but is not guilty of murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter.
>
> "'An "imminent" peril is one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer as a reasonable person.'" App. to Pet. for Cert. 31–33.

The last four words of this instruction—"'as a reasonable person'"—are not part of the relevant form instruction, 1 California Jury Instructions, Criminal, No. 5.17 (6th ed. 1996), and were apparently included in error. The prosecutor's closing argument, however, correctly stated the law.

Respondent was convicted of second-degree murder and appealed on the basis of the erroneous jury instruction. The California Court of Appeal acknowledged the error but upheld her conviction, reasoning:

> "[R]eversal is not required because '[e]rror cannot be predicated upon an isolated phrase, sentence or excerpt from the instructions since the correctness of an instruction is to be determined in its relation to the other instructions and in light of the instructions as a whole.'

> Here, when all of the jury instructions on voluntary manslaughter and imperfect self-defense, are considered in their entirety, it is not reasonably likely that the jury would have misunderstood the requirements of the imperfect self-defense component of voluntary manslaughter. On the contrary, these instructions repeatedly informed the jury that if the defendant had an honest (or actual) but *unreasonable* belief in the need to act in self-defense, then the offense would be manslaughter and the defendant could not be convicted of murder. Furthermore, in arguing to the jury, the prosecutor set forth the appropriate standard, stating '[i]f you believe it is an imperfect self-defense, that she actually believed but that a reasonable person would not believe in the necessity for self-defense, that lessens the crime to what is called, "voluntary manslaughter."'" App. to Pet. for Cert. 33–34 (citations omitted).

Respondent then sought federal habeas relief. The District Court denied her petition, but the Ninth Circuit reversed. 344 F. 3d 988 (2003). We now grant the State's petition for a writ of certiorari and respondent's motion for leave to proceed *in forma pauperis*, and reverse.

II

A federal court may grant habeas relief to a state prisoner if a state court's adjudication of his constitutional claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1). "Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable." *Yarborough* v. *Gentry*, 540 U. S. 1, 5 (2003) *(per curiam);* see *Williams* v. *Taylor*, 529 U. S. 362, 409 (2000).

In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. See *Sandstrom* v. *Montana*, 442 U. S. 510, 520–521 (1979). Nonetheless, not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is "'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" *Estelle* v. *McGuire*, 502 U. S. 62, 72 (1991) (quoting *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973)). "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Boyde* v. *California*, 494 U. S. 370, 378 (1990) (quoting *Cupp*, *supra*, at 146–147). If the charge as a whole is ambiguous, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, *supra*, at 72 (quoting *Boyde*, *supra*, at 380).

The Ninth Circuit held that the erroneous imminent-peril instruction "eliminated" respondent's imperfect self-defense claim, and that the state court unreasonably applied federal law by "completely ignor[ing] unchallenged and uncorrected instructions to the jury." 344 F. 3d, at 999. It acknowledged that it was bound to consider the jury charge as a whole, but held that the other instructions were irrelevant because "[t]he only time that the trial judge actually defined imminent peril for the jury was in the erroneous instruction on imperfect self-defense." *Id.*, at 997.

This conclusion failed to give appropriate deference to the state court's decision. Contrary to the Ninth Circuit's description, the state court did not "ignor[e]" the faulty instruction. It merely held that the instruction was not reasonably likely to have misled the jury given the multiple other instances (at least three, see *supra*, at 434–435) where the charge correctly stated that respondent's belief could be

unreasonable. App. to Pet. for Cert. 34. Given three correct instructions and one contrary one, the state court did not unreasonably apply federal law when it found that there was no reasonable likelihood the jury was misled.

The Ninth Circuit thought that the other references to unreasonableness were irrelevant because they were not part of the definition of "imminent peril." That alone does not make them irrelevant; whether one defines imminent peril in terms of an unreasonable belief or instead describes imperfect self-defense as allowing an unreasonable belief in imminent peril, the import of the instruction is the same. Perhaps the Ninth Circuit reasoned that the erroneous definition of "imminent peril" caused the jury to believe that the earlier, correct instructions ("actual but unreasonable belief in the necessity to defend against imminent peril") meant that, although the belief in the necessity to defend may be unreasonable, the belief in the *existence* of the "imminent peril" may not. This interpretation would require such a rare combination of extremely refined lawyerly parsing of an instruction, and extremely gullible acceptance of a result that makes no conceivable sense, that the state court's implicit rejection of the possibility was surely not an *unreasonable* application of federal law.

The Ninth Circuit also faulted the state court for relying on the prosecutor's argument, noting that instructions from a judge are presumed to have more influence than arguments of counsel. 344 F. 3d, at 999 (citing *Boyde*, *supra*, at 384). But this is not a case where the jury charge clearly says one thing and the prosecutor says the opposite; the instructions were at worst ambiguous because they were internally inconsistent. Nothing in *Boyde* precludes a state court from assuming that counsel's arguments clarified an ambiguous jury charge. This assumption is particularly apt when it is the *prosecutor's* argument that resolves an ambiguity in favor of the *defendant*.

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

It is so ordered.

Syllabus

TENNESSEE STUDENT ASSISTANCE CORPORATION *v.* HOOD

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

No. 02–1606. Argued March 1, 2004—Decided May 17, 2004

Respondent Hood had an outstanding balance on student loans guaranteed by petitioner Tennessee Student Assistance Corporation (TSAC), a state entity, at the time she filed a Chapter 7 bankruptcy petition. Hood's general discharge did not cover her student loans, as she did not list them and they are only dischargeable if a bankruptcy court determines that excepting the debt from the order would be an "undue hardship" on the debtor, 11 U. S. C. § 523(a)(8). Hood subsequently reopened the petition, seeking an "undue hardship" determination. As prescribed by Federal Rules of Bankruptcy Procedure 7001(6), 7003, and 7004, she filed a complaint and, later, an amended complaint, and served them with a summons on TSAC and others. The Bankruptcy Court denied TSAC's motion to dismiss the complaint for lack of jurisdiction, holding that 11 U. S. C. § 106(a) abrogated the State's Eleventh Amendment sovereign immunity. The Sixth Circuit Bankruptcy Appellate Panel affirmed, as did the Sixth Circuit, which held that the Bankruptcy Clause gave Congress the authority to abrogate state sovereign immunity in § 106(a). This Court granted certiorari to determine whether the Bankruptcy Clause grants Congress such authority.

Held: Because the Bankruptcy Court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity, this Court does not reach the question on which certiorari was granted. Pp. 446–455.

(a) States may be bound by some judicial actions without their consent. For example, the Eleventh Amendment does not bar federal jurisdiction over *in rem* admiralty actions when the State does not possess the res. *California* v. *Deep Sea Research, Inc.*, 523 U. S. 491, 507–508. A debt's discharge by a bankruptcy court is similarly an *in rem* proceeding. The court has exclusive jurisdiction over a debtor's property, wherever located, and over the estate. Once debts are discharged, a creditor who did not submit a proof of claim will be unable to collect on his unsecured loans. A bankruptcy court is able to provide the debtor a fresh start, even if all of his creditors do not participate, because the court's jurisdiction is premised on the debtor and his estate, not on the creditors. Because the court's jurisdiction is premised on the res, however, a nonparticipating creditor cannot be personally liable. States,

whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors, see, *e. g.*, *New York* v. *Irving Trust Co.*, 288 U. S. 329, 333. And when the bankruptcy court's jurisdiction over the res is unquestioned, the exercise of its *in rem* jurisdiction to discharge the debt does not infringe a State's sovereignty. TSAC argues, however, that the individualized process by which student loan debts are discharged unconstitutionally infringes its sovereignty. If a debtor does not affirmatively secure § 523(a)(8)'s "undue hardship" determination, States choosing not to submit themselves to the court's jurisdiction might receive some benefit: The debtor's personal liability on the loan may survive the discharge. TSAC misunderstands the proceeding's fundamental nature when it claims that Congress, by making a student loan debt presumptively nondischargeable and singling it out for an individualized determination, has authorized a suit against a State. The bankruptcy court's jurisdiction is premised on the res, not the persona; that States were granted the presumptive benefit of nondischargeability does not alter the court's underlying authority. A debtor does not seek damages or affirmative relief from a State or subject an unwilling State to a coercive judicial process by seeking to discharge his debts. Indeed, this Court has endorsed individual determinations of States' interests within the federal courts' *in rem* jurisdiction, *e. g.*, *Deep Sea Research*, *supra.* Although bankruptcy and admiralty are specialized areas of the law, there is no reason why the exercise of federal courts' *in rem* bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their *in rem* admiralty jurisdiction. Pp. 446–451.

(b) With regard to the procedure used in this case, the Bankruptcy Rules require a debtor to file an adversary proceeding against the State to discharge student loan debts. While this is part of the original bankruptcy case and within the bankruptcy court's *in rem* jurisdiction, it requires the service of a summons and a complaint, see Rules 7001(6), 7003, and 7004. The issuance of process is normally an indignity to a State's sovereignty, because its purpose is to establish personal jurisdiction; but the court's *in rem* jurisdiction allows it to adjudicate the debtors' discharge claim without *in personam* jurisdiction over the State. Section 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion, which would raise no constitutional concern. There is no reason why service of a summons, which in this case is indistinguishable in practical effect from a motion, should be given dispositive weight. Dismissal of the complaint is not appropriate here where the court has *in rem* jurisdiction and has not attempted to adjudicate any claims outside of that jurisdiction. This case is unlike an adversary proceeding by a bankruptcy trustee seeking to recover

property in the State's hands on the grounds that the transfer was a voidable preference. Even if this Court were to hold that Congress lacked the ability to abrogate state sovereign immunity under the Bankruptcy Clause, the Bankruptcy Court would still have authority to make the undue hardship determination Hood seeks. Thus, this Court declines to decide whether a bankruptcy court's exercise of personal jurisdiction over a State would be valid under the Eleventh Amendment. If the Bankruptcy Court on remand exceeds its *in rem* jurisdiction, TSAC would be free to challenge the court's authority. Pp. 451–455.

319 F. 3d 755, affirmed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 455. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 455.

Daryl J. Brand, Associate Solicitor General of Tennessee, argued the cause for petitioner. With him on the briefs were *Paul G. Summers*, Attorney General, *Michael E. Moore*, Solicitor General, *Cynthia E. Kinser*, Deputy Attorney General, and *Marvin E. Clements, Jr.*

Leonard H. Gerson argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Jim Petro*, Attorney General of Ohio, *Douglas R. Cole*, State Solicitor, and *Elise Porter*, Assistant Solicitor, by *Anabelle Rodríguez*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Gregg Renkes* of Alaska, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.*, of Florida, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Tom Miller* of Iowa, *Phill Kline* of Kansas, *Albert B. Chandler III* of Kentucky, *Richard P. Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Peter Heed* of New Hampshire, *Peter C. Harvey* of New Jersey, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Article I, § 8, cl. 4, of the Constitution provides that Congress shall have the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." We granted certiorari to determine whether this Clause grants Congress the authority to abrogate state sovereign immunity from private suits. Because we conclude that a proceeding initiated by a debtor to determine the dischargeability of a student loan debt is not a suit against the State for purposes of the Eleventh Amendment, we affirm the Court of Appeals' judgment, and we do not reach the question on which certiorari was granted.

I

Petitioner, Tennessee Student Assistance Corporation (TSAC), is a governmental corporation created by the Tennessee Legislature to administer student assistance pro-

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New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Henry Dargan McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Jerry W. Kilgore* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *Peggy A. Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming; and for the Council of State Governments et al. by *Richard Ruda* and *D. Bruce La Pierre*.

Briefs of *amici curiae* urging affirmance were filed for the Commercial Law League of America by *Robert D. Piliero;* for the National Association of Bankruptcy Trustees et al. by *Martin P. Sheehan*, *Robert C. Furr*, and *Neil C. Gordon;* for the National Association of Consumer Bankruptcy Attorneys by *Henry J. Sommer;* for Susan Block-Lieb et al. by *Susan M. Freeman* and *Richard Lieb;* for G. Eric Brunstad, Jr., by *Mr. Brunstad, pro se*, *Rheba Rutkowski*, and *Susan Kim;* for Bernard Katz by *P. Anthony Sammons* and *Allen E. Grimes III;* for Bruce H. Mann by *Brady C. Williamson;* and for Donald J. Spring by *C. Hall Swaim*, *Mitchel Appelbaum*, and *George W. Shuster, Jr.*

grams. Tenn. Code Ann. § 49–4–201 (2002). TSAC guarantees student loans made to residents of Tennessee and to nonresidents who are either enrolled in an eligible school in Tennessee or make loans through an approved Tennessee lender. § 49–4–203.

Between July 1988 and February 1990, respondent, Pamela Hood, a resident of Tennessee, signed promissory notes for educational loans guaranteed by TSAC. In February 1999, Hood filed a "no asset" Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Tennessee; at the time of the filing, her student loans had an outstanding balance of $4,169.31. TSAC did not participate in the proceeding, but Sallie Mae Service, Inc. (Sallie Mae), submitted a proof of claim to the Bankruptcy Court, which it subsequently assigned to TSAC.[1] The Bankruptcy Court granted Hood a general discharge in June 1999. See 11 U. S. C. § 727(a).

Hood did not list her student loans in the bankruptcy proceeding, and the general discharge did not cover them. See § 727(b) (providing that a discharge under § 727(a) discharges the debtor from all prepetition debts except as listed in § 523(a)); § 523(a)(8) (providing that student loans guaranteed by governmental units are not included in a general discharge order unless the bankruptcy court determines that excepting the debt from the order would impose an "undue hardship" on the debtor). In September 1999, Hood reopened her bankruptcy petition for the limited purpose of seeking a determination by the Bankruptcy Court that her student loans were dischargeable as an "undue hardship" pursuant to § 523(a)(8). As prescribed by the Federal Rules of Bankruptcy Procedure, Hood filed a complaint against the

[1] Sallie Mae was the original holder of Hood's student loan debt. On November 15, 1999, Sallie Mae signed an assignment of proof of claim, transferring the debt to TSAC. The actual proof of claim was filed by Sallie Mae in the Bankruptcy Court on November 29, and one month later, on December 29, the assignment of the proof of claim was filed.

United States of America, the Department of Education, and Sallie Mae, see Fed. Rules Bkrtcy. Proc. 7001(6) and 7003, and later filed an amended complaint in which she included TSAC and University Account Services as additional defendants and deleted Sallie Mae. The complaint and the amended complaint were served along with a summons on each of the named parties. See Rule 7004.

In response, TSAC filed a motion to dismiss the complaint for lack of jurisdiction, asserting Eleventh Amendment sovereign immunity.[2] The Bankruptcy Court denied the motion, holding that 11 U. S. C. § 106(a) was a valid abrogation of TSAC's sovereign immunity. App. to Pet. for Cert. A–62. TSAC took an interlocutory appeal, see *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 147 (1993), and a unanimous Bankruptcy Appellate Panel of the Sixth Circuit affirmed, 262 B. R. 412 (2001). TSAC appealed the panel's decision to the United States Court of Appeals for the Sixth Circuit. That court affirmed, holding that the States ceded their immunity from private suits in bankruptcy in the Constitutional Convention, and therefore, the Bankruptcy Clause, U. S. Const., Art. I, § 8, cl. 4, provided Congress with the necessary authority to abrogate state sovereign immunity in 11 U. S. C. § 106(a). 319 F. 3d 755, 767 (2003). One judge concurred in the judgment, concluding that TSAC waived its sovereign immunity when it accepted Sallie Mae's proof of claim.[3] *Id.*, at 768. We granted certiorari, 539 U. S. 986 (2003), and now affirm the judgment of the Court of Appeals. Because we hold that a bankruptcy court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity, we do not reach the broader question addressed by the Court of Appeals.

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[2] Hood does not dispute that TSAC is considered a "State" for purposes of the Eleventh Amendment.

[3] Hood does not argue in this Court that TSAC waived its sovereign immunity, and we pass no judgment on the question.

II

By its terms, the Eleventh Amendment precludes suits "in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." For over a century, however, we have recognized that the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment. See *Hans* v. *Louisiana*, 134 U. S. 1 (1890). Although the text of the Amendment refers only to suits against a State by citizens of another State, we have repeatedly held that an unconsenting State also is immune from suits by its own citizens. See, *e. g.*, *id.*, at 15; *Duhne* v. *New Jersey*, 251 U. S. 311, 313 (1920); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 51 (1944); *Employees of Dept. of Public Health and Welfare of Mo.* v. *Department of Public Health and Welfare of Mo.*, 411 U. S. 279, 280 (1973); *Edelman* v. *Jordan*, 415 U. S. 651, 662–663 (1974); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 55 (1996).

States, nonetheless, may still be bound by some judicial actions without their consent. In *California* v. *Deep Sea Research, Inc.*, 523 U. S. 491 (1998), we held that the Eleventh Amendment does not bar federal jurisdiction over *in rem* admiralty actions when the State is not in possession of the property. In that case, a private corporation located a historic shipwreck, the S. S. *Brother Jonathan*, in California's territorial waters. The corporation filed an *in rem* action in federal court seeking rights to the wreck and its cargo. The State of California intervened, arguing that it possessed title to the wreck and that its sovereign immunity precluded the court from adjudicating its rights. While acknowledging that the Eleventh Amendment might constrain federal courts' admiralty jurisdiction in some instances, *id.*, at 503 (citing *Ex parte New York*, 256 U. S. 490 (1921) *(New York I); Ex parte New York*, 256 U. S. 503 (1921) *(New York II); Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982)), we held that the States' sovereign immu-

nity did not prohibit *in rem* admiralty actions in which the State did not possess the res, 523 U. S., at 507–508 (citing *e. g.*, *The Davis*, 10 Wall. 15 (1870); *The Pesaro*, 255 U. S. 216 (1921)).

The discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding. See *Gardner* v. *New Jersey*, 329 U. S. 565, 574 (1947); *Straton* v. *New*, 283 U. S. 318, 320–321 (1931); *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181, 192 (1902); *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.*, 91 U. S. 656, 662 (1876). Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate. See 28 U. S. C. § 1334(e). In a typical voluntary bankruptcy proceeding under Chapter 7, the debtor files a petition for bankruptcy in which he lists his debts or his creditors, Fed. Rule Bkrtcy. Proc. 1007(a)(1); the petition constitutes an order for relief, 11 U. S. C. § 301. The court clerk notifies the debtor's creditors of the order for relief, see Rule 2002(*l*), and if a creditor wishes to participate in the debtor's assets, he files a proof of claim, Rule 3002(a); see 11 U. S. C. § 726. If a creditor chooses not to submit a proof of claim, once the debts are discharged, the creditor will be unable to collect on his unsecured loans. Rule 3002(a); see 11 U. S. C. § 726. The discharge order releases a debtor from personal liability with respect to any discharged debt by voiding any past or future judgments on the debt and by operating as an injunction to prohibit creditors from attempting to collect or to recover the debt. §§ 524(a)(1), (2); 3 W. Norton, Bankruptcy Law and Practice 2d § 48:1, p. 48–3 (1998) (hereinafter Norton).

A bankruptcy court is able to provide the debtor a fresh start in this manner, despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the debtor and his estate, and not on the creditors. *In re Collins*, 173 F. 3d 924, 929 (CA4 1999) ("A federal court's jurisdiction over the dischargeability of debt . . . derives not from jurisdiction over the state or other creditors, but rather

from jurisdiction over debtors and their estates" (internal quotation marks omitted)); see also *Gardner*, *supra*, at 572; *In re Ellett*, 254 F. 3d 1135, 1141 (CA9 2001); *Texas* v. *Walker*, 142 F. 3d 813, 822 (CA5 1998). A bankruptcy court's *in rem* jurisdiction permits it to "determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" 16 J. Moore et al., Moore's Federal Practice § 108.70[1], p. 108–106 (3d ed. 2004). Because the court's jurisdiction is premised on the res, however, a nonparticipating creditor cannot be subjected to personal liability. See *Freeman* v. *Alderson*, 119 U. S. 185, 188–189 (1886) (citing *Cooper* v. *Reynolds*, 10 Wall. 308 (1870)).

Under our longstanding precedent, States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors. In *New York* v. *Irving Trust Co.*, 288 U. S. 329 (1933), we sustained an order of the Bankruptcy Court which barred the State of New York's tax claim because it was not filed within the time fixed for the filing of claims. We held that "[i]f a state desires to participate in the assets of a bankrupt, she must submit to the appropriate requirements." *Id.*, at 333; see also *Gardner*, *supra*, at 574 (holding that a State waives its sovereign immunity by filing a proof of claim). And in *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 228–229 (1931), we held that the Bankruptcy Court had the authority to sell a debtor's property "free and clear" of a State's tax lien. At least when the bankruptcy court's jurisdiction over the res is unquestioned, cf. *United States* v. *Nordic Village, Inc.*, 503 U. S. 30 (1992), our cases indicate that the exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty.[4] Cf. *Hoffman* v. *Connecticut Dept. of In-*

[4] *Missouri* v. *Fiske*, 290 U. S. 18 (1933), is not to the contrary. In that case, private individuals sought to enjoin the State of Missouri from prosecuting probate proceedings in state court, contending that the Federal District Court had made a final determination of the ownership of the

come Maintenance, 492 U. S. 96, 102 (1989) (plurality opinion) (applying Eleventh Amendment analysis where a Bankruptcy Court sought to issue a money judgment against a nonconsenting State).

TSAC concedes that States are generally bound by a bankruptcy court's discharge order, see Tr. of Oral Arg. 17, but argues that the particular process by which student loan debts are discharged unconstitutionally infringes its sovereignty. Student loans used to be presumptively discharged in a general discharge. But in 1976, Congress provided a significant benefit to the States by making it more difficult for debtors to discharge student loan debts guaranteed by States. Education Amendments of 1976, § 439A(a), 90 Stat. 2141 (codified at 20 U. S. C. § 1087–3 (1976 ed.), repealed by Pub. L. 95–598, § 317, 92 Stat. 2678). That benefit is currently governed by 11 U. S. C. § 523(a)(8), which provides that student loan debts guaranteed by governmental units are not included in a general discharge order unless excepting the debt from the order would impose an "undue hardship" on the debtor. See also § 727(b) (providing that a discharge under § 727(a) discharges the debtor from all prepetition debts except as listed in § 523(a)).

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contested stock. We held the Eleventh Amendment prevented federal courts from entertaining such a suit because a "[federal] court has no authority to issue process against the State to compel it to subject itself to the court's judgment." *Id.*, at 28. Although a discharge order under the Bankruptcy Code "operates as an injunction" against creditors who commence or continue an action against a debtor *in personam* to recover or to collect a discharged debt, 11 U. S. C. § 524(a)(2), the enforcement of such an injunction against the State by a federal court is not before us. To the extent that *Fiske* is relevant in the present context, it supports our conclusion that a discharge order is binding on the State. There, we noted the State might still be bound by the federal court's adjudication even if an injunction could not issue. 290 U. S., at 29. It is unlikely that the Court *sub silentio* overruled the holdings in *Irving Trust* and *Van Huffel* in *Fiske* as JUSTICE THOMAS implies, see *post*, at 463 (dissenting opinion), as *Fiske* was decided the same year as *Irving Trust*.

Section 523(a)(8) is "self-executing." Norton § 47:52, at 47–137 to 47–138; see also S. Rep. No. 95–989, p. 79 (1978). Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt. Norton § 47:52, at 47–137 to 47–138. Thus, the major difference between the discharge of a student loan debt and the discharge of most other debts is that governmental creditors, including States, that choose not to submit themselves to the court's jurisdiction might still receive some benefit: The debtor's personal liability on the loan may survive the discharge.

It is this change that TSAC contends infringes state sovereignty. Tr. of Oral Arg. 15–16. By making a student loan debt presumptively nondischargeable and singling it out for an "individualized adjudication," *id.*, at 17, TSAC argues that Congress has authorized a suit against a State. But TSAC misunderstands the fundamental nature of the proceeding.

No matter how difficult Congress has decided to make the discharge of student loan debt, the bankruptcy court's jurisdiction is premised on the res, not on the persona; that States were granted the presumptive benefit of nondischargeability does not alter the court's underlying authority. A debtor does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts.

Indeed, we have previously endorsed individualized determinations of States' interests within the federal courts' *in rem* jurisdiction. In *Van Huffel*, we affirmed the bankruptcy courts' power to sell property free from encumbrances, including States' liens, and approvingly noted that some courts had chosen specifically to discharge States' liens for taxes. 284 U. S., at 228; cf. *Gardner*, 329 U. S., at 572–574 (noting "that the reorganization court had jurisdiction over the proof and allowance of the tax claims and that the exercise of that power was not a suit against the State").

Our decision in *California* v. *Deep Sea Research, Inc.*, 523 U. S. 491 (1998), also involved an individualized *in rem* adjudication in which a State claimed an interest, as have other *in rem* admiralty cases involving sovereigns, *e. g.*, *The Davis*, 10 Wall., at 19; *The Siren*, 7 Wall. 152, 159 (1869); *The Pesaro*, 255 U. S., at 219. Although both bankruptcy and admiralty are specialized areas of the law, we see no reason why the exercise of the federal courts' *in rem* bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their *in rem* admiralty jurisdiction.

We find no authority, *in fine*, that suggests a bankruptcy court's exercise of its *in rem* jurisdiction to discharge a student loan debt would infringe state sovereignty in the manner suggested by TSAC. We thus hold that the undue hardship determination sought by Hood in this case is not a suit against a State for purposes of the Eleventh Amendment.[5]

III

Lastly, we deal with the procedure that was used in this case. Creditors generally are not entitled to personal service before a bankruptcy court may discharge a debt. *Hanover Nat. Bank*, 186 U. S., at 192. Because student loan debts are not automatically dischargeable, however, the Federal Rules of Bankruptcy Procedure provide creditors greater procedural protection. See Fed. Rules Bkrtcy. Proc. 7001(6), 7003, and 7004. The current Bankruptcy Rules require the debtor to file an "adversary proceeding" against the State in order to discharge his student loan debt. The

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[5] This is not to say, "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity," *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 38 (1992), as JUSTICE THOMAS characterizes our opinion, *post*, at 462, but rather that the court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State. Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State. No such concerns are present here, and we do not address them.

proceeding is considered part of the original bankruptcy case, see 10 Collier on Bankruptcy ¶ 7003.02 (rev. 15th ed. 2003), and still within the bankruptcy court's *in rem* jurisdiction as discussed above. But, as prescribed by the Rules, an "adversary proceeding" requires the service of a summons and a complaint. Rules 7001(6), 7003, and 7004.

Because this "adversary proceeding" has some similarities to a traditional civil trial, JUSTICE THOMAS contends that the Bankruptcy Court cannot make an undue hardship determination without infringing TSAC's sovereignty under *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743 (2002). See *post*, at 457–460. In *Federal Maritime Comm'n*, we held that the Eleventh Amendment precluded a private party from haling an unconsenting State into a proceeding before the Federal Maritime Commission (FMC). We noted that we have applied a presumption since *Hans* v. *Louisiana*, 134 U. S. 1 (1890), "that the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" 535 U. S., at 755. Because agency adjudications were unheard of at the time of the founding, we had to determine whether the FMC proceeding was "the type of proceedin[g] from which the Framers would have thought the States possessed immunity when they agreed to enter the Union." *Id.*, at 756. Noting the substantial similarities between a proceeding before the FMC and one before an Article III court, we concluded that the *Hans* presumption applied, see 535 U. S., at 756–763, and that the Eleventh Amendment therefore precluded private suits in such a forum, *id.*, at 769.

In this case, however, there is no need to engage in a comparative analysis to determine whether the adjudication would be an affront to States' sovereignty. As noted above, we have long held that the bankruptcy courts' exercise of *in rem* jurisdiction is not such an offense. *Supra*, at 448–451. Nor is there any dispute that, if the Bankruptcy Court had

to exercise personal jurisdiction over TSAC, such an adjudication would implicate the Eleventh Amendment. Our precedent has drawn a distinction between *in rem* and *in personam* jurisdiction, even when the underlying proceedings are, for the most part, identical. Thus, whether an *in rem* adjudication in a bankruptcy court is similar to civil litigation in a district court is irrelevant. If JUSTICE THOMAS' interpretation of *Federal Maritime Comm'n* were adopted, *Deep Sea Research*, *Van Huffle*, and *Irving Trust*, all of which involved proceedings resembling traditional civil adjudications, would likely have to be overruled. We are not willing to take such a step.

The issuance of process, nonetheless, is normally an indignity to the sovereignty of a State because its purpose is to establish personal jurisdiction over the State. We noted in *Seminole Tribe:* "The Eleventh Amendment does not exist solely in order to prevent federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." 517 U. S., at 58 (citations and internal quotation marks omitted).

Here, however, the Bankruptcy Court's *in rem* jurisdiction allows it to adjudicate the debtor's discharge claim without *in personam* jurisdiction over the State. See 4A C. Wright & A. Miller, Federal Practice and Procedure § 1070, pp. 280–281 (3d ed. 2002) (noting jurisdiction over the person is irrelevant if the court has jurisdiction over the property). Hood does not argue that the court should exercise personal jurisdiction; all she wants is a determination of the dischargeability of her debt. The text of § 523(a)(8) does not require a summons, and absent Rule 7001(6) a debtor could proceed by motion, see Rule 9014 ("[I]n a contested matter . . . not otherwise governed by these rules, relief shall be requested by motion"), which would raise no constitutional concern. Hood concedes that even if TSAC ignores the summons and chooses not to participate in the proceeding the

Bankruptcy Court cannot discharge her debt without making an undue hardship determination. Tr. of Oral Arg. 33–34.

We see no reason why the service of a summons, which in this case is indistinguishable in practical effect from a motion, should be given dispositive weight. As we said in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 270 (1997), "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." See *New York I*, 256 U. S., at 500 (a suit against a State "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record"). To conclude that the issuance of a summons, which is required only by the Rules, precludes Hood from exercising her statutory right to an undue hardship determination would give the Rules an impermissible effect. 28 U. S. C. § 2075 ("[The Bankruptcy Rules] shall not abridge, enlarge, or modify any substantive right"). And there is no reason to take such a step. TSAC sought only to dismiss the complaint for lack of jurisdiction in the Bankruptcy Court. Motion to Dismiss Complaint for Lack of Jurisdiction in No. 99–0847 (Bkrtcy. Ct. WD Tenn.), pp. 1–2. Clearly dismissal of the complaint is not appropriate as the court has *in rem* jurisdiction over the matter, and the court here has not attempted to adjudicate any claims outside of that jurisdiction. The case before us is thus unlike an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference. Even if we were to hold that Congress lacked the ability to abrogate state sovereign immunity under the Bankruptcy Clause, as TSAC urges us to do, the Bankruptcy Court would still have the authority to make the undue hardship determination sought by Hood.

We therefore decline to decide whether a bankruptcy court's exercise of personal jurisdiction over a State would be valid under the Eleventh Amendment. See *Liverpool*,

New York & Philadelphia S. S. Co. v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885) ("[We are bound] never to anticipate a question of constitutional law in advance of the necessity of deciding it"). If the Bankruptcy Court on remand exceeds its *in rem* jurisdiction, TSAC, of course, will be free to challenge the court's authority. At this point, however, any such constitutional concern is merely hypothetical. The judgment of the United States Court of Appeals for the Sixth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring.

I join in the Court's opinion, save for any implicit approval of the holding in *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44 (1996).

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

We granted certiorari in this case to decide whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause. 539 U. S. 986 (2003). Instead of answering this question, the Court addresses a more difficult one regarding the extent to which a bankruptcy court's exercise of its *in rem* jurisdiction could offend the sovereignty of a creditor-State. I recognize that, as the Court concludes today, the *in rem* nature of bankruptcy proceedings might affect the ability of a debtor to obtain, *by motion*, a bankruptcy court determination that affects a creditor-State's rights, but I would not reach this difficult question here. Even if the Bankruptcy Court could have exercised its *in rem* jurisdiction to make an undue hardship determination by motion, I cannot ignore the fact that the determination in this case was sought pursuant to an adversary proceeding. Under *Federal Maritime Comm'n* v.

South Carolina Ports Authority, 535 U. S. 743 (2002), the adversary proceeding here clearly constitutes a suit against the State for sovereign immunity purposes. I would thus reach the easier question presented and conclude that Congress lacks authority to abrogate state sovereign immunity under the Bankruptcy Clause.

I

The Court avoids addressing respondent's principal argument—which was the basis for the Court of Appeals' decision and which this Court granted certiorari in order to address—namely, that Congress possesses the power under the Bankruptcy Clause to abrogate a State's sovereign immunity from suit. Instead, the Court affirms the judgment of the Court of Appeals based on respondent's alternative argument, *ante*, at 445, that the Bankruptcy Court's decision was "an appropriate exercise of [its] *in rem* jurisdiction," Brief for Respondent 35. Although respondent advanced this argument in the proceedings before the Bankruptcy Appellate Panel of the Sixth Circuit, Brief for Appellee in No. 00–8062, p. 8, she declined to do so in the Court of Appeals. Indeed, before that court, respondent relied entirely on Congress' ability to abrogate state sovereign immunity under the Bankruptcy Clause rather than on any *in rem* theory because, under her reading of *Missouri* v. *Fiske*, 290 U. S. 18 (1933), "there is no *in rem* exception to a state's Eleventh Amendment immunity" in bankruptcy. Brief for Appellee in No. 01–5769 (CA6), p. 24. Furthermore, respondent did not raise the *in rem* argument in her brief in opposition before this Court. Under this Court's Rule 15.2, we may deem this argument waived. *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75, n. 13 (1996). And, we should do so here both because the argument is irrelevant to this case, and because the *in rem* question is both complex and uncertain, see *Baldwin* v. *Reese*, *ante*, p. 27.

A

In *Federal Maritime Comm'n*, South Carolina Maritime Services, Inc. (SCMS), filed a complaint with the Federal Maritime Commission (FMC), an independent agency, alleging that a state-run port had violated the Shipping Act of 1984, 46 U. S. C. App. § 1701 *et seq.* We assumed without deciding that the FMC does not exercise "judicial power," 535 U. S., at 754, and nonetheless held that state sovereign immunity barred the adjudication of SCMS' complaint. *Id.*, at 769.

Federal Maritime Comm'n turned on the "overwhelming" similarities between FMC proceedings and civil litigation in federal courts. *Id.*, at 759. For example, FMC's rules governing pleadings and discovery are very similar to the analogous Federal Rules of Civil Procedure. *Id.*, at 757–758. Moreover, we noted that "the role of the [administrative law judge], the impartial officer designated to hear a case, is similar to that of an Article III judge." *Id.*, at 758 (footnote and citation omitted). Based on these similarities, we held that, for purposes of state sovereign immunity, the adjudication before the FMC was indistinguishable from an adjudication in an Article III tribunal. See *id.*, at 760–761. Thus, *Federal Maritime Comm'n* recognized that if the Framers would have found it an "impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts," the Framers would have found it equally impermissible to compel States to do so simply because the adjudication takes place in an Article I rather than an Article III court. *Ibid.*

Although the Court ignores *Federal Maritime Comm'n* altogether, its reasoning applies to this case. The similarities between adversary proceedings in bankruptcy and federal civil litigation are striking. Indeed, the Federal Rules of Civil Procedure govern adversary proceedings in substantial part. The proceedings are commenced by the filing of a complaint, Fed. Rule Bkrtcy. Proc. 7003; process is served,

Rule 7005; the opposing party is required to file an answer, Rule 7007; and the opposing party can file counterclaims against the movant, Rule 7013. Federal Rule of Civil Procedure 8 applies to the parties' pleadings. Fed. Rule Bkrtcy. Proc. 7008. Even the form of the parties' pleadings must comply with the federal rules for civil litigation. Rule 7010. "Likewise, discovery in [adversary proceedings] largely mirrors discovery in federal civil litigation." *Federal Maritime Comm'n*, *supra*, at 758. See Fed. Rules Bkrtcy. Proc. 7026–7037 (applying Fed. Rules Civ. Proc. 26–37 to adversary proceedings). And, when a party fails to answer or appear in an adversary proceeding, the Federal Rule governing default judgments applies. Fed. Rule Bkrtcy. Proc. 7055 (adopting Fed. Rule Civ. Proc. 55).

In spite of these similarities, the Court concludes that, because the bankruptcy court's jurisdiction is premised on the res, the issuance of process in this case, as opposed to all others, does not subject an unwilling State to a coercive judicial process. *Ante*, at 452. The Court also views the adversary proceeding in this case differently than a typical adversary proceeding because, absent Federal Rule of Bankruptcy Procedure 7001(6), the Court concludes that a debtor could obtain an undue hardship determination by motion consistent with a bankruptcy court's *in rem* jurisdiction and consistent with the Constitution. See *ante*, at 453.

Critically, however, the Court fails to explain why, simply because it asserts that this determination *could have been made* by motion, the adversary proceeding utilized in this case is somehow less offensive to state sovereignty. After all, "[t]he very object and purpose of the 11th Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers*, 123 U. S. 443, 505 (1887); *Federal Maritime Comm'n*, *supra*, at 760; *Alden* v. *Maine*, 527 U. S. 706, 748 (1999); *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 58 (1996). The fact that an alternative proceeding exists,

the use of which might not be offensive to state sovereignty, is irrelevant to whether the particular proceeding actually used subjects a particular State to the indignities of coercive process. Indeed, the dissent in *Federal Maritime Comm'n*, much like the Court today, focused on the fact that the FMC was not required by statute to evaluate complaints through agency adjudication, 535 U. S., at 774–776 (opinion of BREYER, J.), and could have opted to evaluate complaints in some other manner. But this fact had no bearing on our decision in that case, nor should it control here. I simply cannot ignore the fact that respondent filed a complaint in the Bankruptcy Court "pray[ing] that proper process issue and that upon a hearing upon the merits that [the court] issue a judgment for [respondent] and against [petitioner] allowing [respondent's] debt to be discharged." Complaint for Hardship Discharge in No. 99–22606–K, Adversary No. 99–0847 (Bkrtcy. Ct. WD Tenn.), p. 1.

More importantly, although the adversary proceeding in this case does not require the State to "defend itself" against petitioner in the ordinary sense, the effect is the same, whether done by adversary proceeding or by motion, and whether the proceeding is *in personam* or *in rem*. In order to preserve its rights, the State is compelled either to subject itself to the Bankruptcy Court's jurisdiction or to forfeit its rights. And, whatever the nature of the Bankruptcy Court's jurisdiction, it maintains at least as much control over nonconsenting States as the FMC, which lacks the power to enforce its own orders. *Federal Maritime Comm'n* rejected the view that the FMC's lack of enforcement power means that parties are not coerced to participate in its proceedings because the effect is the same—a State must submit to the adjudication or compromise its ability to defend itself in later proceedings. 535 U. S., at 761–764. Here, if the State does not oppose the debtor's claim of undue hardship, the Bankruptcy Court is authorized to enter a default judgment *without making an undue hardship determi-*

nation. See Fed. Rules Bkrtcy. Proc. 7055, 9014 (adopting Fed. Rule Civ. Proc. 55 in both adversary proceedings and in contested matters governed by motion). The Court apparently concludes otherwise, but, tellingly, its only support for that questionable proposition is a statement made at oral argument. See *ante,* at 453–454.

As I explain in Part I–B, *infra,* I do not contest the assertion that in bankruptcy, like admiralty, there might be a limited *in rem* exception to state sovereign immunity from suit. Nor do I necessarily reject the argument that this proceeding could have been resolved by motion without offending the dignity of the State. However, because this case did not proceed by motion, I cannot resolve the merits based solely upon what might have, but did not, occur. I would therefore hold that the adversary proceeding in this case constituted a suit against the State for sovereign immunity purposes.

B

The difficulty and complexity of the question of the scope of the Bankruptcy Court's *in rem* jurisdiction as it relates to a State's interests is a further reason that the Court should not address the question here without complete briefing and full consideration by the Court of Appeals.

Relying on this Court's recent recognition of a limited *in rem* exception to state sovereign immunity in certain admiralty actions, see *California* v. *Deep Sea Research, Inc.,* 523 U. S. 491 (1998), the Court recognizes that "States . . . may still be bound by some judicial actions without their consent," *ante,* at 446. The Court then acknowledges the undisputed fact that bankruptcy discharge proceedings are *in rem* proceedings. *Ante,* at 447. These facts, however, standing alone, do not compel the conclusion that the *in rem* exception should extend to this case.

Deep Sea Research, supra, does not make clear the extent of the *in rem* exception in admiralty, much less its potential application in bankruptcy. The Court's recognition of an *in*

rem exception to state sovereign immunity in admiralty actions was informed, in part, by Justice Story's understanding of the difference between admiralty actions and regular civil litigation. Justice Story doubted whether the Eleventh Amendment extended to admiralty and maritime suits at all because, in admiralty, "the jurisdiction of the [federal] court is founded upon the possession of the thing; and if the State should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor." 2 Commentaries on the Constitution of the United States § 1689, p. 491 (5th ed. 1891). Justice Story supported this view by contrasting suits in law or equity with suits in admiralty, which received a separate grant of jurisdiction under Article III. *Id.*, at 491–492. The Court, however, has since adopted a more narrow understanding of the *in rem* maritime exception. See *Ex parte New York*, 256 U. S. 490, 497 (1921) ("Nor is the admiralty and maritime jurisdiction exempt from the operation of the rule [that a State may not be sued without its consent]"). Thus, our holding in *Deep Sea Research* was limited to actions where the res is not within the State's possession. 523 U. S., at 507–508.

Whatever the scope of the *in rem* exception in admiralty, the Court's cases reveal no clear principle to govern which, if any, bankruptcy suits are exempt from the Eleventh Amendment's bar. In *Fiske*, 290 U. S., at 28, the Court stated in no uncertain terms that "[t]he fact that a suit in a federal court is *in rem*, or *quasi in rem*, furnishes no ground for the issue of process against a non-consenting State." The Court contends that *Fiske* supports its argument because there the Court "noted the State might still be bound by the federal court's adjudication even if an injunction could not issue." *Ante*, at 449, n. 4. But the Court in *Fiske* also suggested that the State might not be bound by the federal court's adjudication—a more weighty proposition given the circumstances of the case. *Fiske*, in part, involved the validity of a federal-court decree entered in 1927, which deter-

mined that Sophie Franz had only a life interest in certain shares of stock previously held by her deceased husband. When Franz died in 1930, Franz's executor did not inventory the shares because the federal-court decree declared Franz to have only a life interest in them. The dispute arose because the State sought to inventory those shares as assets of Franz's estate so that it could collect inheritance taxes on those shares. Although *Fiske* did not decide whether the 1927 federal decree was binding on the State, 290 U. S., at 29, the mere suggestion that the State might not be bound by the decree because it was not a party to an *in rem* proceeding in which it had no interest, see *ibid.*, at least leaves in doubt the extent of any *in rem* exception in bankruptcy.

Our more recent decision in *United States* v. *Nordic Village, Inc.*, 503 U. S. 30 (1992), casts some doubt upon the Court's characterization of any *in rem* exception in bankruptcy. *Nordic Village* explicitly recognized that "we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists." *Id.*, at 38. Although *Nordic Village* involved the sovereign immunity of the Federal Government, it also supports the argument that no *in rem* exception exists for other types of relief against a State. *Nordic Village* interpreted 11 U. S. C. § 106(c) to waive claims for declaratory and injunctive, though not monetary, relief against the Government. 503 U. S., at 34–37. We noted that this interpretation did not render § 106(c) irrelevant because a waiver of immunity with respect to claims for declaratory and injunctive relief would "perform a significant function" by "permit[ing] a bankruptcy court to determine the amount and dischargeability of an estate's liability to the Government . . . whether or not the Government filed a proof of claim." *Id.*, at 36. Our interpretation of § 106(c) to waive liability only for declaratory and injunctive relief strongly suggests that such a waiver is necessary—*i. e.*, that without the waiver, despite the bankruptcy court's *in rem* jurisdic-

tion, the bankruptcy court could not order declaratory or injunctive relief against a State without the State's consent. Cf. *Raygor* v. *Regents of Univ. of Minn.*, 534 U. S. 533, 553, n. 11 (2002).

To be sure, the Court has previously held that a State can be bound by a bankruptcy court adjudication that affects a State's interest. See *New York* v. *Irving Trust Co.*, 288 U. S. 329 (1933); *Van Huffel* v. *Harkelrode*, 284 U. S. 225 (1931). But, in neither of those cases did the Court attempt to undertake a sovereign immunity analysis. *Irving Trust*, for instance, rested on Congress' "power to establish uniform laws on the subject of bankruptcies," 288 U. S., at 331, and the need for "orderly and expeditious proceedings," *id.*, at 333. And in *Van Huffel*, the Court appeared to rest its decision more on "the requirements of bankruptcy administration," 284 U. S., at 228, than the effect of the *in rem* nature of the proceedings on state sovereign immunity.* Perhaps recognizing that these precedents cannot support the weight of its reasoning, the Court attempts to limit its holding by explicitly declining to find an *in rem* exception to every exercise of a bankruptcy court's *in rem* jurisdiction that might offend state sovereignty, *ante*, at 451, n. 5. But, I can find no principle in the Court's opinion to distinguish this case from any other. For this reason, I would not undertake this complicated inquiry.

II

Congress has made its intent to abrogate state sovereign immunity under the Bankruptcy Clause clear. See 11 U. S. C. § 106(a). The only question, then, is whether the Bankruptcy Clause grants Congress the power to do so.

**Gardner* v. *New Jersey*, 329 U. S. 565 (1947), also does not aid the Court's argument. Although *Gardner* held that the reorganization court could entertain objections to the State's asserted claim, the Court also held that the State waived its immunity by filing a proof of claim, thus obviating any need to consider the sovereign immunity question in the context of the *in rem* proceedings. *Id.*, at 573–574.

This Court has repeatedly stated that "Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 364 (2001). See also, *e. g.*, *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 80 (2000) ("Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals"); *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 636 (1999) ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers").

Despite the clarity of these statements, the Court of Appeals held that the Bankruptcy Clause operates differently from Congress' other Article I powers because of its "uniformity requirement," 319 F. 3d 755, 764 (CA6 2003). Our discussions of Congress' inability to abrogate state sovereign immunity through the use of its Article I powers reveal no such limitation. I would therefore reverse the judgment of the Court of Appeals.

For the foregoing reasons, I respectfully dissent.

Syllabus

TILL ET UX. *v.* SCS CREDIT CORP.

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

No. 02–1016. Argued December 2, 2003—Decided May 17, 2004

Under the so-called "cramdown option" permitted by the Bankruptcy Code, a Chapter 13 debtor's proposed debt adjustment plan must provide each allowed, secured creditor both a lien securing the claim and a promise of future property disbursements whose total value, as of the plan's date, "is not less than the [claim's] allowed amount," 11 U. S. C. § 1325(a)(5)(B)(ii). When such plans provide for installment payments, each installment must be calibrated to ensure that the creditor receives disbursements whose total present value equals or exceeds that of the allowed claim. Respondent's retail installment contract on petitioners' truck had a secured value of $4,000 at the time petitioners filed a Chapter 13 petition. Petitioners' proposed debt adjustment plan provided the amount that would be distributed to creditors each month and that petitioners would pay an annual 9.5% interest rate on respondent's secured claim. This "prime-plus" or "formula rate" was reached by augmenting the national prime rate of 8% to account for the nonpayment risk posed by borrowers in petitioners' financial position. In confirming the plan, the Bankruptcy Court overruled respondent's objection that it was entitled to its contract interest rate of 21%. The District Court reversed, ruling that the 21% "coerced loan rate" was appropriate because cramdown rates must be set at the level the creditor could have obtained had it foreclosed on the loan, sold the collateral, and reinvested the proceeds in equivalent loans. The Seventh Circuit modified that approach, holding that the original contract rate was a "presumptive rate" that could be challenged with evidence that a higher or lower rate should apply, and remanding the case to the Bankruptcy Court to afford the parties an opportunity to rebut the presumptive 21% rate. The dissent proposed adoption of the formula approach, rejecting a "cost of funds rate" that would simply ask what it would cost the creditor to obtain the cash equivalent of the collateral from another source.

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

301 F. 3d 583, reversed and remanded.

JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded that the prime-plus or formula rate best meets the purposes of the Bankruptcy Code. Pp. 473–485.

Syllabus

(a) The Code gives little guidance as to which of the four interest rates advocated by opinions in this case Congress intended when it adopted the cramdown provision. A debtor's promise of future payments is worth less than an immediate lump-sum payment because the creditor cannot use the money right away, inflation may cause the dollar's value to decline before the debtor pays, and there is a nonpayment risk. In choosing an interest rate sufficient to compensate the creditor for such concerns, bankruptcy courts must consider that: (1) Congress likely intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of the many Code provisions requiring a court to discount a stream of deferred payments back to their present dollar value; (2) Chapter 13 expressly authorizes a bankruptcy court to modify the rights of a creditor whose claim is secured by an interest in anything other than the debtor's principal residence; and (3) from a creditor's point of view, the cramdown provision mandates an objective rather than a subjective inquiry. Pp. 473–477.

(b) These considerations lead to the conclusion that the coerced loan, presumptive contract rate, and cost of funds approaches should be rejected, since they are complicated, impose significant evidentiary costs, and aim to make each individual creditor whole rather than to ensure that a debtor's payments have the required present value. Pp. 477–478.

(c) The formula approach has none of these defects. Taking its cue from ordinary lending practices, it looks to the national prime rate, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the loan's opportunity costs, the inflation risk, and the relatively slight default risk. A bankruptcy court is then required to adjust the prime rate to account for the greater nonpayment risk that bankrupt debtors typically pose. Because that adjustment depends on such factors as the estate's circumstances, the security's nature, and the reorganization plan's duration and feasibility, the court must hold a hearing to permit the debtor and creditors to present evidence about the appropriate risk adjustment. Unlike the other approaches proposed in this case, the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary hearings. The resulting prime-plus rate also depends only on the state of financial markets, the bankruptcy estate's circumstances, and the loan's characteristics, not on the creditor's circumstances or its prior interactions with the debtor. The risk adjustment's proper scale is not before this Court. The Bankruptcy Court approved 1.5% in this case, and other courts have generally approved 1% to 3%, but respondent claims a risk adjustment in this range is inadequate. The issue

need not be resolved here; it is sufficient to note that courts must choose a rate high enough to compensate a creditor for its risk but not so high as to doom the bankruptcy plan. Pp. 478–481.

JUSTICE THOMAS concluded that the proposed 9.5% rate will sufficiently compensate respondent for the fact that it is receiving monthly payments rather than a lump sum payment, but that 11 U. S. C. § 1325(a)(5)(B)(ii) does not require that the proper interest rate reflect the risk of nonpayment. Pp. 485–491.

(a) The plain language of § 1325(a)(5)(B)(ii) requires a court to determine, first, the allowed amount of the claim; second, what is the property to be distributed under the plan; and third, the "value, as of the effective date of the plan," of the property to be distributed. This third requirement, which is at issue here, incorporates the principle of the time value of money. Section 1325(a)(5)(B)(ii) requires valuation of the *property*, not valuation of the *plan*. Thus, a plan need only propose an interest rate that will compensate a creditor for the fact that had he received the property immediately rather than at a future date, he could have immediately made use of the property. In most, if not all, cases, where the plan proposes simply a stream of cash payments, the appropriate risk-free rate should suffice. There may be some risk of nonpayment, but § 1325(a)(5)(B)(ii) does not take this risk into account. Respondent's argument that § 1325(a)(5)(B)(ii) was crafted to protect creditors rather than debtors ignores the statute's plain language and overlooks the fact that secured creditors are compensated in part for the nonpayment risk through the valuation of the secured claim. Further, the statute's plain language is by no means debtor protective. Given the presence of multiple creditor-specific protections, it is not irrational to assume that Congress opted not to provide further protection for creditors by requiring a debtor-specific risk adjustment under § 1325(a)(5). Pp. 486–490.

(b) Here, the allowed amount of the secured claim is $4,000, and the property to be distributed under the plan is cash payments. Because the proposed 9.5% interest rate is higher than the risk-free rate, it is sufficient to account for the time value of money, which is all the statute requires. Pp. 490–491.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 485. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined, *post*, p. 491.

Rebecca J. Harper argued the cause for petitioners. With her on the briefs was *Annette F. Rush*.

David B. Salmons argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson, Assistant Attorney General Keisler, Deputy Solicitor General Clement, Robert M. Loeb,* and *Anthony A. Yang.*

G. Eric Brunstad, Jr., argued the cause for respondent. With him on the brief were *John M. Smith* and *Roger P. Ralph.**

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join.

To qualify for court approval under Chapter 13 of the Bankruptcy Code, an individual debtor's proposed debt adjustment plan must accommodate each allowed, secured creditor in one of three ways: (1) by obtaining the creditor's acceptance of the plan; (2) by surrendering the property securing the claim; or (3) by providing the creditor both a lien securing the claim and a promise of future property distributions (such as deferred cash payments) whose total "value, as of the effective date of the plan, . . . is not less than the allowed amount of such claim."[1] The third alternative is

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*Briefs of *amici curiae* urging reversal were filed for the AARP by *Brady C. Williamson, Elizabeth Warren, Jean Constantine-Davis, Nina F. Simon,* and *Michael R. Schuster;* for the National Association of Chapter Thirteen Trustees by *Henry E. Hildebrand III;* and for the National Association of Consumer Bankruptcy Attorneys et al. by *James Justin Haller.*

James C. Schroeder filed a brief for Allstate Life Insurance Co. et al. as *amici curiae* urging affirmance.

[1] 11 U. S. C. § 1325(a)(5). The text of the statute reads as follows:

"§ 1325. Confirmation of plan

"(a) Except as provided in subsection (b), the court shall confirm a plan if—

. . . . . .

"(5) with respect to each allowed secured claim provided for by the plan—

"(A) the holder of such claim has accepted the plan;

commonly known as the "cramdown option" because it may be enforced over a claim holder's objection.[2] *Associates Commercial Corp.* v. *Rash*, 520 U. S. 953, 957 (1997).

Plans that invoke the cramdown power often provide for installment payments over a period of years rather than a single payment.[3] In such circumstances, the amount of each installment must be calibrated to ensure that, over time, the creditor receives disbursements whose total present value[4] equals or exceeds that of the allowed claim. The proceedings in this case that led to our grant of certiorari identified four different methods of determining the appropriate method with which to perform that calibration. Indeed, the Bankruptcy Judge, the District Court, the Court of Appeals majority, and the dissenting judge each endorsed a different approach. We detail the underlying facts and describe each of those approaches before setting forth our judgment as to which approach best meets the purposes of the Bankruptcy Code.

I

On October 2, 1998, petitioners Lee and Amy Till, residents of Kokomo, Indiana, purchased a used truck from Instant Auto Finance for $6,395 plus $330.75 in fees and taxes.

"(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

"(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

"(C) the debtor surrenders the property securing such claim to such holder . . . ."

[2] As we noted in *Associates Commercial Corp.* v. *Rash*, 520 U. S. 953, 962 (1997), a debtor may also avail himself of the second option (surrender of the collateral) despite the creditor's objection.

[3] See *Rake* v. *Wade*, 508 U. S. 464, 472, n. 8 (1993) (noting that property distributions under § 1325(a)(5)(B)(ii) may take the form of "a stream of future payments").

[4] In the remainder of the opinion, we use the term "present value" to refer to the value as of the effective date of the bankruptcy plan.

They made a $300 downpayment and financed the balance of the purchase price by entering into a retail installment contract that Instant Auto immediately assigned to respondent, SCS Credit Corporation. Petitioners' initial indebtedness amounted to $8,285.24—the $6,425.75 balance of the truck purchase plus a finance charge of 21% per year for 136 weeks, or $1,859.49. Under the contract, petitioners agreed to make 68 biweekly payments to cover this debt; Instant Auto—and subsequently respondent—retained a purchase money security interest that gave it the right to repossess the truck if petitioners defaulted under the contract.

On October 25, 1999, petitioners, by then in default on their payments to respondent, filed a joint petition for relief under Chapter 13 of the Bankruptcy Code. At the time of the filing, respondent's outstanding claim amounted to $4,894.89, but the parties agreed that the truck securing the claim was worth only $4,000. App. 16–17. In accordance with the Bankruptcy Code, therefore, respondent's secured claim was limited to $4,000, and the $894.89 balance was unsecured.[5] Petitioners' filing automatically stayed debt-collection activity by their various creditors, including the Internal Revenue Service (IRS), respondent, three other holders of secured claims, and unidentified unsecured creditors. In addition, the filing created a bankruptcy estate, administered by a trustee, which consisted of petitioners' property, including the truck.[6]

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[5] Title 11 U. S. C. § 506(a) provides:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

[6] See §§ 541(a), 1306(a).

Petitioners' proposed debt adjustment plan called for them to submit their future earnings to the supervision and control of the Bankruptcy Court for three years, and to assign $740 of their wages to the trustee each month.[7] App. to Pet. for Cert. 76a–81a. The plan charged the trustee with distributing these monthly wage assignments to pay, in order of priority: (1) administrative costs; (2) the IRS's priority tax claim; (3) secured creditors' claims; and finally, (4) unsecured creditors' claims. *Id.*, at 77a–79a.

The proposed plan also provided that petitioners would pay interest on the secured portion of respondent's claim at a rate of 9.5% per year. Petitioners arrived at this "prime-plus" or "formula rate" by augmenting the national prime rate of approximately 8% (applied by banks when making low-risk loans) to account for the risk of nonpayment posed by borrowers in their financial position. Respondent objected to the proposed rate, contending that the company was "entitled to interest at the rate of 21%, which is the rate . . . it would obtain if it could foreclose on the vehicle and reinvest the proceeds in loans of equivalent duration and risk as the loan" originally made to petitioners. App. 19–20.

At the hearing on its objection, respondent presented expert testimony establishing that it uniformly charges 21% interest on so-called "subprime" loans, or loans to borrowers with poor credit ratings, and that other lenders in the subprime market also charge that rate. Petitioners countered with the testimony of an Indiana University-Purdue University Indianapolis economics professor, who acknowledged that he had only limited familiarity with the subprime auto lending market, but described the 9.5% formula rate as "very reasonable" given that Chapter 13 plans are "supposed to be

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[7] Petitioners submitted an initial plan that would have required them to assign $1,089 of their wages to the trustee every month. App. 9. Their amended plan, however, reduced this monthly payment to $740. App. to Pet. for Cert. 77a.

financially feasible."[8] *Id.*, at 43–44. Moreover, the professor noted that respondent's exposure was "fairly limited because [petitioners] are under the supervision of the court." *Id.*, at 43. The bankruptcy trustee also filed comments supporting the formula rate as, among other things, easily ascertainable, closely tied to the "condition of the financial market," and independent of the financial circumstances of any particular lender. App. to Pet. for Cert. 41a–42a. Accepting petitioners' evidence, the Bankruptcy Court overruled respondent's objection and confirmed the proposed plan.

The District Court reversed. It understood Seventh Circuit precedent to require that bankruptcy courts set cramdown interest rates at the level the creditor could have obtained if it had foreclosed on the loan, sold the collateral, and reinvested the proceeds in loans of equivalent duration and risk. Citing respondent's unrebutted testimony about the market for subprime loans, the court concluded that 21% was the appropriate rate. *Id.*, at 38a.

On appeal, the Seventh Circuit endorsed a slightly modified version of the District Court's "coerced" or "forced loan" approach. *In re Till*, 301 F. 3d 583, 591 (2002). Specifically, the majority agreed with the District Court that, in a cramdown proceeding, the inquiry should focus on the interest rate "that the creditor in question would obtain in making a new loan in the same industry to a debtor who is similarly situated, although not in bankruptcy." *Id.*, at 592. To approximate that new loan rate, the majority looked to the parties' prebankruptcy contract rate (21%). The court recognized, however, that using the contract rate would not "duplicat[e] precisely . . . the present value of the collateral to the creditor" because loans to bankrupt, court-supervised debtors "involve some risks that would not be incurred in a

[8] The requirement of financial feasibility derives from 11 U. S. C. § 1325(a)(6), which provides that the bankruptcy court shall "confirm a plan if . . . the debtor will be able to make all payments under the plan and to comply with the plan." See *infra*, at 480.

new loan to a debtor not in default" and also produce "some economies." *Ibid.* To correct for these inaccuracies, the majority held that the original contract rate should "serve as a presumptive [cramdown] rate," which either the creditor or the debtor could challenge with evidence that a higher or lower rate should apply. *Ibid.* Accordingly, the court remanded the case to the Bankruptcy Court to afford petitioners and respondent an opportunity to rebut the presumptive 21% rate.[9]

Dissenting, Judge Rovner argued that the majority's presumptive contract rate approach overcompensates secured creditors because it fails to account for costs a creditor would have to incur in issuing a new loan. Rather than focusing on the market for comparable loans, Judge Rovner advocated the Bankruptcy Court's formula approach. *Id.*, at 596. Although Judge Rovner noted that the rates produced by either the formula or the cost of funds approach might be "piddling" relative to the coerced loan rate, she suggested courts should "consider the extent to which the creditor has already been compensated for . . . the risk that the debtor will be unable to discharge his obligations under the reorganization plan . . . in the rate of interest that it charged to the debtor in return for the original loan." *Ibid.* We granted certiorari and now reverse. 539 U. S. 925 (2003).

II

The Bankruptcy Code provides little guidance as to which of the rates of interest advocated by the four opinions in this case—the formula rate, the coerced loan rate, the presumptive contract rate, or the cost of funds rate—Congress had in mind when it adopted the cramdown provision. That provision, 11 U. S. C. § 1325(a)(5)(B), does not mention the term "discount rate" or the word "interest." Rather, it simply

[9] As 21% is the maximum interest rate creditors may charge for consumer loans under Indiana's usury statute, Ind. Code § 24–4.5–3–201 (1993), the remand presumably could not have benefited respondent.

requires bankruptcy courts to ensure that the property to be distributed to a particular secured creditor over the life of a bankruptcy plan has a total "value, as of the effective date of the plan," that equals or exceeds the value of the creditor's allowed secured claim—in this case, $4,000. § 1325(a)(5)(B)(ii).

That command is easily satisfied when the plan provides for a lump-sum payment to the creditor. Matters are not so simple, however, when the debt is to be discharged by a series of payments over time. A debtor's promise of future payments is worth less than an immediate payment of the same total amount because the creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays, and there is always some risk of nonpayment. The challenge for bankruptcy courts reviewing such repayment schemes, therefore, is to choose an interest rate sufficient to compensate the creditor for these concerns.

Three important considerations govern that choice. First, the Bankruptcy Code includes numerous provisions that, like the cramdown provision, require a court to "discoun[t] . . . [a] stream of deferred payments back to the[ir] present dollar value," *Rake* v. *Wade,* 508 U. S. 464, 472, n. 8 (1993), to ensure that a creditor receives at least the value of its claim.[10] We think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions. Moreover, we think Congress would favor an approach that is familiar in the financial

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[10] See 11 U. S. C. § 1129(a)(7)(A)(ii) (requiring payment of property whose "value, as of the effective date of the plan" equals or exceeds the value of the creditor's claim); §§ 1129(a)(7)(B), 1129(a)(9)(B)(i), 1129(a)(9)(C), 1129(b)(2)(A)(i)(II), 1129(b)(2)(B)(i), 1129(b)(2)(C)(i), 1173(a)(2), 1225(a)(4), 1225(a)(5)(B)(ii), 1228(b)(2), 1325(a)(4), 1228(b)(2) (same).

community and that minimizes the need for expensive evidentiary proceedings.

Second, Chapter 13 expressly authorizes a bankruptcy court to modify the rights of any creditor whose claim is secured by an interest in anything other than "real property that is the debtor's principal residence." 11 U. S. C. § 1322(b)(2).[11] Thus, in cases like this involving secured interests in personal property, the court's authority to modify the number, timing, or amount of the installment payments from those set forth in the debtor's original contract is perfectly clear. Further, the potential need to modify the loan terms to account for intervening changes in circumstances is also clear: On the one hand, the fact of the bankruptcy establishes that the debtor is overextended and thus poses a significant risk of default; on the other hand, the postbankruptcy obligor is no longer the individual debtor but the court-supervised estate, and the risk of default is thus somewhat reduced.[12]

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[11] Section 1322(b)(2) provides:

"[T]he plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, . . . or leave unaffected the rights of holders of any class of claims."

[12] Several factors contribute to this reduction in risk. First, as noted below, *infra*, at 480, a court may only approve a cramdown loan (and the debt adjustment plan of which the loan is a part) if it believes the debtor will be able to make all of the required payments. § 1325(a)(6). Thus, such loans will only be approved for debtors that the court deems creditworthy. Second, Chapter 13 plans must "provide for the submission" to the trustee "of all or such portion of [the debtor's] future . . . income . . . as is necessary for the execution of the plan," § 1322(a)(1), so the possibility of nonpayment is greatly reduced. Third, the Bankruptcy Code's extensive disclosure requirements reduce the risk that the debtor has significant undisclosed obligations. Fourth, as a practical matter, the public nature of the bankruptcy proceeding is likely to reduce the debtor's opportunities to take on additional debt. Cf. 11 U. S. C. § 525 (prohibiting certain Government grant and loan programs from discriminating against applicants who are or have been bankrupt).

Third, from the point of view of a creditor, the cramdown provision mandates an objective rather than a subjective inquiry.[13] That is, although § 1325(a)(5)(B) entitles the creditor to property whose present value objectively equals or exceeds the value of the collateral, it does not require that the terms of the cramdown loan match the terms to which the debtor and creditor agreed prebankruptcy, nor does it require that the cramdown terms make the creditor subjectively indifferent between present foreclosure and future payment. Indeed, the very idea of a "cramdown" loan *precludes* the latter result: By definition, a creditor forced to accept such a loan would prefer instead to foreclose.[14] Thus, a court choosing a cramdown interest rate need not consider the creditor's individual circumstances, such as its prebankruptcy dealings with the debtor or the alternative loans it

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[13] We reached a similar conclusion in *Associates Commercial Corp.* v. *Rash*, 520 U. S. 953 (1997), when we held that a creditor's secured interest should be valued from the debtor's, rather than the creditor's, perspective. *Id.*, at 963 ("[The debtor's] actual use, rather than a foreclosure sale that will not take place, is the proper guide . . .").

[14] This fact helps to explain why there is no readily apparent Chapter 13 "cramdown market rate of interest": Because every cramdown loan is imposed by a court over the objection of the secured creditor, there is no free market of willing cramdown lenders. Interestingly, the same is *not* true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors in possession. See, *e. g.*, Balmoral Financial Corporation, http://www.balmoral.com/bdip.htm (all Internet materials as visited Mar. 4, 2004, and available in Clerk of Court's case file) (advertising debtor in possession lending); Debtor in Possession Financing: 1st National Assistance Finance Association DIP Division, http://www.loanmallusa.com/dip.htm (offering "to tailor a financing program . . . to your business' needs and . . . to work closely with your bankruptcy counsel"). Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce. In the Chapter 13 context, by contrast, the absence of any such market obligates courts to look to first principles and ask only what rate will fairly compensate a creditor for its exposure.

could make if permitted to foreclose.[15] Rather, the court should aim to treat similarly situated creditors similarly,[16] and to ensure that an objective economic analysis would suggest the debtor's interest payments will adequately compensate all such creditors for the time value of their money and the risk of default.

III

These considerations lead us to reject the coerced loan, presumptive contract rate, and cost of funds approaches. Each of these approaches is complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value. For example, the coerced loan approach requires bankruptcy courts to consider evidence about the market for comparable loans to similar (though nonbankrupt) debtors—an inquiry far removed from such courts' usual task of evaluating debtors' financial circumstances and the feasibility of their debt adjustment plans. In addition, the approach overcompensates creditors because the market lending rate must be high enough to cover factors, like lenders' transaction costs and overall profits, that are no longer relevant in the context of court-administered and court-supervised cramdown loans.

Like the coerced loan approach, the presumptive contract rate approach improperly focuses on the creditor's potential use of the proceeds of a foreclosure sale. In addition, although the approach permits a debtor to introduce some evidence about each creditor, thereby enabling the court to tailor the interest rate more closely to the creditor's financial circumstances and reducing the likelihood that the creditor

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[15] See *supra*, at 472 (noting that the District Court's coerced loan approach aims to set the cramdown interest rate at the level the creditor could obtain from new loans of comparable duration and risk).

[16] Cf. 11 U. S. C. § 1322(a)(3) ("The plan shall . . . provide the same treatment for each claim within a particular class").

will be substantially overcompensated, that right comes at a cost: The debtor must obtain information about the creditor's costs of overhead, financial circumstances, and lending practices to rebut the presumptive contract rate. Also, the approach produces absurd results, entitling "inefficient, poorly managed lenders" with lower profit margins to obtain higher cramdown rates than "well managed, better capitalized lenders." 2 K. Lundin, Chapter 13 Bankruptcy § 112.1, p. 112–8 (3d ed. 2000). Finally, because the approach relies heavily on a creditor's prior dealings with the debtor, similarly situated creditors may end up with vastly different cramdown rates.[17]

The cost of funds approach, too, is improperly aimed. Although it rightly disregards the now-irrelevant terms of the parties' original contract, it mistakenly focuses on the creditworthiness of the *creditor* rather than the debtor. In addition, the approach has many of the other flaws of the coerced loan and presumptive contract rate approaches. For example, like the presumptive contract rate approach, the cost of funds approach imposes a significant evidentiary burden, as a debtor seeking to rebut a creditor's asserted cost of borrowing must introduce expert testimony about the creditor's financial condition. Also, under this approach, a creditworthy lender with a low cost of borrowing may obtain a lower cramdown rate than a financially unsound, fly-by-night lender.

IV

The formula approach has none of these defects. Taking its cue from ordinary lending practices, the approach begins

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[17] For example, suppose a debtor purchases two identical used cars, buying the first at a low purchase price from a lender who charges high interest, and buying the second at a much higher purchase price from a lender who charges zero-percent or nominal interest. Prebankruptcy, these two loans might well produce identical income streams for the two lenders. Postbankruptcy, however, the presumptive contract rate approach would entitle the first lender to a considerably higher cramdown interest rate, even though the two secured debts are objectively indistinguishable.

by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default.[18] Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly. The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment. Some of this evidence will be included in the debtor's bankruptcy filings, however, so the debtor and creditors may not incur significant additional expense. Moreover, starting from a concededly *low* estimate and adjusting *upward* places the evidentiary burden squarely on the creditors, who are likely to have readier access to any information absent from the debtor's filing (such as evidence about the "liquidity of the collateral market," *post*, at 499 (SCALIA, J., dissenting)). Finally, many of the factors relevant to the adjustment fall squarely within the bankruptcy court's area of expertise.

Thus, unlike the coerced loan, presumptive contract rate, and cost of funds approaches, the formula approach entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings. Moreover, the resulting "prime-plus" rate of interest depends only on the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan, not on the creditor's circumstances or its prior interactions with the debtor. For these reasons, the

[18] We note that, if the court could somehow be certain a debtor would complete his plan, the prime rate would be adequate to compensate any secured creditors forced to accept cramdown loans.

prime-plus or formula rate best comports with the purposes of the Bankruptcy Code.[19]

We do not decide the proper scale for the risk adjustment, as the issue is not before us. The Bankruptcy Court in this case approved a risk adjustment of 1.5%, App. to Pet. for Cert. 44a–73a, and other courts have generally approved adjustments of 1% to 3%, see *In re Valenti*, 105 F. 3d 55, 64 (CA2) (collecting cases), abrogated on other grounds by *Associates Commercial Corp.* v. *Rash*, 520 U. S. 953 (1997). Respondent's core argument is that a risk adjustment in this range is entirely inadequate to compensate a creditor for the real risk that the plan will fail. There is some dispute about the true scale of that risk—respondent claims that more than 60% of Chapter 13 plans fail, Brief for Respondent 25, but petitioners argue that the failure rate for *approved* Chapter 13 plans is much lower, Tr. of Oral Arg. 9. We need not resolve that dispute. It is sufficient for our purposes to note that, under 11 U. S. C. § 1325(a)(6), a court may not approve a plan unless, after considering all creditors' objections and receiving the advice of the trustee, the judge is persuaded that "the debtor will be able to make all payments under the plan and to comply with the plan." *Ibid.* Together with the cramdown provision, this requirement obligates the court to select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan. If the court determines that the likelihood of default is so high as to ne-

[19] The fact that Congress considered but rejected legislation that would endorse the Seventh Circuit's presumptive contract rate approach, H. R. 1085, 98th Cong., 1st Sess., § 19(2)(A) (1983); H. R. 1169, 98th Cong., 1st Sess., § 19(2)(A) (1983); H. R. 4786, 97th Cong., 1st Sess., § 19(2)(A) (1981), lends some support to our conclusion. It is perhaps also relevant that our conclusion is endorsed by the Executive Branch of the Government and by the National Association of Chapter Thirteen Trustees. Brief for United States as *Amicus Curiae;* Brief for National Association of Chapter Thirteen Trustees as *Amicus Curiae.* If we have misinterpreted Congress' intended meaning of "value, as of the date of the plan," we are confident it will enact appropriate remedial legislation.

cessitate an "eye-popping" interest rate, 301 F. 3d, at 593 (Rovner, J., dissenting), the plan probably should not be confirmed.

V

The dissent's endorsement of the presumptive contract rate approach rests on two assumptions: (1) "subprime lending markets are competitive and therefore largely efficient"; and (2) the risk of default in Chapter 13 is normally no less than the risk of default at the time of the original loan. *Post*, at 492–493. Although the Bankruptcy Code provides little guidance on the question, we think it highly unlikely that Congress would endorse either premise.

First, the dissent assumes that subprime loans are negotiated between fully informed buyers and sellers in a classic free market. But there is no basis for concluding that Congress relied on this assumption when it enacted Chapter 13. Moreover, several considerations suggest that the subprime market is not, in fact, perfectly competitive. To begin with, used vehicles are regularly sold by means of tie-in transactions, in which the price of the vehicle is the subject of negotiation, while the terms of the financing are dictated by the seller.[20] In addition, there is extensive fed-

[20] The dissent notes that "[t]ie-ins do not *alone* make financing markets noncompetitive; they only cause prices and interest rates to be considered *in tandem* rather than separately." *Post*, at 495. This statement, while true, is nonresponsive. If a market prices the cost of goods and the cost of financing together, then even if that market is perfectly competitive, all we can know is that the *combined* price of the goods and the financing is competitive and efficient. We have no way of determining whether the allocation of that price between goods and financing would be the same if the two components were separately negotiated. But the only issue before us is the cramdown interest rate (the cost of financing); the value of respondent's truck (the cost of the goods) is fixed. See *Rash*, 520 U. S., at 960 (setting the value of collateral in Chapter 13 proceedings at the "price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller"). The competitiveness of the market for cost-*cum*-financing is thus irrelevant to our analysis.

eral[21] and state[22] regulation of subprime lending, which not only itself distorts the market, but also evinces regulators' belief that unregulated subprime lenders would exploit borrowers' ignorance and charge rates above what a competitive market would allow.[23] Indeed, Congress enacted the Truth in Lending Act in part because it believed "consumers would individually benefit not only from the more informed use of credit, but also from heightened competition which would result from more knowledgeable credit shopping." S. Rep. No. 96–368, p. 16 (1979).[24]

Second, the dissent apparently believes that the debtor's prebankruptcy default—on a loan made in a market in which creditors commonly charge the maximum rate of interest allowed by law, Brief for Respondent 16, and in which neither creditors nor debtors have the protections afforded by Chapter 13—translates into a high probability that the same debtor's confirmed Chapter 13 plan will fail. In our view, however, Congress intended to create a program under which plans that qualify for confirmation have a high probability of success. Perhaps bankruptcy judges currently confirm too

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[21] For example, the Truth in Lending Act regulates credit transactions and credit advertising. 15 U. S. C. §§ 1604–1649, 1661–1665b.

[22] Usury laws provide the most obvious examples of state regulation of the subprime market. See, *e. g.*, Colo. Rev. Stat. § 5–2–201 (2003); Fla. Stat. Ann. § 537.011 (Supp. 2004); Ind. Code § 24–4.5–3–201 (1993); Md. Com. Law Code Ann. § 12–404(d) (2000).

[23] Lending practices in Mississippi, "where there currently is no legal usury rate," support this conclusion: In that State, subprime lenders charge rates "as high as 30 to 40%"—well above the rates that apparently suffice to support the industry in States like Indiana. Norberg, Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13, 7 Am. Bankr. Inst. L. Rev. 415, 438–439 (1999).

[24] See also H. R. Rep. No. 1040, 90th Cong., 1st Sess., 17 (1967) ("The basic premise of the application of disclosure standards to credit advertising rests in the belief that a substantial portion of consumer purchases are induced by such advertising and that if full disclosure is not made in such advertising, the consumer will be deprived of the opportunity to effectively comparison shop for credit").

many risky plans, but the solution is to confirm fewer such plans, not to set default cramdown rates at absurdly high levels, thereby increasing the risk of default.

Indeed, as JUSTICE THOMAS demonstrates, *post*, at 487 (opinion concurring in judgment), the text of § 1325(a)(5)(B)(ii) may be read to support the conclusion that Congress did not intend the cramdown rate to include *any* compensation for the risk of default.[25] That reading is consistent with a view that Congress believed Chapter 13's protections to be so effective as to make the risk of default negligible. Because our decision in *Rash* assumes that cramdown interest rates are adjusted to "offset," to the extent possible, the risk of default, 520 U. S., at 962–963, and because so many judges who have considered the issue (including the authors of the four earlier opinions in this case) have rejected the risk-free approach, we think it too late in the day to endorse that approach now. Of course, if the text of the statute required such an approach, that would be the end of the matter. We think, however, that § 1325(a)(5)(B)(ii)'s reference to "value, as of the effective date of the plan, of property to be distributed under the plan" is better read to incorporate all of the commonly understood components of "present value," including any risk of nonpayment. JUSTICE THOMAS' reading does emphasize, though, that a presumption that bankruptcy plans will succeed is more consistent with Congress' statutory scheme than the dissent's more cynical focus on bankrupt debtors' "financial instability and . . . proclivity to seek legal protection," *post*, at 493.

Furthermore, the dissent's two assumptions do not necessarily favor the presumptive contract rate approach. For one thing, the cramdown provision applies not only to sub-

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[25] The United States, too, notes that "[t]he text of Section 1325 is consistent with the view that the appropriate discount rate should reflect only the time value of money and not any risk premium." Brief for United States as *Amicus Curiae* 11, n. 4. The remainder of the United States' brief, however, advocates the formula approach. See, *e. g.*, *id.*, at 19–28.

prime loans but also to prime loans negotiated prior to the change in circumstance (job loss, for example) that rendered the debtor insolvent. Relatedly, the provision also applies in instances in which national or local economic conditions drastically improved or declined after the original loan was issued but before the debtor filed for bankruptcy. In either case, there is every reason to think that a properly risk-adjusted prime rate will provide a better estimate of the creditor's current costs and exposure than a contract rate set in different times.

Even more important, if all relevant information about the debtor's circumstances, the creditor's circumstances, the nature of the collateral, and the market for comparable loans were equally available to both debtor and creditor, then in theory the formula and presumptive contract rate approaches would yield the same final interest rate. Thus, we principally differ with the dissent not over what final rate courts should adopt but over which party (creditor or debtor) should bear the burden of rebutting the presumptive rate (prime or contract, respectively).

JUSTICE SCALIA identifies four "relevant factors bearing on risk premium[:] (1) the probability of plan failure; (2) the rate of collateral depreciation; (3) the liquidity of the collateral market; and (4) the administrative expenses of enforcement." *Post*, at 499. In our view, any information debtors have about any of these factors is likely to be included in their bankruptcy filings, while the remaining information will be far more accessible to creditors (who must collect information about their lending markets to remain competitive) than to individual debtors (whose only experience with those markets might be the single loan at issue in the case). Thus, the formula approach, which begins with a concededly low estimate of the appropriate interest rate and requires the creditor to present evidence supporting a higher rate, places the evidentiary burden on the more knowledgeable

party, thereby facilitating more accurate calculation of the appropriate interest rate.

If the rather sketchy data uncovered by the dissent support an argument that Chapter 13 of the Bankruptcy Code should mandate application of the presumptive contract rate approach (rather than merely an argument that bankruptcy judges should exercise greater caution before approving debt adjustment plans), those data should be forwarded to Congress. We are not persuaded, however, that the data undermine our interpretation of the statutory scheme Congress has enacted.

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

It is so ordered.

JUSTICE THOMAS, concurring in the judgment.

This case presents the issue of what the proper method is for discounting deferred payments to present value and what compensation the creditor is entitled to in calculating the appropriate discount rate of interest. Both the plurality and the dissent agree that "[a] debtor's promise of future payments is worth less than an immediate payment of the same total amount because the creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays, and there is always some risk of nonpayment." *Ante*, at 474; *post*, at 491. Thus, the plurality and the dissent agree that the proper method for discounting deferred payments to present value should take into account each of these factors, but disagree over the proper starting point for calculating the risk of nonpayment.

I agree that a "*promise* of future payments is worth less than an immediate payment" of the same amount, in part because of the risk of nonpayment. But this fact is irrelevant. The statute does not require that the value of the

promise to distribute property under the plan be no less than the allowed amount of the secured creditor's claim. It requires only that "the value . . . of *property* to be distributed under the plan," at the time of the effective date of the plan, be no less than the amount of the secured creditor's claim. 11 U. S. C. § 1325(a)(5)(B)(ii) (emphasis added). Both the plurality and the dissent ignore the clear text of the statute in an apparent rush to ensure that secured creditors are not undercompensated in bankruptcy proceedings. But the statute that Congress enacted does not require a debtor-specific risk adjustment that would put secured creditors in the same position as if they had made another loan. It is for this reason that I write separately.

I

"It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie* v. *United States Trustee*, 540 U. S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000)). Section 1325(a)(5)(B) provides that "with respect to each allowed secured claim provided for by the plan," "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim [must] not [be] less than the allowed amount of such claim." Thus, the statute requires a bankruptcy court to make at least three separate determinations. First, a court must determine the allowed amount of the claim. Second, a court must determine what is the "property to be distributed under the plan." Third, a court must determine the "value, as of the effective date of the plan," of the property to be distributed.

The dispute in this case centers on the proper method to determine the "value, as of the effective date of the plan, of property to be distributed under the plan." The requirement that the "value" of the property to be distributed be

determined "as of the effective date of the plan" incorporates the principle of the time value of money. To put it simply, $4,000 today is worth more than $4,000 to be received 17 months from today because if received today, the $4,000 can be invested to start earning interest immediately.[1] See G. Munn, F. Garcia, & C. Woelfel, Encyclopedia of Banking & Finance 1015 (rev. 9th ed. 1991). Thus, as we explained in *Rake* v. *Wade*, 508 U. S. 464 (1993), "[w]hen a claim is paid off pursuant to a stream of future payments, a creditor receives the 'present value' of its claim only if the total amount of the deferred payments includes the amount of the underlying claim plus an appropriate amount of interest to compensate the creditor for the decreased value of the claim caused by the delayed payments." *Id.*, at 472, n. 8.

Respondent argues, and the plurality and the dissent agree, that the proper interest rate must also reflect the risk of nonpayment. But the statute contains no such requirement. The statute only requires the valuation of the "property to be distributed," not the valuation of the plan (*i. e.*, the promise to make the payments itself). Thus, in order for a plan to satisfy § 1325(a)(5)(B)(ii), the plan need only propose an interest rate that will compensate a creditor for the fact that if he had received the property immediately rather than at a future date, he could have immediately made use of the property. In most, if not all, cases, where the plan proposes simply a stream of cash payments, the appropriate risk-free rate should suffice.

Respondent here would certainly be acutely aware of any risk of default inherent in a Chapter 13 plan, but it is nonsensical to speak of a debtor's risk of default being inherent in the value of "property" unless that property is a promise or

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[1] For example, if the relevant interest rate is 10%, receiving $4,000 one year from now is the equivalent to receiving $3,636.36 today. In other words, an investor would be indifferent to receiving $3,636.36 today and receiving $4,000 one year from now because each will equal $4,000 one year from now.

a debt. Suppose, for instance, that it is currently time A, the property to be distributed is a house, and it will be distributed at time B. Although market conditions might cause the value of the house to fluctuate between time A and time B, the fluctuating value of the house itself has nothing to do with the risk that the debtor will not deliver the house at time B. The value of the house, then, can be and is determined entirely without any reference to any possibility that a promise to transfer the house would not be honored. So too, then, with cash: the value of the cash can be and is determined without any inclusion of any risk that the debtor will fail to transfer the cash at the appropriate time.

The dissent might be correct that the use of the prime rate,[2] even with a small risk adjustment, "will systematically undercompensate secured creditors for the true risks of default." *Post*, at 492.[3] This systematic undercompensation might seem problematic as a matter of policy. But, it raises no problem as a matter of statutory interpretation. Thus, although there is always some risk of nonpayment when A promises to repay a debt to B through a stream of payments over time rather than through an immediate lump-sum payment, § 1325(a)(5)(B)(ii) does not take this risk into account.

This is not to say that a debtor's risk of nonpayment can never be a factor in determining the value of the property to be distributed. Although "property" is not defined in the Bankruptcy Code, nothing in § 1325 suggests that "property" is limited to cash. Rather, "'property' can be cash, notes, stock, personal property or real property; in short, anything of value." 7 Collier on Bankruptcy ¶ 1129.03[7][b][i], p. 1129–44 (rev. 15th ed. 2003) (discussing Chapter 11's cramdown provision). And if the "property to be distributed"

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[2] The prime rate is "[t]he interest rate most closely approximating the riskless or pure rate for money." G. Munn, F. Garcia, & C. Woelfel, Encyclopedia of Banking & Finance 830 (rev. 9th ed. 1991).

[3] Of course, in an efficient market, this risk has been (or will be) built into the interest rate of the original loan.

under a Chapter 13 plan is a note (*i. e.*, a promise to pay), for instance, the value of that note necessarily includes the risk that the debtor will not make good on that promise. Still, accounting for the risk of nonpayment in that case is not equivalent to reading a risk adjustment requirement into the statute, as in the case of a note, the risk of nonpayment is part of the value of the note itself.

Respondent argues that "Congress crafted the requirements of section 1325(a)(5)(B)(ii) for the protection of *creditors*, not debtors," and thus that the relevant interest rate must account for the true risks and costs associated with a Chapter 13 debtor's promise of future payment. Brief for Respondent 24 (citing *Johnson* v. *Home State Bank*, 501 U. S. 78, 87–88 (1991)). In addition to ignoring the plain language of the statute, which requires no such risk adjustment, respondent overlooks the fact that secured creditors are already compensated in part for the risk of nonpayment through the valuation of the secured claim. In *Associates Commercial Corp.* v. *Rash*, 520 U. S. 953 (1997), we utilized a secured-creditor-friendly replacement-value standard rather than the lower foreclosure-value standard for valuing secured claims when a debtor has exercised Chapter 13's cramdown option. We did so because the statute at issue in that case reflected Congress' recognition that "[i]f a debtor keeps the property and continues to use it, the creditor obtains at once neither the property nor its value and is exposed to double risks: The debtor may again default and the property may deteriorate from extended use." *Id.*, at 962.

Further, the plain language of the statute is by no means specifically debtor protective. As the Court pointed out in *Johnson*, *supra*, at 87–88, § 1325 contains a number of provisions to protect creditors: A bankruptcy court can only authorize a plan that "has been proposed in good faith," § 1325(a)(3); secured creditors must accept the plan, obtain the property securing the claim, or "retain the[ir] lien[s]" and receive under the plan distributions of property which equal

"not less than the allowed amount of such claim," § 1325(a)(5); and a bankruptcy court must ensure that "the debtor will be able to make all payments under the plan and to comply with the plan," § 1325(a)(6). Given the presence of multiple creditor-specific protections, it is by no means irrational to assume that Congress opted not to provide further protection for creditors by requiring a debtor-specific risk adjustment under § 1325(a)(5). Although the dissent may feel that this is insufficient compensation for secured creditors, given the apparent rate at which debtors fail to complete their Chapter 13 plans, see *post,* at 493, and n. 1, this is a matter that should be brought to the attention of Congress rather than resolved by this Court.

II

The allowed amount of the secured claim is $4,000. App. 57. The statute then requires a bankruptcy court to identify the "property to be distributed" under the plan. Petitioners' Amended Chapter 13 Plan (Plan) provided:

> "The future earnings of DEBTOR(S) are submitted to the supervision and control of this Court, and DEBTOR(S) shall pay to the TRUSTEE a sum of $740 . . . per month in weekly installments by voluntary wage assignment by separate ORDER of the Court in an estimated amount of $170.77 and continuing for a total plan term of 36 months unless this Court approves an extension of the term not beyond 60 months from the date of filing the Petition herein." App. to Pet. for Cert. 77a.

From the payments received, the trustee would then make disbursements to petitioners' creditors, pro rata among each class of creditors. The Plan listed one priority claim and four secured claims. For respondent's secured claim, petitioners proposed an interest rate of 9.5%. App. 57. Thus, petitioners proposed to distribute to respondent a stream of cash payments equaling respondent's pro rata share of $740 per month for a period of up to 36 months. *Id.*, at 12.

Although the Plan does not specifically state that "the property to be distributed" under the Plan is cash payments, the cash payments are the only "property" specifically listed for distribution under the Plan. Thus, although the plurality and the dissent imply that the "property to be distributed" under the Plan is the mere *promise* to make cash payments, the plain language of the Plan indicates that the "property to be distributed" to respondent is up to 36 monthly cash payments, consisting of a pro rata share of $740 per month.

The final task, then, is to determine whether petitioners' proposed 9.5% interest rate will sufficiently compensate respondent for the fact that instead of receiving $4,000 today, it will receive $4,000 plus 9.5% interest over a period of up to 36 months. Because the 9.5% rate is higher than the risk-free rate, I conclude that it will. I would therefore reverse the judgment of the Court of Appeals.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

My areas of agreement with the plurality are substantial. We agree that, although all confirmed Chapter 13 plans have been deemed feasible by a bankruptcy judge, some nevertheless fail. See *ante*, at 480. We agree that any deferred payments to a secured creditor must fully compensate it for the risk that such a failure will occur. See *ante*, at 474. Finally, we agree that adequate compensation may sometimes require an " 'eye-popping' " interest rate, and that, if the rate is too high for the plan to succeed, the appropriate course is not to reduce it to a more palatable level, but to refuse to confirm the plan. See *ante*, at 480–481.

Our only disagreement is over what procedure will more often produce accurate estimates of the appropriate interest rate. The plurality would use the prime lending rate—a rate we *know* is too low—and require the judge in every case to determine an amount by which to increase it. I believe

that, in practice, this approach will systematically undercompensate secured creditors for the true risks of default. I would instead adopt the contract rate—*i. e.*, the rate at which the creditor actually loaned funds to the debtor—as a presumption that the bankruptcy judge could revise on motion of either party. Since that rate is generally a good indicator of actual risk, disputes should be infrequent, and it will provide a quick and reasonably accurate standard.

I

The contract-rate approach makes two assumptions, both of which are reasonable. First, it assumes that subprime lending markets are competitive and therefore largely efficient. If so, the high interest rates lenders charge reflect not extortionate profits or excessive costs, but the actual risks of default that subprime borrowers present. Lenders with excessive rates would be undercut by their competitors, and inefficient ones would be priced out of the market. We have implicitly assumed market competitiveness in other bankruptcy contexts. See *Bank of America Nat. Trust and Sav. Assn.* v. *203 North LaSalle Street Partnership,* 526 U. S. 434, 456–458 (1999). Here the assumption is borne out by empirical evidence: One study reports that subprime lenders are nearly twice as likely to be unprofitable as banks, suggesting a fiercely competitive environment. See J. Lane, Associate Director, Division of Supervision, Federal Deposit Insurance Corporation, A Regulator's View of Subprime Lending: Address at the National Automotive Finance Association Non-Prime Auto Lending Conference 6 (June 18–19, 2002) (available in Clerk of Court's case file). By relying on the prime rate, the plurality implicitly assumes that the *prime* lending market is efficient, see *ante*, at 478–479; I see no reason not to make a similar assumption about the *sub*prime lending market.

The second assumption is that the expected costs of default in Chapter 13 are normally no less than those at the

time of lending. This assumption is also reasonable. Chapter 13 plans often fail. I agree with petitioners that the relevant statistic is the percentage of *confirmed* plans that fail, but even resolving that issue in their favor, the risk is still substantial. The failure rate they offer—which we may take to be a conservative estimate, as it is doubtless the lowest one they could find—is 37%. See Girth, The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals, 65 Ind. L. J. 17, 40–42 (1989) (reporting a 63.1% success rate).[1] In every one of the failed plans making up that 37%, a bankruptcy judge had found that "the debtor will be able to make all payments under the plan," 11 U. S. C. § 1325(a)(6), and a trustee had supervised the debtor's compliance, § 1302. That so many nonetheless failed proves that bankruptcy judges are not oracles and that trustees cannot draw blood from a stone.

While court and trustee oversight may provide some marginal benefit to the creditor, it seems obviously outweighed by the fact that (1) an already-bankrupt borrower has demonstrated a financial instability and a proclivity to seek legal protection that other subprime borrowers have not, and

[1] The true rate of plan failure is almost certainly much higher. The Girth study that yielded the 37% figure was based on data for a single division (Buffalo, New York) from over 20 years ago (1980–1982). See 65 Ind. L. J., at 41. A later study concluded that "the Buffalo division ha[d] achieved extraordinary results, far from typical for the country as a whole." Whitford, The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy, 68 Am. Bankr. L. J. 397, 411, n. 50 (1994). Although most of respondent's figures are based on studies that do not clearly exclude unconfirmed plans, one study includes enough detail to make the necessary correction: It finds 32% of filings successful, 18% dismissed without confirmation of a plan, and 49% dismissed after confirmation, for a postconfirmation failure rate of 60% (*i. e.*, $49\% \div (32\% + 49\%)$). See Norberg, Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13, 7 Am. Bankr. Inst. L. Rev. 415, 440–441 (1999). This 60% failure rate is far higher than the 37% reported by Girth.

(2) the costs of foreclosure are substantially higher in bankruptcy because the automatic stay bars repossession without judicial permission. See § 362. It does not strike me as plausible that creditors would *prefer* to lend to individuals already in bankruptcy than to those for whom bankruptcy is merely a possibility—as if Chapter 13 were widely viewed by secured creditors as some sort of godsend. Cf. Dunagan, Enforcement of Security Interests in Motor Vehicles in Bankruptcy, 52 Consumer Fin. L. Q. Rep. 191, 197 (1998). Certainly the record in this case contradicts that implausible proposition. See App. 48 (testimony of Craig Cook, sales manager of Instant Auto Finance) ("Q. Are you aware of how other lenders similar to Instant Auto Finance view credit applicants who appear to be candidates for Chapter 13 bankruptcy?" "A. Negative[ly] as well"). The better assumption is that bankrupt debtors are riskier than other subprime debtors—or, at the very least, not systematically *less* risky.

The first of the two assumptions means that the contract rate reasonably reflects actual risk at the time of borrowing. The second means that this risk persists when the debtor files for Chapter 13. It follows that the contract rate is a decent estimate, or at least the lower bound, for the appropriate interest rate in cramdown.[2]

The plurality disputes these two assumptions. It argues that subprime lending markets are not competitive because "vehicles are regularly sold by means of tie-in transactions, in which the price of the vehicle is the subject of negotiation, while the terms of the financing are dictated by the seller."

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[2] The contract rate is only a presumption, however, and either party remains free to prove that a higher or lower rate is appropriate in a particular case. For example, if market interest rates generally have risen or fallen since the contract was executed, the contract rate could be adjusted by the same amount in cases where the difference was substantial enough that a party chose to make an issue of it.

Ante, at 481.[3] Tie-ins do not *alone* make financing markets noncompetitive; they only cause prices and interest rates to be considered *in tandem* rather than separately. The force of the plurality's argument depends entirely on its claim that "the terms of the financing are dictated by the seller." *Ibid.* This unsubstantiated assertion is contrary to common experience. Car sellers routinely advertise their interest rates, offer promotions like "zero-percent financing," and engage in other behavior that plainly assumes customers are sensitive to interest rates and not just price.[4]

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[3] To the extent the plurality argues that subprime lending markets are not "*perfectly* competitive," *ante*, at 481 (emphasis added), I agree. But there is no reason to doubt they are *reasonably* competitive, so that pricing in those markets is *reasonably* efficient.

[4] I confess that this is "nonresponsive" to the argument made in the plurality's footnote (that the contract interest rate may not accurately reflect risk when set jointly with a car's sale price), see *ante*, at 481, n. 20; it is in response to the quite different argument made in the plurality's text (that joint pricing shows that the subprime lending market is not competitive), see *ante*, at 481. As to the *former* issue, the plurality's footnote makes a fair point. When the seller provides financing itself, there is a possibility that the contract interest rate might not reflect actual risk because a higher contract interest rate can be traded off for a lower sale price and vice versa. Nonetheless, this fact is not likely to bias the contract-rate approach in favor of creditors to any significant degree. If a creditor offers a promotional interest rate—such as "zero-percent financing"—in return for a higher sale price, the creditor bears the burden of showing that the true interest rate is higher than the contract rate. The opposite tactic—inflating the interest rate and decreasing the sale price—is constrained at some level by the buyer's option to finance through a third party, thus taking advantage of the lower price while avoiding the higher interest rate. (If a seller were to condition a price discount on providing the financing itself, the debtor should be entitled to rely on that condition to rebut the presumption that the contract rate reflects actual risk.) Finally, the debtor remains free to rebut the contract rate with any other probative evidence. While joint pricing may introduce some inaccuracy, the contract rate is still a far better initial estimate than the prime rate.

The plurality also points to state and federal regulation of lending markets. *Ante*, at 481–482. It claims that state usury laws evince a belief that subprime lending markets are noncompetitive. While that is one *conceivable* explanation for such laws, there are countless others. One statistical and historical study suggests that usury laws are a "primitive means of social insurance" meant to ensure "low interest rates" for those who suffer financial adversity. Glaeser & Scheinkman, Neither a Borrower Nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws, 41 J. Law & Econ. 1, 26 (1998). Such a rationale does not reflect a belief that lending markets are inefficient, any more than rent controls reflect a belief that real estate markets are inefficient. Other historical rationales likewise shed no light on the point at issue here. See *id.*, at 27. The mere existence of usury laws is therefore weak support for any position.

The federal Truth in Lending Act, 15 U. S. C. § 1601 *et seq.*, not only fails to support the plurality's position; it positively refutes it. The plurality claims the Act reflects a belief that full disclosure promotes competition, see *ante*, at 482, and n. 24; the Act itself says as much, see 15 U. S. C. § 1601(a). But that belief obviously *presumes* markets are competitive (or, at least, that they were noncompetitive only because of the absence of the disclosures the Act now requires). If lending markets were not competitive—if the terms of financing were indeed "dictated by the seller," *ante*, at 481—disclosure requirements would be pointless, since consumers would have no use for the information.[5]

As to the second assumption (that the expected costs of default in Chapter 13 are normally no less than those at the

[5] The plurality also argues that regulatory context is relevant because it "distorts the market." *Ante*, at 482. Federal disclosure requirements do not distort the market in any meaningful sense. And while state usury laws do, that distortion works only to the benefit of debtors under the contract-rate approach, since it keeps contract rates artificially low.

time of lending), the plurality responds, not that Chapter 13 *as currently administered* is less risky than subprime lending generally, but that it *would* be less risky, if only bankruptcy courts would confirm fewer risky plans. *Ante*, at 482–483. Of course, it is often quite difficult to predict which plans will fail. See Norberg, Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13, 7 Am. Bankr. Inst. L. Rev. 415, 462 (1999). But even assuming the high failure rate primarily reflects judicial dereliction rather than unavoidable uncertainty, the plurality's argument fails for want of any reason to believe the dereliction will abate. While full compensation can be attained either by low-risk plans and low interest rates, or by high-risk plans and high interest rates, it cannot be attained by *high*-risk plans and *low* interest rates, which, absent cause to anticipate a change in confirmation practices, is precisely what the formula approach would yield.

The plurality also claims that the contract rate overcompensates creditors because it includes "transaction costs and overall profits." *Ante*, at 477. But the same is true of the rate the plurality prescribes: The prime lending rate includes banks' overhead and profits. These are necessary components of *any* commercial lending rate, since creditors will not lend money if they cannot cover their costs and return a level of profit sufficient to prevent their investors from going elsewhere. See *Koopmans* v. *Farm Credit Services of Mid-America, ACA*, 102 F. 3d 874, 876 (CA7 1996). The plurality's criticism might have force if there were reason to believe subprime lenders made exorbitant profits while banks did not—but, again, the data suggest otherwise. See Lane, Regulator's View of Subprime Lending, at 6.[6]

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[6] Some transaction costs are avoided by the creditor in bankruptcy—for example, loan-origination costs such as advertising. But these are likely only a minor component of the interest rate. According to the record in this case, for example, the average interest rate on new-car loans was roughly 8.5%—only about 0.5% higher than the prime rate and 2.5% higher

Finally, the plurality objects that similarly situated creditors might not be treated alike. *Ante*, at 478, and n. 17. But the contract rate is only a presumption. If a judge thinks it necessary to modify the rate to avoid unjustified disparity, he can do so. For example, if two creditors charged different rates solely because they lent to the debtor at different times, the judge could average the rates or use the more recent one. The plurality's argument might be valid against an approach that *irrebuttably* presumes the contract rate, but that is not what I propose.[7]

II

The defects of the formula approach far outweigh those of the contract-rate approach. The formula approach starts with the prime lending rate—a number that, while objective and easily ascertainable, is indisputably too low. It then ad-

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than the risk-free treasury rate. App. 43 (testimony of Professor Steve Russell). And the 2% difference between prime and treasury rates represented "mostly . . . risk [and] to some extent transaction costs." *Id.*, at 42. These figures suggest that loan-origination costs included in the new-car loan and prime rates but not in the treasury rate are likely only a fraction of a percent. There is no reason to think they are substantially higher in the subprime auto lending market. Any transaction costs the creditor avoids in bankruptcy are thus far less than the additional ones he incurs.

[7] The plurality's other, miscellaneous criticisms do not survive scrutiny either. That the cramdown provision applies to prime as well as subprime loans, *ante*, at 483–484, proves nothing. Nor is there any substance to the argument that the formula approach will perform better where "national or local economic conditions drastically improved or declined after the original loan was issued." *Ante*, at 484. To the extent such economic changes are reflected by changes in the prime rate, the contract rate can be adjusted by the same amount. See n. 2, *supra*. And to the extent they are not, they present the same problem under either approach: When a party disputes the presumption, the court must gauge the significance of the economic change and adjust accordingly. The difference, again, is that the contract-rate approach starts with a number that (but for the economic change) is reasonably accurate, while the formula approach starts with a number that (with or without the economic change) is not even close.

justs by adding a risk premium that, unlike the prime rate, is neither objective nor easily ascertainable. If the risk premium is typically small relative to the prime rate—as the 1.5% premium added to the 8% prime rate by the court below would lead one to believe—then this subjective element of the computation might be forgiven. But in fact risk premiums, if properly computed, would typically be substantial. For example, if the 21% contract rate is an accurate reflection of risk in this case, the risk premium would be 13%—nearly two-thirds of the total interest rate. When the risk premium is the greater part of the overall rate, the formula approach no longer depends on objective and easily ascertainable numbers. The prime rate becomes the objective tail wagging a dog of unknown size.

As I explain below, the most relevant factors bearing on risk premium are (1) the probability of plan failure; (2) the rate of collateral depreciation; (3) the liquidity of the collateral market; and (4) the administrative expenses of enforcement. Under the formula approach, a risk premium must be computed in every case, so judges will invariably grapple with these imponderables. Under the contract-rate approach, by contrast, the task of assessing all these risk factors is entrusted to the entity most capable of undertaking it: the market. See *Bank of America*, 526 U. S., at 457 ("[T]he best way to determine value is exposure to a market"). All the risk factors are reflected (assuming market efficiency) in the debtor's contract rate—a number readily found in the loan document. If neither party disputes it, the bankruptcy judge's task is at an end. There are straightforward ways a debtor *could* dispute it—for example, by showing that the creditor is now substantially oversecured, or that some other lender is willing to extend credit at a lower rate. But unlike the formula approach, which requires difficult estimation in every case, the contract-rate approach requires it only when the parties choose to contest the issue.

The plurality defends the formula approach on the ground that creditors have better access to the relevant information. *Ante,* at 484–485. But this is not a case where we must choose between one initial estimate that is too low and another that is too high. Rather, the choice is between one that is far too low and another that is generally reasonably accurate (or, if anything, a bit too low). In these circumstances, consciously choosing the less accurate estimate merely because creditors have better information smacks more of policymaking than of faithful adherence to the statutory command that the secured creditor receive property worth "*not less than* the allowed amount" of its claim, 11 U. S. C. § 1325(a)(5)(B)(ii) (emphasis added). Moreover, the plurality's argument assumes it is plausible—and desirable—that the issue will be litigated in most cases. But the costs of conducting a detailed risk analysis and defending it in court are prohibitively high in relation to the amount at stake in most consumer loan cases. Whatever approach we prescribe, the norm should be—and undoubtedly will be—that the issue is not litigated because it is not worth litigating. Given this reality, it is far more important that the initial estimate be accurate than that the burden of proving inaccuracy fall on the better informed party.

There is no better demonstration of the inadequacies of the formula approach than the proceedings in this case. Petitioners' economics expert testified that the 1.5% risk premium was "very reasonable" because Chapter 13 plans are "supposed to be financially feasible" and "the borrowers are under the supervision of the court." App. 43. Nothing in the record shows how these two platitudes were somehow manipulated to arrive at a figure of 1.5%. It bears repeating that feasibility determinations and trustee oversight do not prevent at least 37% of confirmed Chapter 13 plans from failing. On cross-examination, the expert admitted that he had only limited familiarity with the subprime auto lending market and that he was not familiar with the default rates or the

costs of collection in that market. *Id.*, at 44–45. In light of these devastating concessions, it is impossible to view the 1.5% figure as anything other than a smallish number picked out of a hat.

Based on even a rudimentary financial analysis of the facts of this case, the 1.5% figure is obviously wrong—not just off by a couple percent, but probably by roughly an order of magnitude. For a risk premium to be adequate, a hypothetical, rational creditor must be indifferent between accepting (1) the proposed risky stream of payments over time and (2) immediate payment of its present value in a lump sum. Whether he is indifferent—*i. e.*, whether the risk premium added to the prime rate is adequate—can be gauged by comparing benefits and costs: on the one hand, the expected value of the extra interest, and on the other, the expected costs of default.

Respondent was offered a risk premium of 1.5% on top of the prime rate of 8%. If that premium were fully paid as the plan contemplated, it would yield about $60.[8] If the debtor defaulted, all or part of that interest would not be paid, so the expected value is only about $50.[9] The prime rate itself already includes some compensation for risk; as it turns out, about the same amount, yielding another $50.[10]

[8] Given its priority, and in light of the amended plan's reduced debtor contributions, the $4,000 secured claim would be fully repaid by about the end of the second year of the plan. The average balance over that period would be about $2,000, *i. e.*, half the initial balance. The total interest premium would therefore be $1.5\% \times 2 \times \$2{,}000 = \$60$. In this and all following calculations, I do not adjust for time value, as timing effects have no substantial effect on the conclusion.

[9] Assuming a 37% rate of default that results on average in only half the interest's being paid, the expected value is $\$60 \times (1 - 37\% \div 2)$, or about $50.

[10] According to the record in this case, the prime rate at the time of filing was 2% higher than the risk-free treasury rate, and the difference represented "mostly . . . risk [and] to some extent transaction costs." App. 42 (testimony of Professor Steve Russell); see also Federal Reserve Board, Selected Interest Rates, http://www.federalreserve.gov/releases/h15/data.htm (as visited Apr. 19, 2004) (available in Clerk of

Given the 1.5% risk premium, then, the total expected benefit to respondent was about $100. Against this we must weigh the expected costs of default. While precise calculations are impossible, rough estimates convey a sense of their scale.

The first cost of default involves depreciation. If the debtor defaults, the creditor can eventually repossess and sell the collateral, but by then it may be substantially less valuable than the remaining balance due—and the debtor may stop paying long before the creditor receives permission to repossess. When petitioners purchased their truck in this case, its value was almost equal to the principal balance on the loan.[11] By the time the plan was confirmed, however, the truck was worth only $4,000, while the balance on the loan was $4,895. If petitioners were to default on their Chapter 13 payments and if respondent suffered the same relative loss from depreciation, it would amount to about $550.[12]

The second cost of default involves liquidation. The $4,000 to which respondent would be entitled if paid in a lump sum reflects the *replacement* value of the vehicle, *i. e.*, the amount it would cost the debtor to purchase a similar used truck. See *Associates Commercial Corp.* v. *Rash*, 520 U. S. 953, 965 (1997). If the debtor defaults, the creditor cannot sell the truck for that amount; it receives only a lesser

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Court's case file) (historical data showing prime rate typically exceeding 3-month constant-maturity treasury rate by 2%–3.5%). If "mostly" means about three-quarters of 2%, then the risk compensation included in the prime rate is 1.5%. Because this figure happens to be the same as the risk premium over prime, the expected value is similarly $50. See nn. 8–9, *supra.*

[11] The truck was initially worth $6,395; the principal balance on the loan was about $6,426.

[12] On the original loan, depreciation ($6,395 − $4,000, or $2,395) exceeded loan repayment ($6,426 − $4,895, or $1,531) by $864, *i. e.*, 14% of the original truck value of $6,395. Applying the same percentage to the new $4,000 truck value yields approximately $550.

foreclosure value because collateral markets are not perfectly liquid and there is thus a spread between what a buyer will pay and what a seller will demand. The foreclosure value of petitioners' truck is not in the record, but, using the relative liquidity figures in *Rash* as a rough guide, respondent would suffer a further loss of about $450.[13]

The third cost of default consists of the administrative expenses of foreclosure. While a Chapter 13 plan is in effect, the automatic stay prevents secured creditors from repossessing their collateral, even if the debtor fails to pay. See 11 U. S. C. § 362. The creditor's attorney must move the bankruptcy court to lift the stay. § 362(d). In the District where this case arose, the filing fee for such motions is now $150. See United States Bankruptcy Court for the Southern District of Indiana, Schedule of Bankruptcy Fees (Nov. 1, 2003) (available in Clerk of Court's case file). And the standard attorney's fee for such motions, according to one survey, is $350 in Indiana and as high as $875 in other States. See J. Cossitt, Chapter 13 Attorney Fee Survey, American Bankruptcy Institute Annual Spring Meeting (Apr. 10–13, 2003) (available in Clerk of Court's case file). Moreover, bankruptcy judges will often excuse first offenses, so foreclosure may require multiple trips to court. The total expected administrative expenses in the event of default could reasonably be estimated at $600 or more.

I have omitted several other costs of default, but the point is already adequately made. The three figures above total $1,600. Even accepting petitioners' low estimate of the plan failure rate, a creditor choosing the stream of future payments instead of the immediate lump sum would be selecting an alternative with an expected cost of about $590 ($1,600 multiplied by 37%, the chance of failure) and an expected

[13] The truck in *Rash* had a replacement value of $41,000 and a foreclosure value of $31,875, *i. e.,* 22% less. 520 U. S., at 957. If the market in this case had similar liquidity and the truck were repossessed after losing half its remaining value, the loss would be 22% of $2,000, or about $450.

benefit of about $100 (as computed above). No rational creditor would make such a choice. The risk premium over prime necessary to make these costs and benefits equal is in the neighborhood of 16%, for a total interest rate of 24%.[14]

Of course, many of the estimates I have made can be disputed. Perhaps the truck will depreciate more slowly now than at first, perhaps the collateral market is more liquid than the one in *Rash*, perhaps respondent can economize on attorney's fees, and perhaps there is some reason (other than judicial optimism) to think the Tills were unlikely to default. I have made some liberal assumptions,[15] but also some conservative ones.[16] When a risk premium is off by an order of magnitude, one's estimates need not be very precise to show that it cannot possibly be correct.

In sum, the 1.5% premium adopted in this case is far below anything approaching fair compensation. That result is not unusual, see, *e. g.*, *In re Valenti*, 105 F. 3d 55, 64 (CA2 1997) (recommending a 1%–3% premium over the *treasury* rate—*i. e.*, approximately a 0% premium over prime); it is the entirely predictable consequence of a methodology that tells bankruptcy judges to set interest rates based on highly imponderable factors. Given the inherent uncertainty of the enterprise, what heartless bankruptcy judge can be expected to demand that the unfortunate debtor pay *triple* the prime rate as a condition of keeping his sole means of transportation? It challenges human nature.

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[14] A 1.5% risk premium plus a 1.5% risk component in the prime rate yielded an expected benefit of about $100, see *supra*, at 501–502, so, to yield $590, the total risk compensation would have to be 5.9 times as high, *i. e.*, almost 18%, or a 16.5% risk premium over prime.

[15] For example, by ignoring the possibility that the creditor might recover some of its undersecurity as an unsecured claimant, that the plan might fail only after full repayment of secured claims, or that an oversecured creditor might recover some of its expenses under 11 U. S. C. § 506(b).

[16] For example, by assuming a failure rate of 37%, cf. n. 1, *supra*, and by ignoring all costs of default other than the three mentioned.

III

JUSTICE THOMAS rejects both the formula approach and the contract-rate approach. He reads the statutory phrase "property to be distributed under the plan," 11 U. S. C. § 1325(a)(5)(B)(ii), to mean the proposed payments *if made as the plan contemplates*, so that the plan need only pay the risk-free rate of interest. *Ante*, at 487 (opinion concurring in judgment). I would instead read this phrase to mean the right to receive payments that the plan vests in the creditor upon confirmation. Because there is no guarantee that the promised payments will in fact be made, the value of this property right must account for the risk of nonpayment.

Viewed in isolation, the phrase is susceptible of either meaning. Both the promise to make payments and the proposed payments themselves are property rights, the former "to be distributed under the plan" immediately upon confirmation, and the latter over the life of the plan. Context, however, supports my reading. The cramdown option which the debtors employed here is only one of three routes to confirmation. The other two—creditor acceptance and collateral surrender, §§ 1325(a)(5)(A), (C)—are both creditor protective, leaving the secured creditor roughly as well off as he would have been had the debtor not sought bankruptcy protection. Given this, it is unlikely the third option was meant to be substantially *under*protective; that would render it so much more favorable to debtors that few would ever choose one of the alternatives.

The risk-free approach also leads to anomalous results. JUSTICE THOMAS admits that, if a plan distributes a note rather than cash, the value of the "property to be distributed" must reflect the risk of default on the note. *Ante*, at 488–489. But there is no practical difference between obligating the debtor to make deferred payments under a plan and obligating the debtor to sign a note that requires those same payments. There is no conceivable reason why Con-

gress would give secured creditors risk compensation in one case but not the other.

Circuit authority uniformly rejects the risk-free approach. While Circuits addressing the issue are divided over *how* to calculate risk, to my knowledge all of them require some compensation for risk, either explicitly or implicitly. See *In re Valenti*, *supra*, at 64 (treasury rate plus 1%–3% risk premium); *GMAC* v. *Jones*, 999 F. 2d 63, 71 (CA3 1993) (contract rate); *United Carolina Bank* v. *Hall*, 993 F. 2d 1126, 1131 (CA4 1993) (creditor's rate for similar loans, but not higher than contract rate); *In re Smithwick*, 121 F. 3d 211, 214 (CA5 1997) (contract rate); *In re Kidd*, 315 F. 3d 671, 678 (CA6 2003) (market rate for similar loans); *In re Till*, 301 F. 3d 583, 592–593 (CA7 2002) (case below) (contract rate); *In re Fisher*, 930 F. 2d 1361, 1364 (CA8 1991) (market rate for similar loans) (interpreting parallel Chapter 12 provision); *In re Fowler*, 903 F. 2d 694, 698 (CA9 1990) (prime rate plus risk premium); *In re Hardzog*, 901 F. 2d 858, 860 (CA10 1990) (market rate for similar loans, but not higher than contract rate) (Chapter 12); *In re Southern States Motor Inns, Inc.*, 709 F. 2d 647, 652–653 (CA11 1983) (market rate for similar loans) (interpreting similar Chapter 11 provision); see also 8 Collier on Bankruptcy ¶ 1325.06[3][b], p. 1325–37 (rev. 15th ed. 2004). JUSTICE THOMAS identifies no decision adopting his view.

Nor does our decision in *Rash*, 520 U. S. 953, support the risk-free approach. There we considered whether a secured creditor's claim should be valued at what the debtor would pay to replace the collateral or at the lower price the creditor would receive from a foreclosure sale. JUSTICE THOMAS contends that *Rash* selected the former in order to compensate creditors for the risk of plan failure, and that, having compensated them once in that context, we need not do so again here. *Ante*, at 489. I disagree with this reading of *Rash*. The Bankruptcy Code provides that "value shall be determined in light of the purpose of the valuation and of the

proposed disposition or use of [the] property." 11 U. S. C. § 506(a). *Rash* held that the foreclosure-value approach failed to give effect to this language, because it assigned the same value whether the debtor surrendered the collateral or was allowed to retain it in exchange for promised payments. 520 U. S., at 962. "From the creditor's perspective as well as the debtor's, surrender and retention are not equivalent acts." *Ibid.* We did point out that retention entails risks for the creditor that surrender does not. *Id.*, at 962–963. But we made no effort to correlate that increased risk with the difference between replacement and foreclosure value. And we also pointed out that retention benefits the debtor by allowing him to continue to use the property—a factor we considered "[o]f prime significance." *Id.*, at 963. *Rash* stands for the proposition that surrender and retention are fundamentally different sorts of "disposition or use," calling for different valuations. Nothing in the opinion suggests that we thought the valuation difference reflected the degree of increased risk, or that we adopted the replacement-value standard *in order to compensate* for increased risk. To the contrary, we said that the debtor's "actual use . . . is the proper guide under a prescription hinged to the property's 'disposition or use.'" *Ibid.*

If Congress wanted to compensate secured creditors for the risk of plan failure, it would not have done so by prescribing a particular method of valuing collateral. A plan may pose little risk even though the difference between foreclosure and replacement values is substantial, or great risk even though the valuation difference is small. For example, if a plan proposes immediate cash payment to the secured creditor, he is entitled to the higher replacement value under *Rash* even though he faces no risk at all. If the plan calls for deferred payments but the collateral consists of listed securities, the valuation difference may be trivial, but the creditor still faces substantial risks. And a creditor oversecured in even the slightest degree at the time of bank-

ruptcy derives no benefit at all from *Rash*, but still faces some risk of collateral depreciation.[17]

There are very good reasons for Congress to prescribe full risk compensation for creditors. Every action in the free market has a reaction somewhere. If subprime lenders are systematically undercompensated in bankruptcy, they will charge higher rates or, if they already charge the legal maximum under state law, lend to fewer of the riskiest borrowers. As a result, some marginal but deserving borrowers will be denied vehicle loans in the first place. Congress evidently concluded that widespread access to credit is worth preserving, even if it means being ungenerous to sympathetic debtors.

* * *

Today's judgment is unlikely to burnish the Court's reputation for reasoned decisionmaking. Eight Justices are in agreement that the rate of interest set forth in the debtor's approved plan must include a premium for risk. Of those eight, four are of the view that beginning with the contract rate would most accurately reflect the actual risk, and four are of the view that beginning with the prime lending rate would do so. The ninth Justice takes no position on the latter point, since he disagrees with the eight on the former point; he would reverse because the rate proposed here, being above the risk-free rate, gave respondent no cause for complaint. Because I read the statute to require full risk compensation, and because I would adopt a valuation method that has a realistic prospect of enforcing that directive, I respectfully dissent.

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[17] It is true that, if the debtor defaults, one of the costs the creditor suffers is the cost of liquidating the collateral. See *supra*, at 502–503. But it is illogical to "compensate" for this risk by requiring all plans to pay the full cost of liquidation (replacement value minus foreclosure value), rather than an amount that reflects the possibility that liquidation will actually be necessary and that full payments will not be made.

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TENNESSEE *v.* LANE ET AL.

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

No. 02–1667. Argued January 13, 2004—Decided May 17, 2004

Respondent paraplegics filed this action for damages and equitable relief, alleging that Tennessee and a number of its counties had denied them physical access to that State's courts in violation of Title II of the Americans with Disabilities Act of 1990 (ADA), which provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity," 42 U. S. C. § 12132. After the District Court denied the State's motion to dismiss on Eleventh Amendment immunity grounds, the Sixth Circuit held the appeal in abeyance pending *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356. This Court later ruled in *Garrett* that the Eleventh Amendment bars private money damages actions for state violations of ADA Title I, which prohibits employment discrimination against the disabled. The en banc Sixth Circuit then issued its *Popovich* decision, in which it interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those relying on due process, and therefore permitted a Title II damages action to proceed despite the State's immunity claim. Thereafter, a Sixth Circuit panel affirmed the dismissal denial in this case, explaining that respondents' claims were not barred because they were based on due process principles. In response to a rehearing petition arguing that *Popovich* did not control because respondents' complaint did not allege due process violations, the panel filed an amended opinion, explaining that due process protects the right of access to the courts, and that the evidence before Congress when it enacted Title II established, *inter alia*, that physical barriers in courthouses and courtrooms have had the effect of denying disabled people the opportunity for such access.

Held: As it applies to the class of cases implicating the fundamental right of access to the courts, Title II constitutes a valid exercise of Congress' authority under § 5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees. Pp. 516–534.

(a) Determining whether Congress has constitutionally abrogated a State's Eleventh Amendment immunity requires resolution of two predicate questions: (1) whether Congress unequivocally expressed its intent to abrogate; and (2), if so, whether it acted pursuant to a valid grant of

constitutional authority. *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 73. The first question is easily answered here, since the ADA specifically provides for abrogation. See § 12202. With regard to the second question, Congress can abrogate state sovereign immunity pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. *E. g.*, *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456. That power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *City of Boerne* v. *Flores*, 521 U. S. 507, 519. In *Boerne*, the Court set forth the test for distinguishing between permissible remedial legislation and unconstitutional substantive redefinition: Section 5 legislation is valid if it exhibits "a congruence and proportionality" between an injury and the means adopted to prevent or remedy it. *Id.*, at 520. Applying the *Boerne* test in *Garrett*, the Court concluded that ADA Title I was not a valid exercise of Congress' § 5 power because the historical record and the statute's broad sweep suggested that Title I's true aim was not so much enforcement, but an attempt to "rewrite" this Court's Fourteenth Amendment jurisprudence. 531 U. S., at 372–374. In view of significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' § 5 power, *id.*, at 360, n. 1. Pp. 517–522.

(b) Title II is a valid exercise of Congress' § 5 enforcement power. Pp. 522–534.

(1) The *Boerne* inquiry's first step requires identification of the constitutional rights Congress sought to enforce when it enacted Title II. *Garrett*, 531 U. S., at 365. Like Title I, Title II seeks to enforce the Fourteenth Amendment's prohibition on irrational disability discrimination. *Id.*, at 366. But it also seeks to enforce a variety of other basic constitutional guarantees, including some, like the right of access to the courts here at issue, infringements of which are subject to heightened judicial scrutiny. See, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330, 336–337. Whether Title II validly enforces such constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *E. g.*, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308. Congress enacted Title II against a backdrop of pervasive unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights. The historical experience that Title II reflects is also documented in the decisions of this and other courts, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of public programs and services. With respect to the particular services at issue, Congress learned that many individuals, in many States, were being excluded from courthouses and court proceedings by reason of their dis-

abilities. A Civil Rights Commission report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by such persons. Congress also heard testimony from those persons describing the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of their exclusion from state judicial services and programs, including failure to make courtrooms accessible to witnesses with physical disabilities. The sheer volume of such evidence far exceeds the record in last Term's *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 728–733, in which the Court approved the family-care leave provision of the Family and Medical Leave Act of 1993 as valid § 5 legislation. Congress' finding in the ADA that "discrimination against individuals with disabilities persists in such critical areas as . . . access to public services," § 12101(a)(3), together with the extensive record of disability discrimination that underlies it, makes clear that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation. Pp. 522–529.

(2) Title II is an appropriate response to this history and pattern of unequal treatment. Unquestionably, it is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services. Congress' chosen remedy for the pattern of exclusion and discrimination at issue, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The long history of unequal treatment of disabled persons in the administration of judicial services has persisted despite several state and federal legislative efforts to remedy the problem. Faced with considerable evidence of the shortcomings of these previous efforts, Congress was justified in concluding that the difficult and intractable problem of disability discrimination warranted added prophylactic measures. *Hibbs*, 538 U. S., at 737. The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. § 12132. But Title II does not require States to employ any and all means to make judicial services accessible or to compromise essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* Title II's implementing regulations make clear that the reasonable modification requirement can be satisfied in various ways, including less costly measures than structural changes. This duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State

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must afford to all individuals a meaningful opportunity to be heard in its courts. *Boddie* v. *Connecticut*, 401 U. S. 371, 379. A number of affirmative obligations flow from this principle. Cases such as *Boddie*, *Griffin* v. *Illinois*, 351 U. S. 12, and *Gideon* v. *Wainwright*, 372 U. S. 335, make clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate is a reasonable prophylactic measure, reasonably targeted to a legitimate end. Pp. 530–534.

315 F. 3d 680, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 534. GINSBURG, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 535. REHNQUIST, C. J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 538. SCALIA, J., *post*, p. 554, and THOMAS, J., *post*, p. 565, filed dissenting opinions.

Michael E. Moore, Solicitor General of Tennessee, argued the cause for petitioner. With him on the briefs were *Paul G. Summers*, Attorney General, *S. Elizabeth Martin*, and *Mary Martelle Collier*.

William J. Brown argued the cause for the private respondents. With him on the brief were *Samuel R. Bagenstos* and *Thomas C. Goldstein*.

Deputy Solicitor General Clement argued the cause for the United States urging affirmance. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Acosta*, *Patricia A. Millett*, *Jessica Dunsay Silver*, *Sarah E. Harrington*, and *Kevin Russell*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Alabama et al. by *William H. Pryor, Jr.*, Attorney General of Alabama, *Nathan A. Forrester*, Solicitor General, *Gene C. Schaerr*, and *Richard H. Sinkfield III*, and by the Attorneys General for their respective States as follows: *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Patrick J. Crank* of Wyoming, and *Mark L. Shurtleff* of Utah.

Briefs of *amici curiae* urging affirmance were filed for the State of Kansas et al. by *Phill Kline*, Attorney General of Kansas, *David W. Davies*, Deputy Attorney General, and *Ralph James DeZago* and *Harry Kennedy*, Assistant Attorneys General, and by *M. Jane Brady*, Attorney Gen-

JUSTICE STEVENS delivered the opinion of the Court.

Title II of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 337, 42 U. S. C. §§ 12131–12165, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity." § 12132. The question presented in this case is whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment.

I

In August 1998, respondents George Lane and Beverly Jones filed this action against the State of Tennessee and a number of Tennessee counties, alleging past and ongoing violations of Title II. Respondents, both of whom are paraplegics who use wheelchairs for mobility, claimed that they were denied access to, and the services of, the state court system by reason of their disabilities. Lane alleged that he was compelled to appear to answer a set of criminal charges on the second floor of a county courthouse that had no eleva-

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eral of Delaware; for the State of Minnesota et al. by *Mike Hatch*, Attorney General of Minnesota, and *Gary R. Cunningham* and *Kristyn Anderson*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Richard Blumenthal* of Connecticut, *Lisa Madigan* of Illinois, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, and *Peggy A. Lautenschlager* of Wisconsin; for the American Bar Association by *Dennis W. Archer* and *Paul R. Q. Wolfson;* for the Blanche Fischer Foundation by *Sherril Nell Babcock;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Charles Lester, Jr.*, *Deborah M. Danzig*, *Barbara R. Arnwine*, *Thomas J. Henderson*, *Michael L. Foreman*, *Kristin M. Dadey*, *Vincent A. Eng*, *Dennis C. Hayes*, *Elliot Mincberg*, and *Michael Lieberman;* for Paralyzed Veterans of America et al. by *Timothy K. Armstrong*, *Elizabeth B. McCallum*, *Ira A. Burnim*, and *Jennifer Mathis;* and for the Honorable Dick Thornburgh et al. by *Arlene B. Mayerson*, *Claudia Center*, and *Elizabeth Kristen.*

tor. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. When Lane returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom; he consequently was arrested and jailed for failure to appear. Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process. Respondents sought damages and equitable relief.

The State moved to dismiss the suit on the ground that it was barred by the Eleventh Amendment. The District Court denied the motion without opinion, and the State appealed.[1] The United States intervened to defend Title II's abrogation of the States' Eleventh Amendment immunity. On April 28, 2000, after the appeal had been briefed and argued, the Court of Appeals for the Sixth Circuit entered an order holding the case in abeyance pending our decision in *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356 (2001).

In *Garrett*, we concluded that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA. We left open, however, the question whether the Eleventh Amendment permits suits for money damages under Title II. *Id.*, at 360, n. 1. Following the *Garrett* decision, the Court of Appeals, sitting en banc, heard argument in a Title II suit brought by a hearing-impaired litigant who sought money damages for the State's failure to accommodate his disability in a child custody proceeding. *Popovich* v. *Cuyahoga County Court*, 276 F. 3d 808 (CA6 2002). A divided court permitted the suit to proceed

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[1] In *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139 (1993), we held that "States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." *Id.*, at 147.

despite the State's assertion of Eleventh Amendment immunity. The majority interpreted *Garrett* to bar private ADA suits against States based on equal protection principles, but not those that rely on due process principles. 276 F. 3d, at 811–816. The minority concluded that Congress had not validly abrogated the States' Eleventh Amendment immunity for any Title II claims, *id.*, at 821, while the concurring opinion concluded that Title II validly abrogated state sovereign immunity with respect to both equal protection and due process claims, *id.*, at 818.

Following the en banc decision in *Popovich*, a panel of the Court of Appeals entered an order affirming the District Court's denial of the State's motion to dismiss in this case. Judgt. order reported at 40 Fed. Appx. 911 (CA6 2002). The order explained that respondents' claims were not barred because they were based on due process principles. In response to a petition for rehearing arguing that *Popovich* was not controlling because the complaint did not allege due process violations, the panel filed an amended opinion. It explained that the Due Process Clause protects the right of access to the courts, and that the evidence before Congress when it enacted Title II "established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause." 315 F. 3d 680, 682 (2003). Moreover, that "record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities may result directly from unconstitutional animus and impermissible stereotypes." *Id.*, at 683. The panel did not, however, categorically reject the State's submission. It instead noted that the case presented difficult questions that "cannot be clarified absent a factual record," and remanded for further proceedings. *Ibid.* We granted certiorari, 539 U. S. 941 (2003), and now affirm.

II

The ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities. In the years immediately preceding the ADA's enactment, Congress held 13 hearings and created a special task force that gathered evidence from every State in the Union. The conclusions Congress drew from this evidence are set forth in the task force and Committee Reports, described in lengthy legislative hearings, and summarized in the preamble to the statute.[2] Central among these conclusions was Congress' finding that

> "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U. S. C. § 12101(a)(7).

Invoking "the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce," the ADA is designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." §§ 12101(b)(1), (b)(4). It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public

[2] See 42 U. S. C. § 12101; Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment 16 (Oct. 12, 1990); S. Rep. No. 101–116 (1989); H. R. Rep. No. 101–485 (1990); H. R. Conf. Rep. No. 101–558 (1990); H. R. Conf. Rep. No. 101–596 (1990); cf. *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 389–390 (2001) (App. A to opinion of BREYER, J., dissenting) (listing congressional hearings).

services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.

Title II, §§ 12131–12134, prohibits any public entity from discriminating against "qualified" persons with disabilities in the provision or operation of public services, programs, or activities. The Act defines the term "public entity" to include state and local governments, as well as their agencies and instrumentalities. § 12131(1). Persons with disabilities are "qualified" if they, "with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2). Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, as added, 29 U. S. C. § 794a, which authorizes private citizens to bring suits for money damages. 42 U. S. C. § 12133.

III

The Eleventh Amendment renders the States immune from "any suit in law or equity, commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State." Even though the Amendment "by its terms . . . applies only to suits against a State by citizens of another State," our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State's own citizens. *Garrett*, 531 U. S., at 363; *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 72–73 (2000). Our cases have also held that Congress may abrogate the State's Eleventh Amendment immunity. To determine whether it has done so in any given case, we "must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Id.*, at 73.

The first question is easily answered in this case. The Act specifically provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U. S. C. § 12202. As in *Garrett*, see 531 U. S., at 363–364, no party disputes the adequacy of that expression of Congress' intent to abrogate the States' Eleventh Amendment immunity. The question, then, is whether Congress had the power to give effect to its intent.

In *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), we held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. *Id.*, at 456. This enforcement power, as we have often acknowledged, is a "broad power indeed." *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 732 (1982), citing *Ex parte Virginia*, 100 U. S. 339, 346 (1880).[3] It includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U. S., at 81. We have thus repeatedly affirmed that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 727–728 (2003). See also *City of Boerne* v. *Flores*,

[3] In *Ex parte Virginia*, we described the breadth of Congress' § 5 power as follows:

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." 100 U. S., at 345–346. See also *City of Boerne* v. *Flores*, 521 U. S. 507, 517–518 (1997).

521 U. S. 507, 518 (1997).[4] The most recent affirmation of the breadth of Congress' § 5 power came in *Hibbs*, in which we considered whether a male state employee could recover money damages against the State for its failure to comply with the family-care leave provision of the Family and Medical Leave Act of 1993 (FMLA), 107 Stat. 6, 29 U. S. C. § 2601 *et seq.* We upheld the FMLA as a valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional under the rule of *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256

[4] In *Boerne*, we observed:

"Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 455 (1976). For example, the Court upheld a suspension of literacy tests and similar voting requirements under Congress' parallel power to enforce the provisions of the Fifteenth Amendment, see U. S. Const., Amdt. 15, § 2, as a measure to combat racial discrimination in voting, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966), despite the facial constitutionality of the tests under *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45 (1959). We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States. *South Carolina* v. *Katzenbach*, *supra* (upholding several provisions of the Voting Rights Act of 1965); *Katzenbach* v. *Morgan*, [384 U. S. 641 (1966)] (upholding ban on literacy tests that prohibited certain people schooled in Puerto Rico from voting); *Oregon* v. *Mitchell*, 400 U. S. 112 (1970) (upholding 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote); *City of Rome* v. *United States*, 446 U. S. 156, 161 (1980) (upholding 7-year extension of the Voting Rights Act's requirement that certain jurisdictions preclear any change to a '"standard, practice, or procedure with respect to voting"'); see also *James Everard's Breweries* v. *Day*, 265 U. S. 545 (1924) (upholding ban on medical prescription of intoxicating malt liquors as appropriate to enforce Eighteenth Amendment ban on manufacture, sale, or transportation of intoxicating liquors for beverage purposes)." *Id.*, at 518.

(1979). When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.

Congress' § 5 power is not, however, unlimited. While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a "substantive change in the governing law." *Boerne*, 521 U. S., at 519. In *Boerne*, we recognized that the line between remedial legislation and substantive redefinition is "not easy to discern," and that "Congress must have wide latitude in determining where it lies." *Id.*, at 519–520. But we also confirmed that "the distinction exists and must be observed," and set forth a test for so observing it: Section 5 legislation is valid if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520.

In *Boerne*, we held that Congress had exceeded its § 5 authority when it enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.* We began by noting that Congress enacted RFRA "in direct response" to our decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), for the stated purpose of "restor[ing]" a constitutional rule that *Smith* had rejected. 521 U. S., at 512, 515 (internal quotation marks omitted). Though the respondent attempted to defend the statute as a reasonable means of enforcing the Free Exercise Clause as interpreted in *Smith*, we concluded that RFRA was "so out of proportion" to that objective that it could be understood only as an attempt to work a "substantive change in constitutional protections." 521 U. S., at 529, 532. Indeed, that was the very purpose of the law.

This Court further defined the contours of *Boerne*'s "congruence and proportionality" test in *Florida Prepaid Post-*

secondary Ed. Expense Bd. v. *College Savings Bank*, 527 U. S. 627 (1999). At issue in that case was the validity of the Patent and Plant Variety Protection Remedy Clarification Act (hereinafter Patent Remedy Act), a statutory amendment Congress enacted in the wake of our decision in *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234 (1985), to clarify its intent to abrogate state sovereign immunity from patent infringement suits. *Florida Prepaid*, 527 U. S., at 631–632. Noting the virtually complete absence of a history of unconstitutional patent infringement on the part of the States, as well as the Act's expansive coverage, the Court concluded that the Patent Remedy Act's apparent aim was to serve the Article I concerns of "provid[ing] a uniform remedy for patent infringement and . . . plac[ing] States on the same footing as private parties under that regime," and not to enforce the guarantees of the Fourteenth Amendment. *Id.*, at 647–648. See also *Kimel*, 528 U. S. 62 (finding that the Age Discrimination in Employment Act exceeded Congress' § 5 powers under *Boerne*); *United States* v. *Morrison*, 529 U. S. 598 (2000) (Violence Against Women Act).

Applying the *Boerne* test in *Garrett*, we concluded that Title I of the ADA was not a valid exercise of Congress' § 5 power to enforce the Fourteenth Amendment's prohibition on unconstitutional disability discrimination in public employment. As in *Florida Prepaid*, we concluded Congress' exercise of its prophylactic § 5 power was unsupported by a relevant history and pattern of constitutional violations. 531 U. S., at 368, 374. Although the dissent pointed out that Congress had before it a great deal of evidence of discrimination by the States against persons with disabilities, *id.*, at 379 (opinion of BREYER, J.), the Court's opinion noted that the "overwhelming majority" of that evidence related to "the provision of public services and public accommodations, which areas are addressed in Titles II and III," rather than Title I, *id.*, at 371, n. 7. We also noted that neither the ADA's legislative findings nor its legislative history reflected a concern that the States had been engaging in a pattern of

unconstitutional employment discrimination. We emphasized that the House and Senate Committee Reports on the ADA focused on "'[d]iscrimination [in] . . . *employment in the private sector*,'" and made no mention of discrimination in public employment. *Id.*, at 371–372 (quoting S. Rep. No. 101–116, p. 6 (1989), and H. R. Rep. No. 101–485, pt. 2, p. 28 (1990)) (emphasis in *Garrett*). Finally, we concluded that Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment. Taken together, the historical record and the broad sweep of the statute suggested that Title I's true aim was not so much to enforce the Fourteenth Amendment's prohibitions against disability discrimination in public employment as it was to "rewrite" this Court's Fourteenth Amendment jurisprudence. 531 U. S., at 372–374.

In view of the significant differences between Titles I and II, however, *Garrett* left open the question whether Title II is a valid exercise of Congress' § 5 enforcement power. It is to that question that we now turn.

IV

The first step of the *Boerne* inquiry requires us to identify the constitutional right or rights that Congress sought to enforce when it enacted Title II. *Garrett*, 531 U. S., at 365. In *Garrett* we identified Title I's purpose as enforcement of the Fourteenth Amendment's command that "all persons similarly situated should be treated alike." *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 439 (1985). As we observed, classifications based on disability violate that constitutional command if they lack a rational relationship to a legitimate governmental purpose. *Garrett*, 531 U. S., at 366 (citing *Cleburne*, 473 U. S., at 446).

Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial

review. See, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330, 336–337 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). These rights include some, like the right of access to the courts at issue in this case, that are protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U. S. 806, 819, n. 15 (1975). The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971); *M. L. B.* v. *S. L. J.*, 519 U. S. 102 (1996). We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Taylor* v. *Louisiana*, 419 U. S. 522, 530 (1975). And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment. *Press-Enterprise Co.* v. *Superior Court of Cal., County of Riverside*, 478 U. S. 1, 8–15 (1986).

Whether Title II validly enforces these constitutional rights is a question that "must be judged with reference to the historical experience which it reflects." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966). See also *Florida Prepaid*, 527 U. S., at 639–640; *Boerne*, 521 U. S., at 530. While § 5 authorizes Congress to enact reasonably prophylactic remedial legislation, the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent.

"Difficult and intractable problems often require powerful remedies," *Kimel*, 528 U. S., at 88, but it is also true that "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one," *Boerne*, 521 U. S., at 530.

It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, "[a]s of 1979, most States . . . categorically disqualified 'idiots' from voting, without regard to individual capacity."[5] The majority of these laws remain on the books,[6] and have been the subject of legal challenge as recently as 2001.[7] Similarly, a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying[8] and serving as jurors.[9] The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled

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[5] *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 464, and n. 14 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (citing Note, Mental Disability and the Right to Vote, 88 Yale L. J. 1644 (1979)).

[6] See Schriner, Ochs, & Shields, Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments, 21 Berkeley J. Emp. & Lab. L. 437, 456–472, tbl. II (2000) (listing state laws concerning the voting rights of persons with mental disabilities).

[7] See *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (Me. 2001).

[8] *E. g.*, D. C. Code § 46–403 (West 2001) (declaring illegal and void the marriage of "an idiot or of a person adjudged to be a lunatic"); Ky. Rev. Stat. Ann. § 402.990(2) (West 1992 Cumulative Service) (criminalizing the marriage of persons with mental disabilities); Tenn. Code Ann. § 36–3–109 (1996) (forbidding the issuance of a marriage license to "imbecile[s]").

[9] *E. g.*, Mich. Comp. Laws Ann. § 729.204 (West 2002) (persons selected for inclusion on jury list may not be "infirm or decrepit"); Tenn. Code Ann. § 22–2–304(c) (1994) (authorizing judges to excuse "mentally and physically disabled" persons from jury service).

persons by state agencies in a variety of settings, including unjustified commitment, *e. g.*, *Jackson* v. *Indiana*, 406 U. S. 715 (1972); the abuse and neglect of persons committed to state mental health hospitals, *Youngberg* v. *Romeo*, 457 U. S. 307 (1982);[10] and irrational discrimination in zoning decisions, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985). The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system,[11] public education,[12] and voting.[13] Notably, these decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice.[14]

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[10] The undisputed findings of fact in *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), provide another example of such mistreatment. See *id.*, at 7 ("Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded").

[11] *E. g.*, *LaFaut* v. *Smith*, 834 F. 2d 389, 394 (CA4 1987) (paraplegic inmate unable to access toilet facilities); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014 (Kan. 1999) (double amputee forced to crawl around the floor of jail). See also, *e. g.*, *Key* v. *Grayson*, 179 F. 3d 996 (CA6 1999) (deaf inmate denied access to sex offender therapy program allegedly required as precondition for parole).

[12] *E. g.*, *New York State Assn. for Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 487, 504 (EDNY 1979) (segregation of mentally retarded students with hepatitis B); *Mills* v. *Board of Ed. of District of Columbia*, 348 F. Supp. 866 (DC 1972) (exclusion of mentally retarded students from public school system). See also, *e. g.*, *Robertson* v. *Granite City Community Unit School Dist. No. 9*, 684 F. Supp. 1002 (SD Ill. 1988) (elementary-school student with AIDS excluded from attending regular education classes or participating in extracurricular activities); *Thomas* v. *Atascadero Unified School Dist.*, 662 F. Supp. 376 (CD Cal. 1986) (kindergarten student with AIDS excluded from class).

[13] *E. g.*, *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (Me. 2001) (disenfranchisement of persons under guardianship by reason of mental illness). See also, *e. g.*, *New York ex rel. Spitzer* v. *County of Delaware*, 82 F. Supp. 2d 12 (NDNY 2000) (mobility-impaired voters unable to access county polling places).

[14] *E. g.*, *Ferrell* v. *Estelle*, 568 F. 2d 1128, 1132–1133 (CA5) (deaf criminal defendant denied interpretive services), opinion withdrawn as moot, 573 F. 2d 867 (1978); *State* v. *Schaim*, 65 Ohio St. 3d 51, 64, 600 N. E. 2d 661,

This pattern of disability discrimination persisted despite several federal and state legislative efforts to address it. In the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 101–116, at 18. See also H. R. Rep. No. 101–485, pt. 2, at 47.[15] It also uncovered further evidence of those shortcomings, in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions. See *Garrett*, 531 U. S., at 379 (BREYER, J., dissenting). See also *id.*, at 391 (App. C to opinion of BREYER, J., dissenting). As the Court's opinion in *Garrett* observed, the "overwhelming majority" of these examples concerned discrimination in the administration of public programs and services. *Id.*, at 371, n. 7; Government's Lodging in *Garrett*, O. T. 2000, No. 99–1240 (available in Clerk of Court's case file).

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672 (1992) (same); *People* v. *Rivera*, 125 Misc. 2d 516, 528, 480 N. Y. S. 2d 426, 434 (Sup. Ct. 1984) (same). See also, *e. g.*, *Layton* v. *Elder*, 143 F. 3d 469, 470–472 (CA8 1998) (mobility-impaired litigant excluded from a county quorum court session held on the second floor of an inaccessible courthouse); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 533–534 (WD Ark. 1998) (wheelchair-bound litigant had to be carried to the second floor of an inaccessible courthouse, from which he was unable to leave to use restroom facilities or obtain a meal, and no arrangements were made to carry him downstairs at the end of the day); *Pomerantz* v. *County of Los Angeles*, 674 F. 2d 1288, 1289 (CA9 1982) (blind persons categorically excluded from jury service); *Galloway* v. *Superior Court of District of Columbia*, 816 F. Supp. 12 (DC 1993) (same); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 405 (WD Pa. 1989) (deaf individual excluded from jury service); *People* v. *Green*, 148 Misc. 2d 666, 669, 561 N. Y. S. 2d 130, 133 (Cty. Ct. 1990) (prosecutor exercised peremptory strike against prospective juror solely because she was hearing impaired).

[15] For a comprehensive discussion of the shortcomings of state disability discrimination statutes, see Colker & Milani, The Post-*Garrett* World: Insufficient State Protection against Disability Discrimination, 53 Ala. L. Rev. 1075 (2002).

With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings. U. S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 39 (1983). Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. Oversight Hearing on H. R. 4498 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40–41, 48 (1988). And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities. Government's Lodging in *Garrett*, O. T. 2000, No. 99–1240. See also Task Force on the Rights and Empowerment of Americans with Disabilities, From ADA to Empowerment (Oct. 12, 1990).[16]

[16] THE CHIEF JUSTICE dismisses as "irrelevant" the portions of this evidence that concern the conduct of nonstate governments. *Post*, at 542–543 (dissenting opinion). This argument rests on the mistaken premise that a valid exercise of Congress' §5 power must always be predicated solely on evidence of constitutional violations by the States themselves. To operate on that premise in this case would be particularly inappropriate because this case concerns the provision of judicial services, an area in which local governments are typically treated as "arm[s] of the State" for Eleventh Amendment purposes, *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429

Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercise of its prophylactic power is puzzling, to say the least. Just last Term in *Hibbs*, we approved the family-care leave provision of the FMLA as valid § 5 legislation based primarily on evidence of disparate provision of parenting leave, little of which concerned unconstitutional state conduct. 538 U. S., at 728–733.[17] We explained that

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U. S. 274, 280 (1977), and thus enjoy precisely the same immunity from unconsented suit as the States. See, *e. g.*, *Callahan* v. *Philadelphia*, 207 F. 3d 668, 670–674 (CA3 2000) (municipal court is an "arm of the State" entitled to Eleventh Amendment immunity); *Kelly* v. *Municipal Courts*, 97 F. 3d 902, 907–908 (CA7 1996) (same); *Franceschi* v. *Schwartz*, 57 F. 3d 828, 831 (CA9 1995) (same). Cf. *Garrett*, 531 U. S., at 368–369.

In any event, our cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry. To be sure, evidence of constitutional violations by the States themselves is particularly important when, as in *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627 (1999), *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62 (2000), and *Garrett*, the sole purpose of reliance on § 5 is to place the States on equal footing with private actors with respect to their amenability to suit. But much of the evidence in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 312–315 (1966), to which THE CHIEF JUSTICE favorably refers, *post*, at 548, involved the conduct of county and city officials, rather than the States. Moreover, what THE CHIEF JUSTICE calls an "extensive legislative record documenting States' gender discrimination in employment leave policies" in *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721 (2003), *post*, at 548, in fact contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States. Indeed, the evidence before the Congress that enacted the FMLA related primarily to the practices of private-sector employers and the Federal Government. See *Hibbs*, 538 U. S., at 730–735. See also *id.*, at 745–750 (KENNEDY, J., dissenting).

[17] Specifically, we relied on (1) a Senate Report citation to a Bureau of Labor Statistics survey revealing disparities in private-sector provision of parenting leave to men and women; (2) submissions from two sources at a hearing on the Parental and Medical Leave Act of 1986, a predecessor bill

because the FMLA was targeted at sex-based classifications, which are subject to a heightened standard of judicial scrutiny, "it was easier for Congress to show a pattern of state constitutional violations" than in *Garrett* or *Kimel*, both of which concerned legislation that targeted classifications subject to rational-basis review. 538 U. S., at 735–737. Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications. And in any event, the record of constitutional violations in this case—including judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services—far exceeds the record in *Hibbs*.

The conclusion that Congress drew from this body of evidence is set forth in the text of the ADA itself: "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and *access to public services*." 42 U. S. C. § 12101(a)(3) (emphasis added). This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.

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to the FMLA, that public-sector parental leave polices "'diffe[r] little'" from private-sector policies; (3) evidence that 15 States provided women up to one year of extended maternity leave, while only 4 States provided for similarly extended paternity leave; and (4) a House Report's quotation of a study that found that failure to implement uniform standards for parenting leave would "'leav[e] Federal employees open to discretionary and possibly unequal treatment,'" H. R. Rep. No. 103–8, pt. 2, p. 11 (1993). *Hibbs*, 538 U. S., at 728–733.

V

The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment. At the outset, we must determine the scope of that inquiry. Title II—unlike RFRA, the Patent Remedy Act, and the other statutes we have reviewed for validity under § 5—reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees. Petitioner urges us both to examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity. According to petitioner, the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives. But nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole.[18] Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can

[18] Contrary to THE CHIEF JUSTICE, *post,* at 551–552, neither *Garrett* nor *Florida Prepaid* lends support to the proposition that the *Boerne* test requires courts in all cases to "measur[e] the full breadth of the statute or relevant provision that Congress enacted against the scope of the constitutional right it purported to enforce." In fact, the decision in *Garrett,* which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need not examine "the full breadth of the statute" all at once. Moreover, *Garrett* and *Florida Prepaid,* like all of our other recent § 5 cases, concerned legislation that narrowly targeted the enforcement of a single constitutional right; for that reason, neither speaks to the issue presented in this case.

Nor is THE CHIEF JUSTICE's approach compelled by the nature of the *Boerne* inquiry. The answer to the question *Boerne* asks—whether a piece of legislation attempts substantively to redefine a constitutional guarantee—logically focuses on the manner in which the legislation operates to enforce that particular guarantee. It is unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts.

validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further. See *United States* v. *Raines*, 362 U. S. 17, 26 (1960).[19]

Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this "difficult and intractable proble[m]" warranted "added prophylactic measures in response." *Hibbs*, 538 U. S., at 737 (internal quotation marks omitted).

The remedy Congress chose is nevertheless a limited one. Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility. 42 U. S. C. § 12131(2). But Title II does not require States to employ any and all means to make judicial

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[19] In *Raines*, a State subject to suit under the Civil Rights Act of 1957 contended that the law exceeded Congress' power to enforce the Fifteenth Amendment because it prohibited "any person," and not just state actors, from interfering with voting rights. We rejected that argument, concluding that "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality." 362 U. S., at 24–25.

services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Ibid.* As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. 28 CFR § 35.151 (2003). But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. § 35.150(b)(1). Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. *Ibid.* And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§ 35.150(a)(2), (a)(3).

This duty to accommodate is perfectly consistent with the well-established due process principle that, "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard" in its courts. *Boddie*, 401 U. S., at 379 (internal quotation marks and citation omitted).[20] Our cases have recognized a number of affirmative obligations that flow from this principle: the duty to waive

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[20] Because this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'s prohibition on irrational discrimination. See *Garrett*, 531 U. S., at 372.

filing fees in certain family-law and criminal cases,[21] the duty to provide transcripts to criminal defendants seeking review of their convictions,[22] and the duty to provide counsel to certain criminal defendants.[23] Each of these cases makes clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate persons with disabilities in the administration of justice cannot be said to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U. S., at 532; *Kimel*, 528 U. S., at 86.[24] It is, rather, a reasonable prophylactic measure, reasonably targeted to a legitimate end.

For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of ac-

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[21] *Boddie* v. *Connecticut*, 401 U. S. 371 (1971) (divorce filing fee); *M. L. B.* v. *S. L. J.*, 519 U. S. 102 (1996) (record fee in parental rights termination action); *Smith* v. *Bennett*, 365 U. S. 708 (1961) (filing fee for habeas petitions); *Burns* v. *Ohio*, 360 U. S. 252 (1959) (filing fee for direct appeal in criminal case).

[22] *Griffin* v. *Illinois*, 351 U. S. 12 (1956).

[23] *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (trial counsel for persons charged with felony offenses); *Douglas* v. *California*, 372 U. S. 353 (1963) (counsel for direct appeals as of right).

[24] THE CHIEF JUSTICE contends that Title II cannot be understood as remedial legislation because it "subjects a State to liability for failing to make a vast array of special accommodations, *without regard for whether the failure to accommodate results in a constitutional wrong.*" *Post*, at 553 (emphasis in original). But as we have often acknowledged, Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," and may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U. S., at 81. Cf. *Hibbs*, 538 U. S. 721 (upholding the FMLA as valid remedial legislation without regard to whether failure to provide the statutorily mandated 12 weeks' leave results in a violation of the Fourteenth Amendment).

cess to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring.

I join the Court's opinion subject to the same caveats about the Court's recent cases on the Eleventh Amendment and § 5 of the Fourteenth that I noted in *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 740 (2003) (SOUTER, J., concurring).

Although I concur in the Court's approach applying the congruence-and-proportionality criteria to Title II of the Americans with Disabilities Act of 1990 as a guarantee of access to courts and related rights, I note that if the Court engaged in a more expansive enquiry as THE CHIEF JUSTICE suggests, *post*, at 551 (dissenting opinion), the evidence to be considered would underscore the appropriateness of action under § 5 to address the situation of disabled individuals before the courts, for that evidence would show that the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under § 5. *Buck* v. *Bell*, 274 U. S. 200 (1927), was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities. See *id.*, at 207 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough"). Laws compelling sterilization were often accompanied by others indiscriminately requiring institutionalization, and prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public.

One administrative action along these lines was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he "produc[e] a depressing and nauseating effect" upon others. *State ex rel. Beattie* v. *Board of Ed. of Antigo*, 169 Wis. 231, 232, 172 N. W. 153 (1919) (approving his exclusion from public school).[1]

Many of these laws were enacted to implement the quondam science of eugenics, which peaked in the 1920's, yet the statutes and their judicial vindications sat on the books long after eugenics lapsed into discredit.[2] See U. S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 19–20 (1983). Quite apart from the fateful inspiration behind them, one pervasive fault of these provisions was their failure to reflect the "amount of flexibility and freedom" required to deal with "the wide variation in the abilities and needs" of people with disabilities. *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 445 (1985). Instead, like other invidious discrimination, they classified people without regard to individual capacities, and by that lack of regard did great harm. In sustaining the application of Title II today, the Court takes a welcome step away from the judiciary's prior endorsement of blunt instruments imposing legal handicaps.

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

For the reasons stated by the Court, and mindful of Congress' objective in enacting the Americans with Disabilities

[1] See generally *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 463–464 (1985) (Marshall, J., concurring in judgment in part and dissenting in part); Burgdorf & Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons As A "Suspect Class" Under the Equal Protection Clause, 15 Santa Clara Law. 855 (1975); Brief for United States 17–19.

[2] As the majority opinion shows, some of them persist to this day, *ante*, at 524–525, to say nothing of their lingering effects on society.

Act—the elimination or reduction of physical and social structures that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation's social, economic, and civic life—I join the Court's opinion.

The Americans with Disabilities Act of 1990 (ADA or Act), 42 U. S. C. §§ 12101–12213, is a measure expected to advance equal-citizenship stature for persons with disabilities. See Bagenstos, Subordination, Stigma, and "Disability," 86 Va. L. Rev. 397, 471 (2000) (ADA aims both to "guarante[e] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and [to] protec[t] society against the loss of valuable talents"). As the Court's opinion relates, see *ante*, at 516–517, the Act comprises three parts, prohibiting discrimination in employment (Title I), public services, programs, and activities (Title II), and public accommodations (Title III). This case concerns Title II, which controls the conduct of administrators of public undertakings.

Including individuals with disabilities among people who count in composing "We the People," Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation. Central to the Act's primary objective, Congress extended the statute's range to reach all government activities, § 12132 (Title II), and required "reasonable modifications to [public actors'] rules, policies, or practices," §§ 12131(2)–12132 (Title II). See also § 12112(b)(5) (defining discrimination to include the failure to provide "reasonable accommodations") (Title I); § 12182(b)(2)(A)(ii) (requiring "reasonable modifications in [public accommodations'] policies, practices, or procedures") (Title III); Bagenstos, *supra*, at 435 (ADA supporters sought "to eliminate the practices that combine with physical and mental conditions to create what we call 'disability.' The society-wide universal access rules serve this function on the macro level, and the require-

ments of individualized accommodation and modification fill in the gaps on the micro level." (footnote omitted)).

In *Olmstead* v. *L. C.*, 527 U. S. 581 (1999), this Court responded with fidelity to the ADA's accommodation theme when it held a State accountable for failing to provide community residential placements for people with disabilities. The State argued in *Olmstead* that it had acted impartially, for it provided no community placements for individuals without disabilities. *Id.*, at 598. Congress, the Court observed, advanced in the ADA "a more comprehensive view of the concept of discrimination," *ibid.*, one that embraced failures to provide "reasonable accommodations," *id.*, at 601. The Court today is similarly faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion.

Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived. It seems to me not conducive to a harmonious federal system to require Congress, before it exercises authority under § 5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities. But see *post,* at 564 (SCALIA, J., dissenting) ("Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."); *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 743 (2003) (SCALIA, J., dissenting) (to be controlled by § 5 legislation, State "can demand that *it* be shown to have been acting in violation of the Fourteenth Amendment" (emphasis in original)). Members of Congress are understandably reluctant to condemn their own States as constitutional violators, complicit in maintaining the isolated and unequal status of persons with disabilities. I would not disarm a National Legislature for resisting an

adversarial approach to lawmaking better suited to the courtroom.

As the Court's opinion documents, see *ante*, at 524–529, Congress considered a body of evidence showing that in diverse parts of our Nation, and at various levels of government, persons with disabilities encounter access barriers to public facilities and services. That record, the Court rightly holds, at least as it bears on access to courts, sufficed to warrant the barrier-lowering, dignity-respecting national solution the People's representatives in Congress elected to order.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

In *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356 (2001), we held that Congress did not validly abrogate States' Eleventh Amendment immunity when it enacted Title I of the Americans with Disabilities Act of 1990 (ADA or Act), 42 U. S. C. §§ 12111–12117. Today, the Court concludes that Title II of that Act, §§ 12131–12165, does validly abrogate that immunity, at least insofar "as it applies to the class of cases implicating the fundamental right of access to the courts." *Ante*, at 533–534. Because today's decision is irreconcilable with *Garrett* and the well-established principles it embodies, I dissent.

The Eleventh Amendment bars private lawsuits in federal court against an unconsenting State. *E. g.*, *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 726 (2003); *Garrett*, *supra*, at 363; *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 73 (2000). Congress may overcome States' sovereign immunity and authorize such suits only if it unmistakably expresses its intent to do so, and only if it "acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Hibbs*, *supra*, at 726. While the Court correctly holds that Congress satisfied the first prerequisite, *ante*, at 518, I disagree with its conclusion that Title II is valid § 5 enforcement legislation.

Section 5 of the Fourteenth Amendment grants Congress the authority "to enforce, by appropriate legislation," the familiar substantive guarantees contained in § 1 of that Amendment. U. S. Const., Amdt. 14, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Congress' power to enact "'appropriate'" enforcement legislation is not limited to "mere legislative repetition" of this Court's Fourteenth Amendment jurisprudence. *Garrett*, *supra*, at 365. Congress may "remedy" and "deter" state violations of constitutional rights by "prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Hibbs*, 538 U. S., at 727 (internal quotation marks omitted). Such "prophylactic" legislation, however, "must be an appropriate remedy for identified constitutional violations, not 'an attempt to substantively redefine the States' legal obligations.'" *Id.*, at 727–728 (quoting *Kimel*, *supra*, at 88); *City of Boerne* v. *Flores*, 521 U. S. 507, 525 (1997) (enforcement power is "corrective or preventive, not definitional"). To ensure that Congress does not usurp this Court's responsibility to define the meaning of the Fourteenth Amendment, valid § 5 legislation must exhibit "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Hibbs*, *supra*, at 728 (quoting *City of Boerne*, *supra*, at 520). While the Court today pays lipservice to the "'congruence and proportionality'" test, see *ante*, at 520, it applies it in a manner inconsistent with our recent precedents.

In *Garrett*, we conducted the three-step inquiry first enunciated in *City of Boerne* to determine whether Title I of the ADA satisfied the congruence-and-proportionality test. A faithful application of that test to Title II reveals that it too "'substantively redefine[s],'" rather than permissibly enforces, the rights protected by the Fourteenth Amendment. *Hibbs*, *supra*, at 728.

The first step is to "identify with some precision the scope of the constitutional right at issue." *Garrett*, *supra*, at 365. This task was easy in *Garrett*, *Hibbs*, *Kimel*, and *City of Boerne* because the statutes in those cases sought to enforce only one constitutional right. In *Garrett*, for example, the statute addressed the equal protection right of disabled persons to be free from unconstitutional employment discrimination. 531 U. S., at 365. See also *Hibbs*, *supra*, at 728 ("The [Family and Medical Leave Act of 1993 (FMLA)] aims to protect the right to be free from gender-based discrimination in the workplace"); *Kimel*, *supra*, at 83 (right to be free from unconstitutional age discrimination in employment); *City of Boerne*, *supra*, at 529 (right of free exercise of religion). The scope of that right, we explained, is quite limited; indeed, the Equal Protection Clause permits a State to classify on the basis of disability so long as it has a rational basis for doing so. *Garrett*, *supra*, at 366–368 (discussing *Cleburne* v. *Cleburne Living Center*, *Inc.*, 473 U. S. 432 (1985)); see also *ante*, at 522.

In this case, the task of identifying the scope of the relevant constitutional protection is more difficult because Title II purports to enforce a panoply of constitutional rights of disabled persons: not only the equal protection right against irrational discrimination, but also certain rights protected by the Due Process Clause. *Ante*, at 522–523. However, because the Court ultimately upholds Title II "as it applies to the class of cases implicating the fundamental right of access to the courts," *ante*, at 533–534, the proper inquiry focuses on the scope of those due process rights. The Court cites four access-to-the-courts rights that Title II purportedly enforces: (1) the right of the criminal defendant to be present at all critical stages of the trial, *Faretta* v. *California*, 422 U. S. 806, 819 (1975); (2) the right of litigants to have a "meaningful opportunity to be heard" in judicial proceedings, *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971); (3) the right of the criminal defendant to trial by a jury composed

of a fair cross section of the community, *Taylor* v. *Louisiana*, 419 U. S. 522, 530 (1975); and (4) the public right of access to criminal proceedings, *Press-Enterprise Co.* v. *Superior Court of Cal., County of Riverside*, 478 U. S. 1, 8–15 (1986). *Ante*, at 522–523.

Having traced the "metes and bounds" of the constitutional rights at issue, the next step in the congruence-and-proportionality inquiry requires us to examine whether Congress "identified a history and pattern" of violations of these constitutional rights by the States with respect to the disabled. *Garrett*, 531 U. S., at 368. This step is crucial to determining whether Title II is a legitimate attempt to remedy or prevent actual constitutional violations by the States or an illegitimate attempt to rewrite the constitutional provisions it purports to enforce. Indeed, "Congress' §5 authority is appropriately exercised *only* in response to state transgressions." *Ibid.* (emphasis added). But the majority identifies nothing in the legislative record that shows Congress was responding to widespread violations of the due process rights of disabled persons.

Rather than limiting its discussion of constitutional violations to the due process rights on which it ultimately relies, the majority sets out on a wide-ranging account of societal discrimination against the disabled. *Ante*, at 524–526. This digression recounts historical discrimination against the disabled through institutionalization laws, restrictions on marriage, voting, and public education, conditions in mental hospitals, and various other forms of unequal treatment in the administration of public programs and services. Some of this evidence would be relevant if the Court were considering the constitutionality of the statute as a whole; but the Court rejects that approach in favor of a narrower "as-applied" inquiry.[1] We discounted much the same type of outdated, generalized evidence in *Garrett* as unsupportive of

[1] For further discussion of the propriety of this approach, see *infra*, at 551–552.

Title I's ban on employment discrimination. 531 U. S., at 368–372; see also *City of Boerne*, 521 U. S., at 530 (noting that the "legislative record lacks . . . modern instances of . . . religious bigotry"). The evidence here is likewise irrelevant to Title II's purported enforcement of due process access-to-the-courts rights.

Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States*. The bulk of the Court's evidence concerns discrimination by nonstate governments, rather than the States themselves.[2] We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States. *Garrett*, *supra*, at 368–369; *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 640 (1999); *Kimel*, 528 U. S., at 89. Moreover, the majority today cites the same congressional task force evidence we rejected in *Garrett*. *Ante*, at 526 (citing *Garrett*, *supra*, at 379 (BREYER, J., dissenting), and 531 U. S., at 391–424 (App. C to opinion of BREYER, J., dissenting) (chronicling instances of "unequal treatment" in the "administration of public programs")). As in *Garrett*, this "unexamined, anecdotal" evidence does not suffice. 531 U. S., at 370. Most of the brief anecdotes do not involve States at all, and those that do are not sufficiently detailed to determine whether the instances of "unequal treatment" were irrational, and thus unconstitutional under our decision in *Cleburne*. *Garrett*, *supra*, at 370–371.

[2] *E. g.*, *ante*, at 525 (citing *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985) (irrational discrimination by city zoning board)); *ante*, at 525, n. 13 (citing *New York ex rel. Spitzer* v. *County of Delaware*, 82 F. Supp. 2d 12 (NDNY 2000) (ADA lawsuit *brought by State* against a county)); *ante*, at 525, n. 12 (citing four cases concerning local school boards' unconstitutional actions); *ante*, at 525, n. 11 (citing one case involving conditions in federal prison and another involving a county jail inmate); *ante*, at 526 (referring to "hundreds of examples of unequal treatment . . . by States *and their political subdivisions*" (emphasis added)).

Therefore, even outside the "access to the courts" context, the Court identifies few, if any, constitutional violations perpetrated by the States against disabled persons.[3]

With respect to the due process "access to the courts" rights on which the Court ultimately relies, Congress' failure to identify a pattern of actual constitutional violations by the States is even more striking. Indeed, there is *nothing* in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials.[4]

The Court's attempt to disguise the lack of congressional documentation with a few citations to judicial decisions cannot retroactively provide support for Title II, and in any event, fails on its own terms. See, *e. g.*, *Garrett*, 531 U. S., at 368 ("[W]e examine whether *Congress* identified a history and pattern" of constitutional violations); *ibid.* ("The *legislative record* . . . fails to show that *Congress* did in fact identify

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[3] The majority obscures this fact by repeatedly referring to congressional findings of "discrimination" and "unequal treatment." Of course, generic findings of discrimination and unequal treatment *vel non* are insufficient to show a pattern of *constitutional* violations where rational-basis scrutiny applies. *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 370 (2001).

[4] Certainly, respondents Lane and Jones were not denied these constitutional rights. The majority admits that Lane was able to attend the initial hearing of his criminal trial. *Ante*, at 514. Lane was arrested for failing to appear at his second hearing only after he refused assistance from officers dispatched by the court to help him to the courtroom. *Ibid.* The court conducted a preliminary hearing in the first-floor library to accommodate Lane's disability, App. to Pet. for Cert. 16, and later offered to move all further proceedings in the case to a handicapped-accessible courthouse in a nearby town. In light of these facts, it can hardly be said that the State violated Lane's right to be present at his trial; indeed, it made affirmative attempts to secure that right. Respondent Jones, a disabled court reporter, does not seriously contend that she suffered a constitutional injury.

a pattern" of constitutional violations (emphases added)). Indeed, because this type of constitutional violation occurs in connection with litigation, it is particularly telling that the majority is able to identify only *two* reported cases finding that a disabled person's federal constitutional rights were violated.[5] See *ante*, at 525–526, n. 14 (citing *Ferrell* v. *Estelle*, 568 F. 2d 1128, 1132–1133 (CA5), opinion withdrawn as moot, 573 F. 2d 867 (1978); *People* v. *Rivera*, 125 Misc. 2d 516, 528, 480 N. Y. S. 2d 426, 434 (Sup. Ct. 1984)).[6]

Lacking any real evidence that Congress was responding to actual due process violations, the majority relies primarily on three items to justify its decision: (1) a 1983 U. S. Civil Rights Commission Report showing that 76% of "public services and programs housed in state-owned buildings were inaccessible" to persons with disabilities, *ante*, at 527; (2) testimony before a House subcommittee regarding the "physical inaccessibility" of local courthouses, *ibid.;* and (3) evidence submitted to Congress' designated ADA task

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[5] As two Justices noted in *Garrett*, if the States were violating the due process rights of disabled persons, "one would have expected to find in decisions of the courts . . . extensive litigation and discussion of the constitutional violations." 531 U. S., at 376 (KENNEDY, J., joined by O'CONNOR, J., concurring).

[6] The balance of the Court's citations refer to cases arising *after* enactment of the ADA or do not contain findings of federal constitutional violations. *Ante*, at 525–526, n. 14 (citing *Layton* v. *Elder*, 143 F. 3d 469 (CA8 1998) (post-ADA case finding ADA violations only); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525 (WD Ark. 1998) (same); *Galloway* v. *Superior Court*, 816 F. Supp. 12 (DC 1993) (same); *State* v. *Schaim*, 65 Ohio St. 3d 51, 600 N. E. 2d 661 (1992) (remanded for hearing on constitutional issue); *People* v. *Green*, 148 Misc. 2d 666, 561 N. Y. S. 2d 130 (Cty. Ct. 1990) (finding violation of state constitution only); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399 (WD Pa. 1989) (statute upheld against facial constitutional challenge; Rehabilitation Act of 1973 violations only); *Pomerantz* v. *Los Angeles County*, 674 F. 2d 1288 (CA9 1982) (Rehabilitation Act of 1973 claim; challenged jury-service statute later amended)). Accordingly, they offer no support whatsoever for the notion that Title II is a valid response to documented constitutional violations.

force that purportedly contains "numerous examples of the exclusion of persons with disabilities from state judicial services and programs." *Ibid.*

On closer examination, however, the Civil Rights Commission's finding consists of a single conclusory sentence in its report, and it is far from clear that its finding even includes courthouses. The House subcommittee report, for its part, contains the testimony of *two* witnesses, neither of whom reported being denied the right to be present at constitutionally protected court proceedings.[7] Indeed, the witnesses' testimony, like the U. S. Commission on Civil Rights Report, concerns only physical barriers to access, and does not address whether States either provided means to overcome those barriers or alternative locations for proceedings involving disabled persons. Cf. n. 4, *supra* (describing alternative means of access offered to respondent Lane).

Based on the majority's description, *ante*, at 527, the report of the ADA Task Force on the Rights and Empowerment of Americans with Disabilities sounds promising. But the report itself says nothing about any disabled person being denied access to court. The Court thus apparently relies solely on a general citation to the Government's Lodging in *Garrett*, O. T. 2000, No. 99–1240, which, amidst thousands of pages, contains only a few anecdotal handwritten reports of physically inaccessible courthouses, again with no mention of whether States provided alternative means of access. This evidence, moreover, was submitted not to Congress, but only to the task force, which itself made no

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[7] Oversight Hearing on H. R. 4498 before the House Subcommittee on Select Education of the Committee on Education and Labor, 100th Cong., 2d Sess., 40–41 (1988) (statement of Emeka Nwojke) (explaining that he encountered difficulties appearing in court due to physical characteristics of the courthouse and courtroom and the rudeness of court employees); *id.*, at 48 (statement of Ellen Telker) (blind attorney "know[s] of at least one courthouse in New Haven where the elevators do not have tactile markings").

findings regarding disabled persons' access to judicial proceedings. Cf. *Garrett*, 531 U. S., at 370–371 (rejecting anecdotal task force evidence for similar reasons). As we noted in *Garrett*, "had Congress truly understood this [task force] information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings." *Id.*, at 371. Yet neither the legislative findings, nor even the Committee Reports, contain a single mention of the seemingly vital topic of access to the courts.[8] Cf. *ibid.; Florida Prepaid*, 527 U. S., at 641 (observing that Senate Report on Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act) "contains no evidence that unremedied patent infringement by States had become a problem of national import"). To the contrary, the Senate Report on the ADA observed that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings." S. Rep. No. 101–116, p. 92 (1989).

Even if the anecdotal evidence and conclusory statements relied on by the majority could be properly considered, the mere existence of an architecturally "inaccessible" courthouse—*i. e.*, one a disabled person cannot utilize without assistance—does not state a constitutional violation. A violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding. We have never held that a person has a *constitutional* right to make his way into a courtroom without any

[8] The majority rather peculiarly points to Congress' finding that "'discrimination against individuals with disabilities persists in such critical areas as . . . *access to public services*'" as evidence that Congress sought to vindicate the due process rights of disabled persons. *Ante*, at 529 (quoting 42 U. S. C. § 12101(a)(3) (emphasis added by the Court)). However, one does not usually refer to the right to attend a judicial proceeding as "access to [a] public servic[e]." Given the lack of any concern over courthouse accessibility issues in the legislative history, it is highly unlikely that this legislative finding obliquely refers to state violations of the due process rights of disabled persons to attend judicial proceedings.

external assistance. Indeed, the fact that the State may need to assist an individual to attend a hearing has no bearing on whether the individual successfully exercises his due process right to be present at the proceeding. Nor does an "inaccessible" courthouse violate the Equal Protection Clause, unless it is irrational for the State not to alter the courthouse to make it "accessible." But financial considerations almost always furnish a rational basis for a State to decline to make those alterations. See *Garrett*, 531 U. S., at 372 (noting that it would be constitutional for an employer to "conserve scarce financial resources" by hiring employees who can use existing facilities rather than making the facilities accessible to disabled employees). Thus, evidence regarding inaccessible courthouses, because it is not evidence of constitutional violations, provides no basis to abrogate States' sovereign immunity.

The near-total lack of actual constitutional violations in the congressional record is reminiscent of *Garrett*, wherein we found that the same type of minimal anecdotal evidence "f[e]ll far short of even suggesting the pattern of unconstitutional [state action] on which § 5 legislation must be based." *Id.*, at 370. See also *Kimel*, 528 U. S., at 91 ("Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary"); *Florida Prepaid*, *supra*, at 645 ("The legislative record thus suggests that the Patent Remedy Act did not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation" (quoting *City of Boerne*, 521 U. S., at 526)).

The barren record here should likewise be fatal to the majority's holding that Title II is valid legislation enforcing due process rights that involve access to the courts. This conclusion gains even more support when Title II's nonexistent record of constitutional violations is compared with legisla-

tion that we have sustained as valid § 5 enforcement legislation. See, *e. g.*, *Hibbs*, 538 U. S., at 729–732 (tracing the extensive legislative record documenting States' gender discrimination in employment leave policies); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 312–313 (1966) (same with respect to racial discrimination in voting rights). Accordingly, Title II can only be understood as a congressional attempt to "rewrite the Fourteenth Amendment law laid down by this Court," rather than a legitimate effort to remedy or prevent state violations of that Amendment. *Garrett*, *supra*, at 374.[9]

The third step of our congruence-and-proportionality inquiry removes any doubt as to whether Title II is valid § 5 legislation. At this stage, we ask whether the rights and remedies created by Title II are congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress. *Hibbs*, *supra*, at 737–739; *Garrett*, *supra*, at 372–373.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to dis-

[9] The Court correctly explains that "'it [i]s easier for Congress to show a pattern of state constitutional violations'" when it targets state action that triggers a higher level of constitutional scrutiny. *Ante*, at 529 (quoting *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 736 (2003)). However, this Court's precedents attest that Congress may not dispense with the required showing altogether simply because it purports to enforce due process rights. See *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 645–646 (1999) (invalidating Patent Remedy Act, which purported to enforce the Due Process Clause, because Congress failed to identify a record of constitutional violations); *City of Boerne* v. *Flores*, 521 U. S. 507, 530–531 (1997) (same with respect to Religious Freedom Restoration Act of 1993 (RFRA)). As the foregoing discussion demonstrates, that is precisely what the Court has sanctioned here. Because the record is utterly devoid of proof that Congress was responding to state violations of due process access-to-the-courts rights, this case is controlled by *Florida Prepaid* and *City of Boerne*, rather than *Hibbs*.

crimination by any such entity." 42 U. S. C. § 12132. A disabled person is considered "qualified" if he "meets the essential eligibility requirements" for the receipt of the entity's services or participation in the entity's programs, "*with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services.*" § 12131(2) (emphasis added). The ADA's findings make clear that Congress believed it was attacking "discrimination" in all areas of public services, as well as the "discriminatory effects" of "architectural, transportation, and communication barriers." §§ 12101(a)(3), (a)(5). In sum, Title II requires, on pain of money damages, special accommodations for disabled persons in virtually every interaction they have with the State.

"Despite subjecting States to this expansive liability," the broad terms of Title II "d[o] nothing to limit the coverage of the Act to cases involving arguable constitutional violations." *Florida Prepaid*, 527 U. S., at 646. By requiring special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination. We invalidated Title I's similar requirements in *Garrett*, observing that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." 531 U. S., at 368; *id.*, at 372–373 (contrasting Title I's reasonable accommodation and disparate-impact provisions with the Fourteenth Amendment's requirements). Title II fails for the same reason. Like Title I, Title II may be laudable public policy, but it cannot be seriously disputed that it is also an attempt to legislatively "redefine the States' legal obligations" under the Fourteenth Amendment. *Kimel*, *supra*, at 88.

The majority, however, claims that Title II also vindicates fundamental rights protected by the Due Process Clause—

in addition to access to the courts—that are subject to heightened Fourteenth Amendment scrutiny. *Ante*, at 522–523 (citing *Dunn* v. *Blumstein*, 405 U. S. 330, 336–337 (1972) (voting); *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969) (right to move to a new jurisdiction); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942) (marriage and procreation)). But Title II is not tailored to provide prophylactic protection of these rights; instead, it applies to any service, program, or activity provided by any entity. Its provisions affect transportation, health, education, and recreation programs, among many others, all of which are accorded only rational-basis scrutiny under the Equal Protection Clause. A requirement of accommodation for the disabled at a state-owned amusement park or sports stadium, for example, bears no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights. Thus, as with Title I in *Garrett*, the Patent Remedy Act in *Florida Prepaid*, the Age Discrimination in Employment Act of 1967 in *Kimel*, and the RFRA in *City of Boerne*, all of which we invalidated as attempts to substantively redefine the Fourteenth Amendment, it is unlikely "that many of the [state actions] affected by [Title II] have [any] likelihood of being unconstitutional." *City of Boerne*, *supra*, at 532. Viewed as a whole, then, there is little doubt that Title II of the ADA does not validly abrogate state sovereign immunity.[10]

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[10] Title II's all-encompassing approach to regulating public services contrasts starkly with the more closely tailored laws we have upheld as legitimate prophylactic § 5 legislation. In *Hibbs*, for example, the FMLA was "narrowly targeted" to remedy widespread gender discrimination in the availability of family leave. 538 U. S., at 738–739 (distinguishing *City of Boerne*, *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62 (2000), and *Garrett* on this ground). Similarly, in cases involving enforcement of the Fifteenth Amendment, we upheld "limited remedial scheme[s]" that were narrowly tailored to address massive evidence of discrimination in voting. *Garrett*, 531 U. S., at 373 (discussing *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966)). Unlike these statutes, Title II's "indiscriminate scope

The majority concludes that Title II's massive overbreadth can be cured by considering the statute only "as it applies to the class of cases implicating the accessibility of judicial services." *Ante*, at 531 (citing *United States* v. *Raines*, 362 U. S. 17, 26 (1960)). I have grave doubts about importing an "as applied" approach into the § 5 context. While the majority is of course correct that this Court normally only considers the application of a statute to a particular case, the proper inquiry under *City of Boerne* and its progeny is somewhat different. In applying the congruence-and-proportionality test, we ask whether Congress has attempted to statutorily redefine the constitutional rights protected by the Fourteenth Amendment. This question can only be answered by measuring the breadth of a statute's coverage against the scope of the constitutional rights it purports to enforce and the record of violations it purports to remedy.

In conducting its as-applied analysis, however, the majority posits a hypothetical statute, never enacted by Congress, that applies only to courthouses. The effect is to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right. But Title II is not susceptible of being carved up in this manner; it applies indiscriminately to all "services," "programs," or "activities" of any "public entity." Thus, the majority's approach is not really an assessment of whether Title II is "appropriate *legislation*" at all, U. S. Const., Amdt. 14, § 5 (emphasis added), but a test of whether the Court can conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation.

Our § 5 precedents do not support this as-applied approach. In each case, we measured the full breadth of the statute or relevant provision that Congress enacted against

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. . . is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Florida Prepaid*, 527 U. S., at 647.

the scope of the constitutional right it purported to enforce. If we had arbitrarily constricted the scope of the statutes to match the scope of a core constitutional right, those cases might have come out differently. In *Garrett*, for example, Title I might have been upheld "as applied" to irrational employment discrimination; or in *Florida Prepaid*, the Patent Remedy Act might have been upheld "as applied" to intentional, uncompensated patent infringements. It is thus not surprising that the only authority cited by the majority is *Raines*, *supra*, a case decided long before we enunciated the congruence-and-proportionality test.[11]

I fear that the Court's adoption of an as-applied approach eliminates any incentive for Congress to craft § 5 legislation for the purpose of remedying or deterring actual constitutional violations. Congress can now simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States. All the while, States will be subjected to substantial litigation in a piecemeal attempt to vindicate their Eleventh Amendment rights. The majority's as-applied approach simply cannot be squared with either our recent precedent or the proper role of the Judiciary.

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[11] *Raines* is inapposite in any event. The Court there considered the constitutionality of the Civil Rights Act of 1957—a statute designed to enforce the Fifteenth Amendment—whose narrowly tailored substantive provisions could "unquestionably" be applied to state actors (like the respondents therein). 362 U. S., at 25, 26. The only question presented was whether the statute was facially invalid because it might be read to constrain nonstate actors as well. *Id.*, at 20. The Court upheld the statute as applied to respondents and declined to entertain the facial challenge. *Id.*, at 24–26. The situation in this case is much different: The very question presented is whether Title II's indiscriminate substantive provisions can constitutionally be applied to the petitioner State. *Raines* thus provides no support for avoiding this question by conjuring up an imaginary statute with substantive provisions that might pass the congruence-and-proportionality test.

Even in the limited courthouse-access context, Title II does not properly abrogate state sovereign immunity. As demonstrated in depth above, Congress utterly failed to identify any evidence that disabled persons were denied constitutionally protected access to judicial proceedings. Without this predicate showing, Title II, even if we were to hypothesize that it applies only to courthouses, cannot be viewed as a congruent and proportional response to state constitutional violations. *Garrett*, 531 U. S., at 368 ("Congress' § 5 authority is appropriately exercised only in response to state transgressions").

Moreover, even in the courthouse-access context, Title II requires substantially more than the Due Process Clause. Title II subjects States to private lawsuits if, *inter alia*, they fail to make "reasonable modifications" to facilities, such as removing "architectural . . . barriers." 42 U. S. C. §§ 12131(2), 12132. Yet the statute is not limited to occasions when the failure to modify results, or will likely result, in an actual due process violation—*i. e.*, the inability of a disabled person to participate in a judicial proceeding. Indeed, liability is triggered if an inaccessible building results in a disabled person being "subjected to discrimination"—a term that presumably encompasses any sort of inconvenience in accessing the facility, for whatever purpose. § 12132.

The majority's reliance on *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), and other cases in which we held that due process requires the State to waive filing fees for indigent litigants, is unavailing. While these cases support the principle that the State must remove financial requirements that in fact prevent an individual from exercising his constitutional rights, they certainly do not support a statute that subjects a State to liability for failing to make a vast array of special accommodations, *without regard for whether the failure to accommodate results in a constitutional wrong.*

In this respect, Title II is analogous to the Patent Remedy Act at issue in *Florida Prepaid*. That statute subjected States to monetary liability for any act of patent infringement. 527 U. S., at 646–647. Thus, "Congress did nothing to limit" the Patent Remedy Act's coverage "to cases involving arguable [due process] violations," such as when the infringement was nonnegligent or uncompensated. *Ibid.* Similarly here, Congress has authorized private damages suits against a State for merely maintaining a courthouse that is not readily accessible to the disabled, without regard to whether a disabled person's due process rights are ever violated. Accordingly, even as applied to the "access to the courts" context, Title II's "indiscriminate scope offends [the congruence-and-proportionality] principle," particularly in light of the lack of record evidence showing that inaccessible courthouses cause actual due process violations. *Id.*, at 647.[12]

For the foregoing reasons, I respectfully dissent.

JUSTICE SCALIA, dissenting.

Section 5 of the Fourteenth Amendment provides that Congress "shall have power to enforce, by appropriate legislation, the provisions" of that Amendment—including, of course, the Amendment's Equal Protection and Due Process Clauses. In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), we

[12] The majority's invocation of *Hibbs* to justify Title II's overbreadth is unpersuasive. See *ante*, at 533, n. 24. The *Hibbs* Court concluded that "in light of the evidence before Congress" the FMLA's 12-week family-leave provision was necessary to "achiev[e] Congress' remedial object." 538 U. S., at 748. The Court found that the legislative record included not only evidence of state constitutional violations, but evidence that a provision merely enforcing the Equal Protection Clause would actually perpetuate the gender stereotypes Congress sought to eradicate because employers could simply eliminate family leave entirely. *Ibid.* Without comparable evidence of constitutional violations and the necessity of prophylactic measures, the Court has no basis on which to uphold Title II's special-accommodation requirements.

decided that Congress could, under this provision, forbid English literacy tests for Puerto Rican voters in New York State who met certain educational criteria. Though those tests were not themselves in violation of the Fourteenth Amendment, we held that § 5 authorizes prophylactic legislation—that is, "legislation that proscribes facially constitutional conduct," *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 728 (2003), when Congress determines such proscription is desirable "'to make the amendments fully effective,'" *Morgan*, *supra*, at 648 (quoting *Ex parte Virginia*, 100 U. S. 339, 345 (1880)). We said that "the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment" is the flexible "necessary and proper" standard of *McCulloch* v. *Maryland*, 4 Wheat. 316, 342, 421 (1819). *Morgan*, 384 U. S., at 651. We described § 5 as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Ibid.*

The *Morgan* opinion followed close upon our decision in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), which had upheld prophylactic application of the similarly worded "enforce" provision of the Fifteenth Amendment (§ 2) to challenged provisions of the Voting Rights Act of 1965. But the Fourteenth Amendment, unlike the Fifteenth, is not limited to denial of the franchise and not limited to the denial of other rights on the basis of race. In *City of Boerne* v. *Flores*, 521 U. S. 507 (1997), we confronted Congress's inevitable expansion of the Fourteenth Amendment, as interpreted in *Morgan*, beyond the field of racial discrimination.[1] There Congress had sought, in the Religious Freedom Restoration

[1] Congress had previously attempted such an extension in the Voting Rights Act Amendments of 1970, 84 Stat. 318, which sought to lower the voting age in state elections from 21 to 18. This extension was rejected, but in three separate opinions, none of which commanded a majority of the Court. See *infra*, at 563.

Act of 1993, 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*, to impose upon the States an interpretation of the First Amendment's Free Exercise Clause that this Court had explicitly rejected. To avoid placing in congressional hands effective power to rewrite the Bill of Rights through the medium of § 5, we formulated the "congruence and proportionality" test for determining what legislation is "appropriate." When Congress enacts prophylactic legislation, we said, there must be "proportionality or congruence between the means adopted and the legitimate end to be achieved." 521 U. S., at 533.

I joined the Court's opinion in *Boerne* with some misgiving. I have generally rejected tests based on such malleable standards as "proportionality," because they have a way of turning into vehicles for the implementation of individual judges' policy preferences. See, *e. g.*, *Ewing* v. *California*, 538 U. S. 11, 31–32 (2003) (SCALIA, J., concurring in judgment) (declining to apply a "proportionality" test to the Eighth Amendment's ban on cruel and unusual punishment); *Stenberg* v. *Carhart*, 530 U. S. 914, 954–956 (2000) (SCALIA, J., dissenting) (declining to apply the "undue burden" standard of *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992)); *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 599 (1996) (SCALIA, J., dissenting) (declining to apply a "reasonableness" test to punitive damages under the Due Process Clause). Even so, I signed on to the "congruence and proportionality" test in *Boerne*, and adhered to it in later cases: *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627 (1999), where we held that the provisions of the Patent and Plant Variety Protection Remedy Clarification Act, 35 U. S. C. §§ 271(h), 296(a), were "'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior,'" 527 U. S., at 646 (quoting *Boerne*, *supra*, at 532); *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62 (2000), where we held that

the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (1994 ed. and Supp. III), imposed on state and local governments requirements "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act," 528 U. S., at 83; *United States* v. *Morrison,* 529 U. S. 598 (2000), where we held that a provision of the Violence Against Women Act of 1994, 42 U. S. C. § 13981, lacked congruence and proportionality because it was "not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe," 529 U. S., at 626; and *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356 (2001), where we said that Title I of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 330, 42 U. S. C. §§ 12111–12117, raised "the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*," 531 U. S., at 372.

But these cases were soon followed by *Nevada Dept. of Human Resources* v. *Hibbs*, in which the Court held that the Family and Medical Leave Act of 1993, 107 Stat. 9, 29 U. S. C. § 2612 *et seq.*, which required States to provide their employees up to 12 work weeks of unpaid leave (for various purposes) annually, was "congruent and proportional to its remedial object [of preventing sex discrimination], and can be understood as responsive to, or designed to prevent, unconstitutional behavior." 538 U. S., at 740 (internal quotation marks omitted). I joined JUSTICE KENNEDY's dissent, which established (conclusively, I thought) that Congress had identified no unconstitutional state action to which the statute could conceivably be a proportional response. And now we have today's decision, holding that Title II of the ADA is congruent and proportional to the remediation of constitutional violations, in the face of what seems to me a compelling demonstration of the opposite by THE CHIEF JUSTICE's dissent.

I yield to the lessons of experience. The "congruence and proportionality" standard, like all such flabby tests, is a

standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress's taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ("congruence and proportionality") that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed. As I wrote for the Court in an earlier case, "low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 239 (1995).

I would replace "congruence and proportionality" with another test—one that provides a clear, enforceable limitation supported by the text of § 5. Section 5 grants Congress the power "to *enforce*, by appropriate legislation," the other provisions of the Fourteenth Amendment. U. S. Const., Amdt. 14 (emphasis added). *Morgan* notwithstanding, one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit—even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit. And one does not "enforce" the right of access to the courts at issue in this case, see *ante*, at 531, by requiring that disabled persons be provided access to *all* of the "services, programs, or activities" furnished or conducted by the State, 42 U. S. C. § 12132. That is simply not what the power to enforce means—or ever

meant. The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined "enforce" as: "To put in execution; to cause to take effect; as, to *enforce* the laws." *Id.*, at 396. See also J. Worcester, Dictionary of the English Language 484 (1860) ("To put in force; to cause to be applied or executed; as, 'To *enforce* a law' "). Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or "remedy" conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called "prophylactic legislation" is reinforcement rather than enforcement.

Morgan asserted that this commonsense interpretation "would confine the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." 384 U. S., at 648–649. That is not so. One must remember "that in 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution." R. Berger, Government By Judiciary 247 (2d ed. 1997). If, just after the Fourteenth Amendment was ratified, a State had enacted a law imposing racially discriminatory literacy tests (different questions for different races) a citizen prejudiced by such a test would have had no means of asserting his constitutional right to be free of it. Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights. One of the first pieces of legislation passed under Congress's § 5 power was the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13, entitled "*An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.*" Section 1 of that Act, later codified as Rev. Stat. § 1979, 42 U. S. C. § 1983, authorized a cause of action against "any person who, under

color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." 17 Stat. 13. Section 5 would also authorize measures that do not restrict the States' substantive scope of action but impose requirements directly related to the *facilitation* of "enforcement"—for example, reporting requirements that would enable violations of the Fourteenth Amendment to be identified.[2] But what § 5 does *not* authorize is so-called "prophylactic" measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment.

The major impediment to the approach I have suggested is *stare decisis.* A lot of water has gone under the bridge since *Morgan,* and many important and well-accepted measures, such as the Voting Rights Act, assume the validity of *Morgan* and *South Carolina.* As Prof. Archibald Cox put it in his Supreme Court Foreword: "The etymological meaning of section 5 may favor the narrower reading. Literally, 'to enforce' means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state's constitutional duty." Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 110–111 (1966).

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[2] Professor Tribe's treatise gives some examples of such measures that facilitate enforcement in the context of the Fifteenth Amendment:

"The Civil Rights Act of 1957, 71 Stat. 634, authorized the Attorney General to seek injunctions against interference with the right to vote on racial grounds. The Civil Rights Act of 1960, 74 Stat. 86, permitted joinder of states as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systemic discrimination. The Civil Rights Act of 1964, 78 Stat. 241, expedited the hearing of voting cases before three-judge courts . . . ." L. Tribe, American Constitutional Law 931, n. 5 (3d ed. 2000).

However, *South Carolina* and *Morgan*, all of our later cases except *Hibbs* that give an expansive meaning to "enforce" in § 5 of the Fourteenth Amendment, and all of our earlier cases that even suggest such an expansive meaning in dicta, involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, *racial discrimination.* See *Oregon* v. *Mitchell*, 400 U. S. 112 (1970) (see discussion *infra*); *Ex parte Virginia*, 100 U. S. 339 (1880) (dictum in a case involving a statute that imposed criminal penalties for officials' racial discrimination in jury selection); *Strauder* v. *West Virginia*, 100 U. S. 303, 311–312 (1880) (dictum in a case involving a statute that permitted removal to federal court of a black man's claim that his jury had been selected in a racially discriminatory manner); *Virginia* v. *Rives*, 100 U. S. 313, 318 (1880) (dictum in a racial discrimination case involving the same statute). See also *City of Rome* v. *United States*, 446 U. S. 156, 173–178 (1980) (upholding as valid legislation under § 2 of the Fifteenth Amendment the most sweeping provisions of the Voting Rights Act of 1965); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 439–441 (1968) (upholding a law, 42 U. S. C. § 1982, banning public or private racial discrimination in the sale and rental of property as appropriate legislation under § 2 of the Thirteenth Amendment).

Giving § 5 more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions. In the *Slaughter-House Cases*, 16 Wall. 36, 81 (1873), the Court's first confrontation with the Fourteenth Amendment, we said the following with respect to the Equal Protection Clause:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to

> come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

Racial discrimination was the practice at issue in the early cases (cited in *Morgan*) that gave such an expansive description of the effects of §5. See 384 U. S., at 648 (citing *Ex parte Virginia*); 384 U. S., at 651 (citing *Strauder* v. *West Virginia* and *Virginia* v. *Rives*).[3] In those early days, bear in mind, the guarantee of equal protection had not been extended beyond race to sex, age, and the many other categories it now covers. Also still to be developed were the incorporation doctrine (which holds that the Fourteenth Amendment incorporates and applies against the States the Bill of Rights, see *Duncan* v. *Louisiana*, 391 U. S. 145, 147–148 (1968)) and the doctrine of so-called "substantive due process" (which holds that the Fourteenth Amendment's Due Process Clause protects unenumerated liberties, see gener-

[3] A later case cited in *Morgan*, *James Everard's Breweries* v. *Day*, 265 U. S. 545, 558–563 (1924), applied the more flexible standard of *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), to the Eighteenth Amendment, which, in §1, forbade "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes" and provided, in §2, that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." Congress had provided, in the Supplemental Prohibition Act of 1921, §2, 42 Stat. 222, that "only spirituous and vinous liquor may be prescribed for medicinal purposes." That was challenged as unconstitutional because it went beyond the regulation of intoxicating liquors for beverage purposes, and hence beyond "enforcement." In an opinion citing none of the Thirteenth, Fourteenth, and Fifteenth Amendment cases discussed in text, the Court held that the *McCulloch* v. *Maryland* test applied. Unlike what is at issue here, that case did not involve a power to control the States in respects not otherwise permitted by the Constitution. The only consequence of the Federal Government's going beyond "enforcement" narrowly defined was its arguable incursion upon powers left to the States—which is essentially the same issue that *McCulloch* addressed.

ally *Lawrence* v. *Texas*, 539 U. S. 558 (2003); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992)). Thus, the Fourteenth Amendment did not include the many guarantees that it now provides. In such a seemingly limited context, it did not appear to be a massive expansion of congressional power to interpret § 5 broadly. Broad interpretation was particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored. The former is still true, and the latter remained true at least as late as *Morgan*.

When congressional regulation has not been targeted at racial discrimination, we have given narrower scope to § 5. In *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), the Court upheld, under § 2 of the Fifteenth Amendment, that provision of the Voting Rights Act Amendments of 1970, 84 Stat. 314, which barred literacy tests and similar voter-eligibility requirements—classic tools of the racial discrimination in voting that the Fifteenth Amendment forbids; but found to be *beyond* the § 5 power of the Fourteenth Amendment the provision that lowered the voting age from 21 to 18 in state elections. See 400 U. S., at 124–130 (opinion of Black, J.); *id.*, at 153–154 (Harlan, J., concurring in part and dissenting in part); *id.*, at 293–296 (Stewart, J., joined by Burger, C. J., and Blackmun, J., concurring in part and dissenting in part). A third provision, which forbade States from disqualifying voters by reason of residency requirements, was also upheld—but only a minority of the Justices believed that § 5 was adequate authority. Justice Black's opinion in that case described exactly the line I am drawing here, suggesting that Congress's enforcement power is broadest when directed "to the goal of eliminating discrimination on account of race." *Id.*, at 130. And of course the *results* reached in *Boerne*, *Florida Prepaid*, *Kimel*, *Morrison*, and *Garrett* are consistent with the narrower compass afforded congressional

regulation that does not protect against or prevent racial discrimination.

Thus, principally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. See *Hibbs*, 538 U. S., at 741–743 (SCALIA, J., dissenting); *Morrison*, 529 U. S., at 626–627; *Morgan*, 384 U. S., at 666–667, 669, 670–671 (Harlan, J., dissenting).[4] I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. See *Morrison*, *supra*, at 625–626. And I would not, of course, permit any congressional measures that violate other provisions of the Constitution. When those requirements have been met, however, I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.

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[4] Dicta in one of our earlier cases seemed to suggest that even *nonprophylactic* provisions could not be adopted under § 5 except in response to a State's constitutional violations:

"When the State has been guilty of no violation of [the Fourteenth Amendment's] provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress." *United States* v. *Harris*, 106 U. S. 629, 639 (1883).

I do not see the textual basis for this interpretation.

I shall also not subject to "congruence and proportionality" analysis congressional action under § 5 that is *not* directed to racial discrimination. Rather, I shall give full effect to that action when it consists of "enforcement" of the provisions of the Fourteenth Amendment, within the broad but not unlimited meaning of that term I have described above. When it goes beyond enforcement to prophylaxis, however, I shall consider it ultra vires. The present legislation is plainly of the latter sort.

* * *

Requiring access for disabled persons to all public buildings cannot remotely be considered a means of "enforcing" the Fourteenth Amendment. The considerations of long accepted practice and of policy that sanctioned such distortion of language where state racial discrimination is at issue do not apply in this field of social policy far removed from the principal object of the Civil War Amendments. "The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'" *United States* v. *12 200-ft. Reels of Super 8MM. Film*, 413 U. S. 123, 127 (1973) (Burger, C. J., for the Court) (footnote omitted). It is past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion. For these reasons, I respectfully dissent from the judgment of the Court.

JUSTICE THOMAS, dissenting.

I join THE CHIEF JUSTICE's dissent. I agree that Title II of the Americans with Disabilities Act of 1990 cannot be a

congruent and proportional remedy to the States' alleged practice of denying disabled persons access to the courts. Not only did Congress fail to identify any evidence of such a practice when it enacted the ADA, *ante*, at 541–548, Title II regulates far more than the provision of access to the courts, *ante*, at 548–554. Because I joined the dissent in *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721 (2003), and continue to believe that *Hibbs* was wrongly decided, I write separately only to disavow any reliance on *Hibbs* in reaching this conclusion.

Syllabus

GRUPO DATAFLUX *v.* ATLAS GLOBAL GROUP, L. P., ET AL.

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

No. 02–1689. Argued March 3, 2004—Decided May 17, 2004

Respondent Atlas Global Group, L. P., a limited partnership created under Texas law, filed a state-law suit against petitioner, a Mexican corporation, in federal court, alleging diversity jurisdiction. After the jury returned a verdict for Atlas, but before entry of judgment, petitioner moved to dismiss for lack of subject-matter jurisdiction because the parties were not diverse at the time the complaint was filed. In granting the motion, the Magistrate Judge found that, as a partnership, Atlas was a Mexican citizen because two of its partners, also respondents, were Mexican citizens at the time of filing; and that the requisite diversity was absent because petitioner was also a Mexican citizen. On appeal, Atlas urged the Fifth Circuit to disregard the diversity failure at the time of filing because the Mexican partners had left Atlas before the trial began and, thus, diversity existed thereafter. Relying on *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, the Fifth Circuit held that the conclusiveness of citizenship at the time of filing is subject to an exception where, as here, the jurisdictional error was not identified until after the jury's verdict and the postfiling change in the partnership cured the jurisdictional defect before it was identified.

Held: A party's postfiling change in citizenship cannot cure a lack of subject-matter jurisdiction that existed at the time of filing in a diversity action. This Court has long adhered to the rule that subject-matter jurisdiction in diversity cases depends on the state of facts that existed at the time of filing. *Caterpillar*'s statement that "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming," 519 U. S., at 75, did not augur a new approach to deciding whether a jurisdictional defect has been cured. The jurisdictional defect *Caterpillar* addressed had been cured by the dismissal of the party that had destroyed diversity, a curing method that had long been an exception to the time-of-filing rule. This Court has never approved a deviation from the longstanding rule that "[w]here there is *no* change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." *Conolly* v. *Taylor*, 2 Pet. 556, 565 (emphasis added). Dismissal for lack of subject-matter jurisdiction is the only

option available here. Allowing a citizenship change in the partnership to cure the jurisdictional defect existing at the time of filing would contravene the *Conolly* principle. Apart from breaking with this Court's longstanding precedent, holding that "finality, efficiency, and judicial economy" can justify suspension of the time-of-filing rule would create an exception of indeterminate scope that is bound to produce costly collateral litigation. Pp. 570–582.

312 F. 3d 168, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 582.

William J. Boyce argued the cause for petitioner. With him on the briefs were *Warren S. Huang* and *Mark A. Robertson.*

Roger B. Greenberg argued the cause for respondents. With him on the brief was *Gerardo Garcia.*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a party's post-filing change in citizenship can cure a lack of subject-matter jurisdiction that existed at the time of filing in an action premised upon diversity of citizenship. See 28 U. S. C. § 1332.

I

Respondent Atlas Global Group, L. P., is a limited partnership created under Texas law. In November 1997, Atlas filed a state-law suit against petitioner Grupo Dataflux, a Mexican corporation, in the United States District Court for the Southern District of Texas. The complaint contained claims for breach of contract and *in quantum meruit*, seeking over $1.3 million in damages. It alleged that "[f]ederal jurisdiction is proper based upon diversity jurisdiction pursuant to 28 U. S. C. § 1332(a), as this suit is between a Texas citizen [Atlas] and a citizen or subject of Mexico [Grupo Da-

taflux]."[1] App. 19a (Complaint ¶ 3). Pretrial motions and discovery consumed almost three years. In October 2000, the parties consented to a jury trial presided over by a Magistrate Judge. On October 27, after a 6-day trial, the jury returned a verdict in favor of Atlas awarding $750,000 in damages.

On November 18, before entry of the judgment, Dataflux filed a motion to dismiss for lack of subject-matter jurisdiction because the parties were not diverse at the time the complaint was filed. See Fed. Rules Civ. Proc. 12(b)(1), (h)(3). The Magistrate Judge granted the motion. The dismissal was based upon the accepted rule that, as a partnership, Atlas is a citizen of each State or foreign country of which any of its partners is a citizen. See *Carden* v. *Arkoma Associates*, 494 U. S. 185, 192–195 (1990). Because Atlas had two partners who were Mexican citizens at the time of filing, the partnership was a Mexican citizen. (It was also a citizen of Delaware and Texas based on the citizenship of its other partners.) And because the defendant, Dataflux, was a Mexican corporation, aliens were on both sides of the case, and the requisite diversity was therefore absent. See *Mossman* v. *Higginson*, 4 Dall. 12, 14 (1800).

On appeal, Atlas did not dispute the finding of no diversity at the time of filing. It urged the Court of Appeals to disregard this failure and reverse dismissal because the Mexican partners had left the partnership in a transaction consummated the month before trial began. Atlas argued that, since diversity existed when the jury rendered its verdict, dismissal was inappropriate. The Fifth Circuit agreed. 312 F. 3d 168, 174 (2002). It acknowledged the general rule that, for purposes of determining the existence of diversity

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[1] Title 28 U. S. C. § 1332(a)(2) provides:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs, and is between . . .

"citizens of a State and citizens or subjects of a foreign state."

jurisdiction, the citizenship of the parties is to be determined with reference to the facts as they existed at the time of filing. *Id.*, at 170. However, relying on our decision in *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61 (1996), it held that the conclusiveness of citizenship at the time of filing was subject to exception when the following conditions are satisfied:

> "(1) [A]n action is filed or removed when constitutional and/or statutory jurisdictional requirements are not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling has been made by the court, and (3) before the verdict is rendered, or ruling is issued, the jurisdictional defect is cured." 312 F. 3d, at 174.

The opinion strictly limited the exception as follows: "If at any point prior to the verdict or ruling, the issue is raised, the court must apply the general rule and dismiss regardless of subsequent changes in citizenship." *Ibid.*

The jurisdictional error in the present case not having been identified until after the jury returned its verdict; and the postfiling change in the composition of the partnership having (in the Court's view) cured the jurisdictional defect; the Court reversed and remanded with instructions to the District Court to enter judgment in favor of Atlas. *Ibid.* We granted certiorari. 540 U. S. 944 (2003).

II

It has long been the case that "the jurisdiction of the court depends upon the state of things at the time of the action brought." *Mollan* v. *Torrance*, 9 Wheat. 537, 539 (1824). This time-of-filing rule is hornbook law (quite literally[2])

[2] See, *e. g.*, J. Friedenthal, M. Kane, & A. Miller, Civil Procedure 27 (3d ed. 1999); C. Wright & M. Kane, Law of Federal Courts 173 (6th ed. 2002). See also 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3608, p. 452 (1984).

taught to first-year law students in any basic course on federal civil procedure. It measures all challenges to subject-matter jurisdiction premised upon diversity of citizenship against the state of facts that existed at the time of filing—whether the challenge be brought shortly after filing, after the trial, or even for the first time on appeal. (Challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment. See *Capron* v. *Van Noorden*, 2 Cranch 126 (1804).)

We have adhered to the time-of-filing rule regardless of the costs it imposes. For example, in *Anderson* v. *Watt*, 138 U. S. 694 (1891), two executors of an estate, claiming to be New York citizens, had brought a diversity-based suit in federal court against defendants alleged to be Florida citizens. When it later developed that two of the defendants were New York citizens, the plaintiffs sought to save jurisdiction by revoking the letters testamentary for one executor and alleging that the remaining executor was in fact a British citizen. The Court rejected this attempted postfiling salvage operation, because at the time of filing the executors included a New Yorker. *Id.*, at 708. It dismissed the case for want of jurisdiction, even though the case had been filed about 5½ years earlier, the trial court had entered a decree ordering land to be sold 4 years earlier, the sale had been made, exceptions had been filed and overruled, and the case had come to the Court on appeal from the order confirming the land sale. *Id.*, at 698. Writing for the Court, Chief Justice Fuller adhered to the principle set forth in *Conolly* v. *Taylor*, 2 Pet. 556, 565 (1829), that "jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." "[J]urisdiction," he reasoned, "could no more be given . . . by the amendment than if a citizen of Florida had sued another in

that court and subsequently sought to give it jurisdiction by removing from the State." 138 U. S., at 708.[3]

It is uncontested that application of the time-of-filing rule to this case would require dismissal, but Atlas contends that this Court "should accept the very limited exception created by the Fifth Circuit to the time-of-filing principle." Brief for Respondents 2. The Fifth Circuit and Atlas rely on our statement in *Caterpillar*, *supra*, at 75, that "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming." This statement unquestionably provided the *ratio decidendi* in *Caterpillar*, but it did not augur a new approach to deciding whether a jurisdictional defect has been cured.

Caterpillar broke no new ground, because the jurisdictional defect it addressed had been cured by the dismissal of the party that had destroyed diversity. That method of curing a jurisdictional defect had long been an exception to the time-of-filing rule. "[T]he question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether . . . they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights may be made, the jurisdiction of the court should be retained and the suit dismissed as to them." *Horn* v. *Lockhart*, 17 Wall. 570, 579 (1873). Federal Rule of Civil Procedure 21 provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." By now, "it is

[3] The dissent asserts that *Anderson* is "not altogether in tune with *Caterpillar* and *Newman-Green*," *post*, at 591, n. 7 (opinion of GINSBURG, J.), but the cases can easily be harmonized. *Anderson* did not, as the dissent suggests, refuse to give diversity-perfecting effect to the dismissal of an independent severable party; it refused to give that effect to the alteration of a coexecutorship into a lone executorship—much as we decline to give diversity-perfecting effect to the alteration of a partnership with diversity-destroying partners into a partnership without diversity-destroying partners.

well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 832 (1989). Indeed, the Court held in *Newman-Green* that courts of appeals also have the authority to cure a jurisdictional defect by dismissing a dispensable nondiverse party. *Id.*, at 837.

Caterpillar involved an unremarkable application of this established exception. Complete diversity had been lacking at the time of removal to federal court, because one of the plaintiffs shared Kentucky citizenship with one of the defendants. Almost three years after the District Court denied a motion to remand, but before trial, the diversity-destroying defendant settled out of the case and was dismissed. The case proceeded to a 6-day jury trial, resulting in judgment for the defendant, Caterpillar, against Lewis. This Court unanimously held that the lack of complete diversity at the time of removal did not require dismissal of the case.

The sum of *Caterpillar*'s jurisdictional analysis was an approving acknowledgment of Lewis's admission that there was "complete diversity, and therefore federal subject-matter jurisdiction, at the time of trial and judgment." 519 U. S., at 73. The failure to explain *why* this solved the problem was not an oversight, because there was nothing novel to explain. The postsettlement dismissal of the diversity-destroying defendant cured the jurisdictional defect just as the dismissal of the diversity-destroying party had done in *Newman-Green.* In both cases, the less-than-complete diversity which had subsisted throughout the action had been converted to complete diversity between the remaining parties to the final judgment. See also *Horn*, *supra*, at 579.

While recognizing that *Caterpillar* is "technically" distinguishable because the defect was cured by the dismissal of a diversity-destroying party, the Fifth Circuit reasoned that

"this factor was not at the heart of the Supreme Court's analysis . . . ." 312 F. 3d, at 172–173. The crux of the analysis, according to the Fifth Circuit, was *Caterpillar*'s statement that "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming." 519 U. S., at 75. This was indeed the crux of analysis in *Caterpillar*, but analysis of a different issue. It related not to cure of the *jurisdictional* defect, but to cure of a *statutory* defect, namely, failure to comply with the requirement of the removal statute, 28 U. S. C. § 1441(a), that there be complete diversity at the time of removal.[4] The argument to which the statement was directed took as its *starting point* that subject-matter jurisdiction had been satisfied: "ultimate satisfaction of the subject-matter jurisdiction requirement ought not swallow up antecedent *statutory* violations." 519 U. S., at 74 (emphasis added). The resulting holding of *Caterpillar*, therefore, is only that a statutory defect—"Caterpillar's failure to meet the § 1441(a) requirement that the case be fit for federal adjudication at the time the removal petition is filed," *id.*, at 73—did not require dismissal once there was no longer any jurisdictional defect.

III

To our knowledge, the Court has never approved a deviation from the rule articulated by Chief Justice Marshall in 1829 that "[w]here there is *no* change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." *Conolly*, 2 Pet., at 565 (emphasis added). Unless the Court is to manufacture a brand-new exception to the time-of-filing rule,

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[4] Title 28 U. S. C. § 1441(a) provides, in relevant part:

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

dismissal for lack of subject-matter jurisdiction is the only option available in this case. The purported cure arose not from a change in the parties to the action, but from a change in the citizenship of a continuing party. Withdrawal of the Mexican partners from Atlas did not change the fact that Atlas, the single artificial entity created under Texas law, remained a party to the action. True, the composition of the partnership, and consequently its citizenship, changed. But allowing a citizenship change to cure the jurisdictional defect that existed at the time of filing would contravene the principle articulated by Chief Justice Marshall in *Conolly*.[5] We decline to do today what the Court has refused to do for the past 175 years.

Apart from breaking with our longstanding precedent, holding that "finality, efficiency, and judicial economy" can justify suspension of the time-of-filing rule would create an exception of indeterminate scope. The Court of Appeals sought to cabin the exception with the statement that "[i]f at any point prior to the verdict or ruling, the [absence of diversity at the time of filing] is raised, the court must apply the general rule and dismiss regardless of subsequent

[5] The dissent acknowledges that "[t]he Court has long applied [Chief Justice] Marshall's time-of-filing rule categorically to postfiling changes that otherwise would *destroy* diversity jurisdiction," *post*, at 583–584, but asserts that "[i]n contrast, the Court has not adhered to a similarly steady rule for postfiling changes in the party lineup, alterations that *perfect* previously defective statutory subject-matter jurisdiction," *post*, at 584. The authorities relied upon by the dissent do not call into question the particular aspect of the time-of-filing rule that is at issue in this case—the principle (quoted in text) that "[w]here there is *no* change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit." *Conolly*, 2 Pet., at 565 (emphasis added). The dissent identifies five cases in which the Court permitted a postfiling change to cure a jurisdictional defect. *Post*, at 584. Every one of them involved a *change of party*. The dissent does not identify a single case in which the Court held that a single party's postfiling change of citizenship cured a previously existing jurisdictional defect.

changes in citizenship." 312 F. 3d, at 174. This limitation is unsound in principle and certain to be ignored in practice.

It is unsound in principle because there is no basis in reason or logic to dismiss preverdict if in fact the change in citizenship has eliminated the jurisdictional defect. Either the court has jurisdiction at the time the defect is identified (because the parties are diverse at that time) or it does not (because the postfiling citizenship change is irrelevant). If the former, then dismissal is inappropriate; if the latter, then retention of jurisdiction postverdict is inappropriate.

Only two escapes from this dilemma come to mind, neither of which is satisfactory. First, one might say that it is not *any* change in party citizenship that cures the jurisdictional defect, but only a change that remains unnoticed until the end of trial. That is not so much a logical explanation as a restatement of the illogic that produces the dilemma. There is no conceivable reason why the jurisdictional deficiency which continues despite the citizenship change should suddenly disappear upon the rendering of a verdict. Second, one might say that there never was a cure, but that the party who failed to object before the end of trial forfeited his objection. This is logical enough, but comes up against the established principle, reaffirmed earlier this Term, that "a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct." *Kontrick* v. *Ryan*, 540 U. S. 443, 456 (2004). "A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Id.*, at 455. Because the Fifth Circuit's attempted limitation upon its new exception makes a casualty either of logic or of this Court's jurisprudence, there is no principled way to defend it.

And principled or not, the Fifth Circuit's artificial limitation is sure to be discarded in practice. Only 8% of diversity cases concluded in 2003 actually went to trial, and the median time from filing to trial disposition was nearly two years.

See Administrative Office of the United States Courts, Statistics on Diversity Filings and Terminations in District Courts for Calendar Year 2003 (on file with the Clerk of Court). In such a litigation environment, an approach to jurisdiction that focuses on efficiency and judicial economy cannot possibly be held to the line drawn by the Court of Appeals. As Judge Garza observed in his dissent:

> "[T]here is no difference in efficiency terms between the jury verdict and, for example, the moment at which the jury retires. Nor, for that matter, is there a large difference between the verdict and mid-way through the trial. . . . Indeed, in complicated cases requiring a great deal of discovery, the parties and the court often expend tremendous resources long before the case goes to trial." 312 F. 3d, at 177.

IV

The dissenting opinion rests on two principal propositions: (1) the jurisdictional defect in this case was cured by a change in the composition of the partnership; and (2) refusing to recognize an exception to the time-of-filing rule in this case wastes judicial resources, while creating an exception does not. We discuss each in turn.

A

Unlike the dissent, our opinion does not turn on whether the jurisdictional defect here contained at least "minimal diversity."[6] Regardless of how one characterizes the ac-

[6] The answer to the "minimal diversity" question is not as straightforward as the dissent's analysis suggests. We understand "minimal diversity" to mean the existence of at least *one* party who is diverse in citizenship from one party on the other side of the case, even though the extraconstitutional "complete diversity" required by our cases is lacking. It is possible, though far from clear, that one can have opposing parties in a two-party case who are cocitizens, and yet have minimal Article III jurisdiction because of the multiple citizenship of one of the parties. Although the Court has previously said that minimal diversity requires "two

knowledged jurisdictional defect, it was never cured. The only two ways in which one could conclude that it had been cured would be either (1) to acknowledge that a party's post-filing change of citizenship *can* cure a time-of-filing jurisdictional defect, or (2) to treat a change in the composition of a partnership like a change in the parties to the action. The Court has never, to our knowledge, done the former; and not even the dissent suggests that it ought to do so in this case.[7] The dissent diverges from our analysis by adopting the latter approach, stating that "this case seems . . . indistinguishable from one in which there is a change in the parties to the action." *Post*, at 591 (internal quotation marks omitted).

This equation of a dropped partner with a dropped party is flatly inconsistent with *Carden*. The dissent in *Carden* sought to apply a "real party to the controversy" approach to determine which partners counted for purposes of jurisdictional analysis. The *Carden* majority rejected that ap-

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adverse parties [who] are not co-citizens," *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 531 (1967), the Court did not have before it a multiple-citizenship situation.

The dissent contends that the existence of minimal diversity was clear because the rule of *Carden* v. *Arkoma Associates*, 494 U. S. 185 (1990), is not required by the Constitution. *Post*, at 588–590. But neither is the rule that a corporation is "a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U. S. C. § 1332(c)(1). We do not understand the inquiry into minimal diversity to proceed by hypothetically rewriting, to whatever the Constitution might allow that would support Article III jurisdiction in the particular case, all laws bearing upon the diversity question. Whether the Constitution requires it or not, *Carden is* the subconstitutional rule by which we determine the citizenship of a partnership—and in this case it leads to the conclusion that there were *no* opposing parties who were not cocitizens.

[7] The dissent appears to leave open the possibility that this line could be crossed in a future case, contrasting *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61 (1996), not with all cases involving a party's change of citizenship, but with the polar extreme of "a plaintiff who moves to another State to create diversity not even minimally present when the complaint was filed," *post*, at 590.

proach, reasoning that "[t]he question presented today is not which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship . . . . There are *not* . . . multiple respondents before the Court, but only *one:* the artificial entity called Arkoma Associates, a limited partnership." 494 U. S., at 188, n. 1. Today's dissent counters that "[w]hile a partnership may be characterized as a single artificial entity, a district court determining whether diversity jurisdiction exists looks to the citizenship of the several persons composing [the entity]." *Post*, at 591, n. 8 (internal quotation marks and citations omitted). It is true that the court "looks to" the citizenship of the several persons composing the entity, but it does so for the purpose of determining the citizenship of the entity that is a party, not to determine which citizens who compose the entity are to be treated as parties. See *Carden*, 494 U. S., at 188, n. 1 ("[W]hat we must decide is the . . . question of how the citizenship of that single artificial entity is to be determined"); *id.*, at 195 ("[W]e reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members").[8]

There was from the beginning of this action a single plaintiff (Atlas), which, under *Carden*, was not diverse from the sole defendant (Dataflux). Thus, this case fails to present "two adverse parties [who] are not co-citizens." *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 531 (1967). Contrary to the dissent's characterization, then, this is not a

[8] These statements from *Carden* rebut the dissent's assertion that "an association whose citizenship, for diversity purposes, is determined by aggregating the citizenships of each of its members" could "[w]ith equal plausibility . . . be characterized as an 'aggregation' composed of its members, or an 'entity' comprising its members." *Post*, at 590, n. 6. We think it evident that *Carden* decisively adopted an understanding of the limited partnership as an "entity," rather than an "aggregation," for purposes of diversity jurisdiction. See 494 U. S., at 188, n. 1.

case like *Caterpillar* or *Newman-Green* in which "party lineup changes . . . simply trimmed the litigation down to an ever-present core that met the statutory requirement." *Post*, at 591. Rather, this is a case in which a single party changed its citizenship by changing its internal composition.

The incompatibility with prior law of the dissent's attempt to treat a change in partners like a change in parties is revealed by a curious anomaly: It would produce a case unlike every other case in which dropping a party has cured a jurisdictional defect, in that no judicial action (such as granting a motion to dismiss) was necessary to get the jurisdictional spoilers out of the case. Indeed, judicial action to that end was not even *possible:* The court could hardly have "dismissed" the partners from the partnership to save jurisdiction.[9]

B

We now turn from consideration of the conceptual difficulties with the dissent's disposition to consideration of its practical consequences. The time-of-filing rule is what it is precisely because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful. The dissent would have it that the time-of-filing rule applies to establish that a court has jurisdiction (and to protect that jurisdiction from later destruction), but does *not* apply to establish that a court lacks jurisdiction (and to prevent postfiling changes that perfect jurisdiction). *Post*, at 583–584. But whether destruction or perfection of jurisdiction is at issue, the policy goal

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[9] An additional anomaly, under the particular facts of the present case, is that the two individual Mexican partners, whom the dissent treats *like parties* for purposes of enabling their withdrawal to perfect jurisdiction, were brought into the litigation personally by the court's granting of Dataflux's motion to add them as parties for purposes of Dataflux's counterclaim. The motion was made and granted under Federal Rule of Civil Procedure 13(h), which applies only to "[p]ersons *other than* those made parties to the original action." (Emphasis added.)

of minimizing litigation over jurisdiction is thwarted whenever a new exception to the time-of-filing rule is announced, arousing hopes of further new exceptions in the future. Cf. *Dretke* v. *Haley*, *ante*, at 394–395 (recognizing that the creation of exceptions to judge-made procedural rules will enmesh the federal courts in litigation testing the boundaries of each new exception). That litigation-fostering effect would be particularly strong for a new exception derived from such an expandable concept as the "efficiency" rationale relied upon by the dissent.

The dissent argues that it is essential to uphold jurisdiction in this and similar cases because dismissal followed by refiling condemns the parties to "an almost certain replay of the case, with, in all likelihood, the same ultimate outcome." *Post*, at 595. But if the parties expect "the same ultimate outcome," they will not waste time and resources slogging through a new trial. They will settle, with the jury's prior verdict supplying a range for the award. Indeed, settlement instead of retrial will probably occur even if the parties do *not* expect the same ultimate outcome. When the stakes remain the same and the players have been shown each other's cards, they will not likely play the hand all the way through just for the sake of the game. And finally, even if the parties run the case through complete "relitigation in the very same District Court in which it was first filed in 1997," *post*, at 598, the "waste" will not be great. Having been through three years of discovery and pretrial motions in the current case, the parties would most likely proceed promptly to trial.

Looked at in its overall effect, and not merely in its application to the sunk costs of the present case, it is the dissent's proposed rule that is wasteful. Absent uncertainty about jurisdiction (which the dissent's readiness to change settled law would preserve for the future), the obvious course, for a litigant whose suit was dismissed as Atlas's was, would have been immediately to file a new action. That is in fact what

Atlas did, though it later dismissed the new case without prejudice. Had that second suit been pursued instead of this one, there is little doubt that the dispute would have been resolved on the merits by now. Putting aside the time that has passed between the Fifth Circuit's decision and today, there were two years of wasted time between dismissal of the action and the Fifth Circuit's reversal of that dismissal—time that the parties could have spent litigating the merits (or engaging in serious settlement talks) instead of litigating jurisdiction.

Atlas and Dataflux have thus far litigated this case for more than 6½ years, including 3½ years over a conceded jurisdictional defect. Compared with the *one month* it took the Magistrate Judge to apply the time-of-filing rule and *Carden* when the jurisdictional problem was brought to her attention, this waste counsels strongly against any course that would impair the certainty of our jurisdictional rules and thereby encourage similar jurisdictional litigation.

* * *

We decline to endorse a new exception to a time-of-filing rule that has a pedigree of almost two centuries. Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful. The stability provided by our time-tested rule weighs heavily against the approval of any new deviation. The judgment of the Fifth Circuit is reversed.

It is so ordered.

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

When this lawsuit was filed in the United States District Court for the Southern District of Texas in 1997, diversity of citizenship was incomplete among the adverse parties: The plaintiff partnership, Atlas Global Group (Atlas), had five members, including a general partner of Delaware citizenship and two limited partners of Mexican citizenship, App.

98a; the defendant, Grupo Dataflux (Dataflux), was a Mexican corporation with its principal place of business in Mexico, *id.*, at 18a. In a transaction completed in September 2000 unrelated to this lawsuit, all Mexican-citizen partners withdrew from Atlas. *Id.*, at 98a, 122a–123a. Thus, before trial commenced in October 2000, complete diversity existed. Only after the jury returned a verdict favorable to Atlas did Dataflux, by moving to dismiss the case, draw the initial jurisdictional flaw to the District Court's attention. The Court today holds that the initial flaw "still burden[s] and run[s] with the case," *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 70 (1996); see *ante*, at 572–576; consequently, the entire trial and jury verdict must be nullified. In my view, the initial defect here—the original absence of complete diversity—"is not fatal to the ensuing adjudication." *Caterpillar*, 519 U. S., at 64. In accord with the Court of Appeals for the Fifth Circuit, I would leave intact the results of the six-day trial between completely diverse citizens, and would not expose Atlas and the courts to the "exorbitant cost" of relitigation, *id.*, at 77.

I

Chief Justice Marshall, in a pathmarking 1824 opinion, *Mollan* v. *Torrance*, 9 Wheat. 537, 539, instructed "that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events." He did not extract this practical time-of-filing rule from any constitutional or statutory text. In contrast, 18 years earlier, Marshall had derived the complete-diversity rule from the text of the 1789 Judiciary Act, and so stated in *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806). Compare *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 530–531 (1967) (complete-diversity rule is statutory), with 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3608, p. 452 (2d ed. 1984) (time-of-filing rule "represents a policy decision").

The Court has long applied Marshall's time-of-filing rule categorically to postfiling changes that otherwise would *de-*

stroy diversity jurisdiction. See, *e. g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 69 (1987) (SCALIA, J., concurring in part and concurring in judgment); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289–290 (1938); *Mollan*, 9 Wheat., at 539–540. I do not question this consistently applied, altogether sensible refusal to allow a losing party, after summary judgment or an adverse verdict, to assert that all bets are off on the ground that jurisdiction, originally present, was thereafter divested.

In contrast, the Court has not adhered to a similarly steady rule for postfiling party lineup alterations that *perfect* previously defective statutory subject-matter jurisdiction. Compare *Keene Corp.* v. *United States*, 508 U. S. 200, 207–208 (1993) (dismissing suit); *Minneapolis & St. Louis R. Co.* v. *Peoria & Pekin Union R. Co.*, 270 U. S. 580, 586 (1926) (same); *Anderson* v. *Watt*, 138 U. S. 694, 707–708 (1891) (same), with *Caterpillar*, 519 U. S., at 64 (not dismissing suit); *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 837–838 (1989) (same); *Mullaney* v. *Anderson*, 342 U. S. 415, 416–417 (1952) (same); *Horn* v. *Lockhart*, 17 Wall. 570, 579 (1873) (same); *Conolly* v. *Taylor*, 2 Pet. 556, 565 (1829) (same). Instead, the Court has recognized that "untimely compliance," *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 43 (1998), with the complete-diversity rule announced in *Strawbridge* can operate to preserve an adjudication where (1) neither the parties nor the court raised the time-of-filing flaw until after resolution of the case by jury verdict or dispositive court ruling, and (2) prior to that resolution, the jurisdictional defect was cured. See *Caterpillar*, 519 U. S., at 64.

II

A

To state the background of this case in fuller detail, in November 1997, respondent Atlas, a limited partnership,

which then included two Mexican-citizen limited partners and a Delaware-citizen general partner,[1] commenced a federal-court action against Dataflux, a Mexican corporation with its principal place of business in Mexico. 312 F. 3d 168, 169–170 (CA5 2002); App. 18a–19a, 98a; Brief for Petitioner 3. Seeking recovery on contract and *quantum meruit* claims, Atlas erroneously asserted diversity jurisdiction under 28 U. S. C. § 1332(a). 312 F. 3d, at 169–170; App. 18a–19a.[2] Dataflux's answer admitted diversity jurisdiction even though, in fact, complete diversity did not exist given the altogether evident Mexican citizenship of both Dataflux and

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[1] At the time of filing, Atlas comprised (1) general partner Bahia Management, L. L. C., a Texas limited liability company (LLC), which included Mexican-citizen members; (2) general partner Capital Financial Partner, Inc., a Delaware corporation; (3) limited partner HIL Financial Holdings, L. P., a limited partnership with Texas and Delaware citizenship; (4) limited partner Francisco Llamosa, a Mexican citizen; and (5) limited partner Oscar Robles, another Mexican citizen. Brief for Petitioner 3; App. 98a. At least arguably, the general partner Bahia Management, like the two limited partners of Mexican citizenship, initially spoiled diversity. Although the Court has never ruled on the issue, Courts of Appeals have held the citizenship of each member of an LLC counts for diversity purposes. See, *e. g.*, *GMAC Commercial Credit LLC* v. *Dillard Dept. Stores*, 357 F. 3d 827, 829 (CA8 2004); *Cosgrove* v. *Bartolotta*, 150 F. 3d 729, 731 (CA7 1998). Bahia withdrew from Atlas at the same time as the two Mexican-citizen limited partners withdrew. App. 98a.

[2] Section 1332(a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State and citizens or subjects of a foreign state;

"(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

"(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

"For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled."

two of Atlas' limited partners. 312 F. 3d, at 170; App. 35a; see *Carden* v. *Arkoma Associates*, 494 U. S. 185, 195–196 (1990) (federal court must look to citizenship of partnership's limited, as well as its general, partners to determine whether there is complete diversity). In addition, one of Atlas' general partners at least arguably ranked as a Mexican citizen. See *supra*, at 585, n. 1.

In September 2000, several weeks before trial, and unrelated to the claims in suit, Atlas completed a transaction in which all Mexican-citizen partners withdrew from the partnership. App. 14a, 122a–123a, 126a–128a; Brief for Appellants in No. 01–20245 (CA5), p. 7. After that reorganization, it is not disputed, complete diversity existed between the adverse parties. Brief for Petitioner 2; Brief for Respondents 2.

Prevailing at a six-day trial, Atlas gained a jury verdict of $750,000. 312 F. 3d, at 170. Dataflux then promptly moved to dismiss the action for lack of subject-matter jurisdiction, raising, for the first time, the original, but pretrial-cured, absence of complete diversity. App. 42a–49a. The District Court, which had not yet entered judgment on the jury's verdict, granted Dataflux's motion; simultaneously, the court "ordered that the statute of limitations for the claims alleged in this case [be] stayed from November 18, 1997, the date this case was filed, until ten days after the entry of this order [December 6, 2000], to allow plaintiff to refile this case in the appropriate forum." App. to Pet. for Cert. 20a–22a (capitalization in original omitted). The Court of Appeals for the Fifth Circuit reversed the District Court's judgment and remanded the case to that court. 312 F. 3d, at 173–174. Viewing *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826 (1989), as "instructive," and *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61 (1996), as "compel[ling]," the Court of Appeals found it unnecessary and inappropriate to "erase the result of [the trial and verdict] by requiring [the parties] to relitigate their claims." 312 F. 3d, at 171–174.

Caterpillar and *Newman-Green* are indeed the decisions most closely on point. In *Caterpillar*, plaintiff Lewis, a Kentucky citizen, filed a civil action in state court against two corporate defendants—Caterpillar Inc., a citizen of both Delaware and Illinois, and Whayne Supply Company, a Kentucky citizen. 519 U. S., at 64–65. Several months later, Liberty Mutual, a Massachusetts corporation, intervened as a plaintiff, asserting claims against both defendants. *Id.*, at 65. After Lewis settled with Whayne Supply, Caterpillar filed a notice of removal. *Ibid.* Lewis moved to remand the case to the state court on the ground that Liberty Mutual had not settled its claim against Whayne Supply, and that Whayne Supply's continuing presence as a defendant in the lawsuit defeated complete diversity. *Id.*, at 65–66. The District Court denied Lewis' motion to remand. *Id.*, at 66. Liberty Mutual and Whayne Supply subsequently settled, and the District Court dismissed Whayne Supply from the suit. *Ibid.*

The case proceeded to a jury trial, which yielded a verdict and corresponding judgment for Caterpillar. *Id.*, at 66–67. On appeal to the Court of Appeals for the Sixth Circuit, Lewis prevailed. *Id.*, at 67. Observing that, at the time of removal, diversity was incomplete, the appellate court accepted Lewis' argument that dismissal of the case for want of subject-matter jurisdiction was obligatory. *Ibid.* In turn, this Court reversed the Court of Appeals' judgment: "[A] district court's error in failing to remand a case improperly removed," this Court held unanimously, "is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id.*, at 64.

Newman-Green concerned a state-law action filed in Federal District Court by an Illinois corporation against a Venezuelan corporation, four Venezuelan citizens, and a United States citizen domiciled in Venezuela. 490 U. S., at 828. After the District Court granted partial summary judgment for the defendants, the plaintiff appealed. *Ibid.* *Sua*

sponte, the Court of Appeals for the Seventh Circuit inquired into the basis for federal jurisdiction over the case, and concluded that the presence of the Venezuela-domiciled United States citizen spoiled complete diversity. *Id.*, at 828–829.[3] To cure the defect, the three-judge panel granted the plaintiff's motion to drop the nondiverse party, citing Federal Rule of Civil Procedure 21. *Newman-Green*, 490 U. S., at 829.[4] But the full Seventh Circuit, empaneled en banc, concluded that an appellate court lacks such authority. *Id.*, at 830–831. This Court reversed that determination. Federal appellate courts, the Court held, "posses[s] the authority to grant motions to dismiss dispensable nondiverse parties." *Id.*, at 836.[5]

As in *Caterpillar* and *Newman-Green*, minimal diversity within Article III's compass existed in this case from the start. See U. S. Const., Art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); *State Farm Fire & Casualty Co.*, 386 U. S., at 531 ("Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."). The jurisdictional flaw—in *Caterpillar*, *Newman-Green*, and this case—was the absence of complete diversity, required by the governing statute,

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[3] A United States citizen with no domicil in any State ranks as a stateless person for purposes of 28 U. S. C. § 1332(a)(3), providing for suits between "citizens of different States and in which citizens or subjects of a foreign state are additional parties," and § 1332(a)(2), authorizing federal suit when "citizens of a State" sue "citizens or subjects of a foreign state." See *Newman-Green*, 490 U. S., at 828.

[4] Rule 21, governing proceedings in district courts, provides in relevant part: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

[5] After our decision, the Seventh Circuit dismissed the nondiverse defendant and remanded the case to the District Court. *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 734 F. Supp. 1470, 1472 (ND Ill. 1990).

§ 1332(a), when the action commenced, a flaw eliminated at a later stage of the proceedings. Cf. *ante*, at 573 (describing *Caterpillar* and *Newman-Green* as cases in which "the less-than-complete diversity which had subsisted throughout the action had been converted to complete diversity between the remaining parties to the final judgment").

It bears clarification why this case, in common with *Caterpillar* and *Newman-Green*, met the constitutional requirement of minimal diversity at the onset of the litigation. True, Atlas' case involves a partnership, while the diversity spoiler in *Caterpillar* was a corporation and in *Newman-Green*, an individual. See *supra*, at 587–588 and this page. In *Carden* v. *Arkoma Associates*, this Court held that, in determining a partnership's qualification to sue or be sued under § 1332, the citizenship of each partner, whether general or limited, must be attributed to the partnership. See 494 U. S., at 195–196.

Notably, however, the Court did not suggest in *Carden* that minimal diversity, which is adequate for Article III purposes, would be absent when some, but not all, partners composing the "single artificial entity," *id.*, at 188, n. 1, share the opposing party's citizenship. To the contrary, the Court emphasized in *Carden* that Congress could, "by legislation," determine which of the "wide assortment of artificial entities possessing different powers and characteristics . . . is entitled to be considered a 'citizen' for diversity purposes, and which of their members' citizenship is to be consulted." *Id.*, at 197. Congress would be disarmed from making such determinations—for example, from legislating that only the citizenship of general partners counts for § 1332 purposes—if Article III itself commanded that each partner's citizenship, limited and general partner's alike, inescapably adheres to the partnership entity. See *ibid.;* cf. *Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U. S. 145, 153 (1965) (assimilating unincorporated labor unions to the status of corporations for diversity purposes, instead of counting each member's citizenship,

is a matter "suited to the legislative and not the judicial branch"). Just as Article III did not dictate the *Carden* decision, so the question here is plainly subconstitutional in character.

B

Petitioner Dataflux maintains, and the Court agrees, see *ante*, at 573–574, that this case is not properly bracketed with *Caterpillar*, where the subtraction of a party yielded complete diversity; instead, according to Dataflux, this case should be aligned with those in which an individual plaintiff initially shared citizenship with a defendant, and then, post-commencement of the litigation, moved to another State. See Brief for Petitioner 12–14, and n. 9, 23–24; Tr. of Oral Arg. 8–11. In my view, this case ranks with *Caterpillar* and is not equivalent to the case of a plaintiff who moves to another State to create diversity not even minimally present when the complaint was filed.

It has long been clear that "if a citizen sue[d] a citizen of the same state, he [could not] give jurisdiction by removing himself, and becoming a citizen of a different state." *Conolly*, 2 Pet., at 565.[6] When that sole plaintiff files suit in federal court, there is no semblance of Article III diversity; his move to another State manufactures diversity of citizenship that did not exist even minimally at the outset. *Caterpillar* and *Newman-Green*, by contrast, involved parties who were minimally, but not completely, diverse at the time federal-court proceedings began. *Caterpillar*, 519 U. S., at

[6] In *Conolly*, a party "was struck out of the bill before the cause was brought before the court." 2 Pet., at 564. Since *Conolly*, the Court has addressed the time-of-filing rule in a variety of cases in which the party lineup changed during the pendency of the litigation. See *supra*, at 584; *ante*, at 575, n. 5. The Court, however, has not previously ruled on a case resembling the controversy at hand, *i. e.*, one involving an association whose citizenship, for diversity purposes, is determined by aggregating the citizenships of each of its members. With equal plausibility, such an association could be characterized as an "aggregation" composed of its members, or an "entity" comprising its members.

64–65; *Newman-Green*, 490 U. S., at 828; *supra*, at 587–589. The postcommencement party lineup changes in *Caterpillar* and *Newman-Green* simply trimmed the litigation down to an ever-present core that met the statutory requirement.[7]

The same holds true for Atlas. No partner moved. Instead, those that spoiled statutory diversity dropped out of the case as did the nondiverse parties in *Caterpillar* and *Newman-Green*. See *supra*, at 587–589. In essence, then, this case seems to me indistinguishable from one in which there is "a change in the parties to the action." *Ante*, at 575.[8] As the Court correctly states, the crux of our disagreement lies in whether to "treat a change in the composition of a partnership like a change in the parties to the action." *Ante*, at 578. In common with Dataflux, the Court draws no distinction between an individual plaintiff who changes her citizenship and an enterprise composed of diverse persons, like Atlas, from which one or more original

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[7] *Anderson* v. *Watt*, 138 U. S. 694 (1891), see *ante*, at 571–572, is not altogether in tune with *Caterpillar* and *Newman-Green*. In *Anderson*, coexecutors sued for the benefit of an estate. 138 U. S., at 703. One of the coexecutors, it turned out, shared common citizenship with two of the defendants. To salvage the adjudication, the nondiverse coexecutor sought to withdraw both as executor and as plaintiff, but the Court declined to give effect to the postfiling change in the party lineup. *Id.*, at 708. The Court would harmonize *Anderson* with *Caterpillar* and *Newman-Green* by attributing entity, rather than aggregate, status to the *Anderson* coexecutors. *Ante*, at 572, n. 3. But that characterization is hardly preordained. If, as it seems to me, either characterization would be plausible, *Caterpillar* and *Newman-Green* suggest that the one preserving the adjudication ought to hold sway.

[8] While a partnership may be characterized as a "single artificial entity," *Carden* v. *Arkoma Associates*, 494 U. S. 185, 188, n. 1 (1990), a district court determining whether diversity jurisdiction exists looks "to the citizenship of the several persons composing [the entity]," *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 456 (1900). *I. e.*, the district court looks to the citizenship of each general and limited partner, just as in multiparty litigation the court looks to the citizenship of each litigant joined on the same side. See *supra*, at 585–586.

members exit. See *ante,* at 575 ("The purported cure [in this case] arose not from a change in the parties to the action, but from a change in the citizenship of a continuing party."). Resisting that far-from-inevitable alignment, I would bracket the multimember enterprise with partially changed membership together with multiparty litigation from which some of the originally joined parties drop. I would do so on the ground that in procedural rulings generally, even on questions of a court's adjudicatory authority in particular, salvage operations are ordinarily preferable to the wrecking ball.

C

Petitioner Dataflux sees *Caterpillar* as a ruling limited to removal cases, and *Newman-Green* as limited to court-ordered dismissals of nondiverse parties. See 312 F. 3d, at 173–174; Brief for Petitioner 23, 26–27; Reply Brief for Petitioner 11; Tr. of Oral Arg. 15–16. True, the court's attention may be attracted to the jurisdictional question by a motion to remand a removed case or a motion to drop a party. But, as the Fifth Circuit observed, "the principle of these cases is [not] limited to only the exact same procedural scenarios." 312 F. 3d, at 173. It would be odd, indeed, to hold, as Dataflux's argument suggests, that jurisdictional flaws fatal to original jurisdiction are nonetheless tolerable when removal jurisdiction is exercised. Removal jurisdiction, after all, is totally dependent on satisfaction of the requirements for original jurisdiction. See 28 U. S. C. § 1441(a) ("any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to [a] district court of the United States"). The "considerations of finality, efficiency, and economy" central to the *Caterpillar* Court's treatment of a failure to satisfy "the [complete-diversity] requirement of the removal statute, 28 U. S. C. § 1441(a)," *ante,* at 574 (internal quotation marks omitted), have equal force in appraising the "*statutory* defect" here, *ibid.* (emphasis in

original), *i. e.*, Atlas' failure initially to satisfy the complete-diversity requirement of § 1332(a).

Moreover, by whatever route a case arrives in federal court, it is the obligation of both district court and counsel to be alert to jurisdictional requirements. See, *e. g., Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986) ("every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it" (quoting *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934))); *United Republic Ins. Co., in Receivership* v. *Chase Manhattan Bank*, 315 F. 3d 168, 170–171 (CA2 2003) ("We have . . . urged counsel and district courts to treat subject matter jurisdiction as a threshold issue for resolution . . . ."); *United States* v. *Southern California Edison Co.*, 300 F. Supp. 2d 964, 972 (ED Cal. 2004) (district courts have an "independent obligation to address [subject-matter jurisdiction] *sua sponte*" (internal quotation marks omitted)); *Trawick* v. *Asbury MS Gray-Daniels, LLC*, 244 F. Supp. 2d 697, 699 (SD Miss. 2003) (criticizing counsel for failing to do the "minimal amount of research" that would have revealed the absence of subject-matter jurisdiction). But cf. *ante*, at 580 (time-of-filing rule should be rigidly applied when "no judicial action . . . was necessary to get the jurisdictional spoilers out of the case"). That obligation is equally applicable to cases initially filed in federal court and cases removed from state court to federal court.

In short, the Fifth Circuit correctly comprehended the essential teaching of *Caterpillar* and *Newman-Green:* The generally applicable time-of-filing rule is displaced when (1) a "jurisdictional requiremen[t] [is] not met, (2) neither the parties nor the judge raise the error until after a jury verdict has been rendered, or a dispositive ruling [typically, a grant of summary judgment] has been made by the court, and (3) before the verdict is rendered, or [the dispositive] ruling

is issued, the jurisdictional defect is cured." 312 F. 3d, at 174.[9]

D

The "considerations of finality, efficiency, and economy" the Court found "overwhelming" in *Caterpillar* and *Newman-Green* have undiluted application here. *Caterpillar*, 519 U. S., at 75; see *Newman-Green*, 490 U. S., at 836–837. See also *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 191–192, and n. 5 (2000) (noting stricter approach to standing than to mootness in view of "sunk costs" once a "case has been brought and litigated"). In *Newman-Green*, this Court observed that rigid insistence on the time-of-filing rule, rather than allowing elimination of

[9] According to the majority, it would be "unsound in principle and certain to be ignored in practice" to decline to apply the time-of-filing rule only in those cases where the flaw is drawn to a court's attention after a full adjudication of the case, whether through trial or by a dispositive court ruling. *Ante*, at 575–576. Declining to apply the time-of-filing rule only in those cases, the Court suggests, can be justified only on the theory that "the party who failed to object before the end of trial [or dispositive court ruling] forfeited his objection." *Ante*, at 576 (citing *Kontrick* v. *Ryan*, 540 U. S. 443, 456 (2004)). The time-of-filing rule, however, is a court-created rule, see *supra*, at 583; it is therefore incumbent on the Court to define the contours of that rule's application. The Fifth Circuit's decision rested not on a forfeiture theory; rather, the decision accurately reflected the judicial economy underpinnings of the time-of-filing rule. True, as the Court observes, judicial economy concerns might be pressing even when a case is not fully adjudicated through trial or summary pretrial disposition. See *ante*, at 576–577. When a district court has so fully adjudicated the case, however, there can be no doubt that the "sunk costs to the judicial system," *Friends of Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 192, n. 5 (2000), have become "overwhelming," *Caterpillar Inc.* v. *Lewis*, 519 U. S. 61, 75 (1996). That the rule advanced by the Court of Appeals is underinclusive does not make it "illogic[al]," *ante*, at 576; instead, the limitation makes the rule readily manageable. To hold the time-of-filing rule developed by this Court inapplicable here merely abjures mechanical extension of the rule in favor of responding sensibly to the rule's underlying justifications when those justifications are indisputably present.

the jurisdictional defect by dropping a dispensable party, would mean an almost certain replay of the case, with, in all likelihood, the same ultimate outcome. 490 U. S., at 837.[10] Similarly here, given the October 2000 jury verdict of $750,000 and the unquestioned current existence of complete diversity, Atlas can be expected "simply [to] refile in the District Court" and rerun the proceedings. See *ibid.*[11] No legislative prescription, nothing other than this Court's readiness to cut loose a court-made rule from common sense, accounts for waste of this large order.

The Court hypothesizes that Atlas and Dataflux will now settle to avoid fresh litigation costs. *Ante*, at 581. The majority's forecast, however, ignores the procedural history of

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[10] In stark contrast to today's decision, see *ante*, at 580–582, the *Newman-Green* Court said: "If the entire suit were dismissed, Newman-Green would simply refile in the District Court . . . and submit the discovery materials already in hand. . . . Newman-Green should not be compelled to jump through [such] judicial hoops merely for the sake of hypertechnical jurisdictional purity." 490 U. S., at 837.

[11] The statute of limitations is unlikely to bar the repeat performance given the representation of counsel for both Atlas and Dataflux that "a [Texas] savings statute, assuming Texas law applies, . . . would allow Atlas to refile suit." Tr. of Oral Arg. 22; see *id.*, at 31. See also App. to Pet. for Cert. 22a (District Court order staying "the statute of limitations for the claims alleged in this case"); *supra*, at 586. Although counsel did not provide a citation to the Texas saving statute, I note a provision of that State's law, Tex. Civ. Prac. & Rem. Code Ann. § 16.064 (1997), covering cases originally filed in the wrong forum: "The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if" the first action is dismissed for "lack of jurisdiction." This prescription, described as "remedial in nature," has been "liberally construed." *Vale* v. *Ryan*, 809 S. W. 2d 324, 326 (Tex. App. 1991). Counsel for both Atlas and Dataflux also suggested New York law may apply. See Tr. of Oral Arg. 22, 31. New York has a saving provision that appears to allow refiling just as Texas law would. See N. Y. Civ. Prac. Law § 205(a) (West 2003) ("If an action is timely commenced and is terminated," *e. g.*, for lack of jurisdiction, "the plaintiff . . . may commence a new action . . . within six months . . . .").

this case. Knowing full well the first jury verdict, the parties on two occasions missed clear opportunities to settle: after the District Court's dismissal and after the Court of Appeals' reversal. Instead, the parties "waste[d] time and resources," including 3½ years on a jurisdictional question. *Ibid.* Even with the jurisdictional question resolved in its favor, Dataflux would now weigh against settlement the possibility that a new panel of jurors, and tactical knowledge gleaned from the first trial, could yield a different outcome the second time around. Atlas, too, might decline to settle: It prevailed once in a jury trial, and committed 6½ years to litigation, see *ante*, at 582, a cost that is rational to ignore, but, in practice, hard to sideline. In short, settlement, which depends on the parties' shared estimate of likely litigation outcomes, is hardly guaranteed.

In two respects, there is stronger cause for departure from the time-of-filing rule in Atlas' case than there was in *Caterpillar*. See *supra*, at 587 (discussing *Caterpillar*). First, the *Caterpillar* plaintiff, judgment loser in the federal trial court, had timely but fruitlessly objected to the defendant's improper removal. 519 U. S., at 74. The plaintiff in *Caterpillar*, this Court acknowledged, had done "all that was required to preserve his objection to removal." *Ibid.* Though mindful of the "antecedent statutory violatio[n]," the Court declined to disturb the District Court's final judgment on the merits. *Id.*, at 74–75. The defendant in this case, Dataflux, in seeking to erase the trial and verdict here, resembles the plaintiff in *Caterpillar*, except that Dataflux raised its subject-matter jurisdiction objection only *after* the parties had become completely diverse. Cf. 312 F. 3d, at 170. It is one thing to preserve jurisdictional objections so long as the jurisdictional flaw persists, see *Kontrick* v. *Ryan*, 540 U. S. 443, 455 (2004); *Capron* v. *Van Noorden*, 2 Cranch 126 (1804), quite another to tolerate such an objection after the initial flaw has disappeared from the case.

The Court sustains these outcomes: The *Caterpillar* plaintiff, whose prompt resistance to removal would generally have garnered a remand to the state forum plaintiff had originally selected, is nevertheless bound to an adverse federal-court judgment; the defendant, Dataflux here, after incorrectly conceding federal subject-matter jurisdiction in its answer, see App. 35a, and leaving the record uncorrected until the jury favored the plaintiff, is allowed to return to square one, unburdened by the adverse judgment. There is no little irony in that juxtaposition, all the more so given the absence of any charge of manipulation in this case.

Nor would affirmance of the Fifth Circuit judgment entail a significant risk of manipulation in other cases. Rarely, if ever, will a plaintiff bring suit in federal district court, invoking diversity jurisdiction under § 1332(a), with the knowledge that complete diversity does not exist, but in the hope of a postfiling jurisdiction-perfecting event. Such a plaintiff's anticipation is likely to be thwarted by the court's or the defendant's swift detection of the jurisdictional impediment. Furthermore, a plaintiff who ignores threshold jurisdictional requirements risks sanctions and "the displeasure of a district court whose authority has been improperly invoked." *Caterpillar*, 519 U. S., at 77–78. The Court's fears about the "litigation-fostering effect" of exceptions to the time-of-filing rule, *ante*, at 581, thus appear more imaginary than real. No wave of new jurisdictional litigation is likely, as the federal courts' experience after *Caterpillar* and *Newman-Green* shows.

Also distinguishing the two cases, in *Caterpillar*, the removing defendant "satisfied with only a day to spare the statutory requirement that a diversity-based removal take place within one year of a lawsuit's commencement." 519 U. S., at 65 (citing 28 U. S. C. § 1446(b)). Had that defendant remained in state court pending the settlement that left only completely diverse parties in the litigation, the one-year limitation on removal would have barred the way to federal

court. Nothing in the record or briefing here, however, suggests that Atlas filed precipitously in federal court in the hope of outpacing a fast-running limitations period; on the contrary, Atlas' complaint rested on events that occurred only ten months prior to the commencement of the action, see App. 18a, 22a–23a, and therefore fell comfortably within any applicable time bar.[12] This case thus presents no risk that refusal to treat an initial jurisdictional flaw as determinative will *de facto* extend a limitations period. Cf. 13B Wright, Miller, & Cooper, Federal Practice and Procedure § 3608, p. 459.

In sum, the Court's judgment effectively returns this case for relitigation in the very same District Court in which it was first filed in 1997. Having lost once, Dataflux now gets an unmerited second chance, never mind "just how much time will be lost along the way." *Newman-Green*, 490 U. S., at 837, n. 12 (internal quotation marks omitted). Nothing is gained by burdening our district courts with the task of replaying diversity actions of this kind once they have been fully and fairly tried. Neither the Constitution nor federal

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[12] At oral argument, counsel for Atlas and Dataflux indicated that either New York or Texas law would supply the governing limitations period. See Tr. of Oral Arg. 22, 31. The Texas limitations period for contract and *quantum meruit* actions is four years. See *W. W. Laubach Trust/The Georgetown Corp.* v. *The Georgetown Corp./W. W. Laubach Trust*, 80 S. W. 3d 149, 160 (Tex. App. 2002) ("Breach of contract claims are generally governed by a four year statute of limitations." (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (1986))); *Mann* v. *Jack Roach Bissonnet, Inc.*, 623 S. W. 2d 716, 718 (Tex. Civ. App. 1981) ("[The] suit to recover on quantum meruit . . . is a species of a suit for debt," subject to the limitations period for debt actions contained in § 16.004.). New York allows six years for contract and *quantum meruit* actions. See *In re R. M. Kliment & Frances Halsband, Architects*, 3 App. Div. 3d 143, 147, 770 N. Y. S. 2d 329, 332 (1st Dept., 2004) ("Breach of contract actions are subject generally to a six-year statute of limitations." (internal quotation marks omitted)); *Eisen* v. *Feder*, 307 App. Div. 2d 817, 818, 763 N. Y. S. 2d 279, 280 (1st Dept., 2003) (a six-year statute of limitations applies to *quantum meruit* actions, citing N. Y. Civ. Prac. Law § 213.2 (West 2003)).

statute demands a time-of-filing rule as rigid as the one the Court today installs.

The Court invokes "175 years" of precedent, *ante*, at 575, endorsing a time-of-filing rule that, generally, is altogether sound. On that point, the Court is united. See *supra*, at 583–584. For the class of cases over which we divide—cases involving a postfiling change in the composition of a multimember association such as a partnership—the Court presents no authority impelling the waste today's judgment approves. Even if precedent could provide a basis for the Court's disposition, rules fashioned by this Court for "the just, speedy, and inexpensive determination [of cases]," Fed. Rule Civ. Proc. 1, should not become immutable at the instant of their initial articulation. Rather, they should remain adjustable in light of experience courts constantly gain in handling the cases that troop before them. See *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204, 233 (2002) (GINSBURG, J., dissenting); *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 336–337, and n. 4 (1999) (GINSBURG, J., concurring in part and dissenting in part) (recognizing, in line with contemporary English decisions, dynamic quality of equity jurisprudence in response to evolving social and commercial needs). I would affirm the judgment of the Fifth Circuit, which faithfully and sensibly followed the path the Court marked in *Newman-Green* and *Caterpillar*.

Syllabus

SABRI *v.* UNITED STATES

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

No. 03–44. Argued March 3, 2004—Decided May 17, 2004

After petitioner Sabri offered three separate bribes to a Minneapolis councilman to facilitate construction in the city, Sabri was charged with violating 18 U. S. C. § 666(a)(2), which proscribes bribery of state and local officials of entities, such as Minneapolis, that receive at least $10,000 in federal funds. Before trial, Sabri moved to dismiss the indictment on the ground that § 666(a)(2) is unconstitutional on its face for failure to require proof of a connection between the federal funds and the alleged bribe, as an element of liability. The District Court agreed, but the Eighth Circuit reversed, holding that the absence of such an express requirement was not fatal, and that the statute was constitutional under the Constitution's Necessary and Proper Clause in serving the objects of the congressional spending power.

Held: Section 666(a)(2) is a valid exercise of Congress's Article I authority. Pp. 604–610.

(a) Sabri's "facial" challenge that § 666(a)(2) must, as an element of the offense, require proof of connection with federal money is readily rejected. This Court does not presume the unconstitutionality of all federal criminal statutes from the absence of an explicit jurisdictional hook, and there is no occasion even to consider the need for such a requirement where there is no reason to suspect that enforcing a criminal statute would extend beyond a legitimate interest cognizable under Article I, § 8. Congress has Spending Clause authority to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and corresponding Necessary and Proper Clause authority, Art. I, § 8, cl. 18, to assure that taxpayer dollars appropriated under that power are in fact spent for the general welfare, rather than frittered away in graft or upon projects undermined by graft. See, *e. g.*, *McCulloch* v. *Maryland*, 4 Wheat. 316. Congress does not have to accept the risk of getting poor performance for its money, owing to local and state administrators' improbity. See, *e. g.*, *id.*, at 417. Section 666(a)(2) addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of federal dollar recipients. Although not every bribe offered or paid to covered government agents will be traceably skimmed from specific federal payments, or be found in the guise of a *quid pro quo* for some dereliction in spending a federal grant, these facts do not

portend enforcement beyond the scope of federal interest, for the simple reason that corruption need not be so limited in order to affect that interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. It is enough that the statute condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here. The legislative history confirms that § 666(a)(2) is an instance of necessary and proper legislation. Neither of Sabri's arguments against § 666(a)(2)'s constitutionality helps him. First, his claim that § 666 is of a piece with the legislation ruled unconstitutional in *United States* v. *Lopez*, 514 U. S. 549, and *United States* v. *Morrison*, 529 U. S. 598, is unavailing because these precedents do not control here. In them, the Court struck down federal statutes regulating gun possession near schools and gender-motivated violence, respectively, because it found the effects of those activities on interstate commerce insufficiently robust. Here, in contrast, Congress was within its prerogative to ensure that the objects of spending are not menaced by local administrators on the take. Cf. *Lopez*, *supra*, at 561. Second, contrary to Sabri's argument, § 666(a)(2) is not an unduly coercive, and impermissibly sweeping, condition on the grant of federal funds, but is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain. *South Dakota* v. *Dole*, 483 U. S. 203, distinguished. Pp. 604–608.

(b) The Court disapproves Sabri's technique for challenging his indictment by facial attack on the underlying statute. If Sabri was making any substantive constitutional claim, it had to be seen as an overbreadth challenge; the most he could seriously say was that the statute could not be enforced against him, because it could not be enforced against someone else whose behavior would be outside the scope of Congress's Article I authority to legislate. Facial challenges of this sort are to be discouraged because they invite judgments on fact-poor records and entail a departure from the norms of federal-court adjudication by calling for relaxation of familiar standing requirements to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand. See, *e. g.*, *Chicago* v. *Morales*, 527 U. S. 41, 55–56, n. 22. Thus, the Court has recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, only on the strength of a specific reason, such as free speech, that is weighty enough to overcome the Court's well-founded reticence. See, *e. g.*, *Broadrick* v. *Oklahoma*, 413 U. S. 601. Pp. 608–610.

326 F. 3d 937, affirmed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined, and in which KENNEDY and SCALIA, JJ., joined as to all but Part III. KENNEDY, J., filed an opinion concurring in part, in which SCALIA, J., joined, *post,* p. 610. THOMAS, J., filed an opinion concurring in the judgment, *post,* p. 610.

Andrew S. Birrell argued the cause for petitioner. With him on the briefs were *R. Travis Snider* and *Aaron D. Van Oort.*

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the brief were *Solicitor General Olson, Assistant Attorney General Wray, Jeffrey A. Lamken,* and *Jeffrey P. Singdahlsen.**

JUSTICE SOUTER delivered the opinion of the Court.

The question is whether 18 U. S. C. § 666(a)(2), proscribing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds, is a valid exercise of congressional authority under Article I of the Constitution. We hold that it is.

I

Petitioner Basim Omar Sabri is a real estate developer who proposed to build a hotel and retail structure in the city of Minneapolis. Sabri lacked confidence, however, in his ability to adapt to the lawful administration of licensing and zoning laws, and offered three separate bribes to a city councilman, Brian Herron, according to the grand jury indictment that gave rise to this case. At the time the bribes were allegedly offered (between July 2 and July 17, 2001), Herron served as a member of the Board of Commissioners of the Minneapolis Community Development Agency (MCDA), a public body created by the city council to fund housing and

*Briefs of *amici curiae* urging reversal were filed for the Cato Institute by *Gary Lawson, Robert A. Levy,* and *Timothy Lynch;* and for the National Association of Criminal Defense Lawyers by *Joshua L. Dratel, Richard A. Greenberg,* and *Richard W. Garnett.*

economic development within the city. App. to Pet. for Cert. A–64 to A–65.

Count 1 of the indictment charged Sabri with offering a $5,000 kickback for obtaining various regulatory approvals, *ibid.*, and according to Count 2, Sabri offered Herron a $10,000 bribe to set up and attend a meeting with owners of land near the site Sabri had in mind, at which Herron would threaten to use the city's eminent domain authority to seize their property if they were troublesome to Sabri, *id.*, at A–65 to A–66. Count 3 alleged that Sabri offered Herron a commission of 10% on some $800,000 in community economic development grants that Sabri sought from the city, the MCDA, and other sources. *Id.*, at A–66.

The charges were brought under 18 U. S. C. § 666(a)(2), which imposes federal criminal penalties on anyone who

> "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more."

For criminal liability to lie, the statute requires that

> "the organization, government, or agency receiv[e], in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." § 666(b).

In 2001, the City Council of Minneapolis administered about $29 million in federal funds paid to the city, and in the same period, the MCDA received some $23 million of federal money. App. to Pet. for Cert. A–63.

Before trial, Sabri moved to dismiss the indictment on the ground that § 666(a)(2) is unconstitutional on its face for failure to require proof of a connection between the federal

funds and the alleged bribe, as an element of liability. App. A–4. The Government responded that "even if an additional nexus between the bribery conduct and the federal funds is required, the evidence in this case will easily meet such a standard" because Sabri's alleged actions related to federal dollars. *Id.*, at A–6. Although Sabri did not contradict this factual claim, the District Court agreed with him that the law was facially invalid. A divided panel of the Eighth Circuit reversed, holding that there was nothing fatal in the absence of an express requirement to prove some connection between a given bribe and federally pedigreed dollars, and that the statute was constitutional under the Necessary and Proper Clause in serving the objects of the congressional spending power. 326 F. 3d 937 (2003). Judge Bye dissented out of concern about the implications of the law for dual sovereignty. *Id.*, at 953–957.

We granted certiorari, 540 U. S. 944 (2003), to resolve a split among the Courts of Appeals over the need to require connection between forbidden conduct and federal funds; compare, *e. g.*, *United States* v. *Grossi*, 143 F. 3d 348 (CA7 1998) (no nexus requirement), and *United States* v. *Lipscomb*, 299 F. 3d 303 (CA5 2002) (same), with *United States* v. *Zwick*, 199 F. 3d 672 (CA3 1999) (nexus requirement), and *United States* v. *Santopietro*, 166 F. 3d 88 (CA2 1999) (same). We now affirm.

II

Sabri raises what he calls a facial challenge to § 666(a)(2): the law can never be applied constitutionally because it fails to require proof of any connection between a bribe or kickback and some federal money. It is fatal, as he sees it, that the statute does not make the link an element of the crime, to be charged in the indictment and demonstrated beyond a reasonable doubt. Thus, Sabri claims his attack meets the demanding standard set out in *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), since he says no prosecution can satisfy the Constitution under this statute, owing to its failure to

require proof that its particular application falls within Congress's jurisdiction to legislate. See Tr. of Oral Arg. 12 ("This statute cannot be properly applied in any case").

We can readily dispose of this position that, to qualify as a valid exercise of Article I power, the statute must require proof of connection with federal money as an element of the offense. We simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook, and there is no occasion even to consider the need for such a requirement where there is no reason to suspect that enforcement of a criminal statute would extend beyond a legitimate interest cognizable under Article I, § 8.

Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars. See generally *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819) (establishing review for means-ends rationality under the Necessary and Proper Clause). See also *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276 (1981) (same); *Hanna* v. *Plumer*, 380 U. S. 460, 472 (1965) (same). Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity. See, *e. g.*, *McCulloch*, *supra*, at 417 (power to "'establish post-offices and post-roads'" entails authority to "punish those who steal letters"). Section 666(a)(2) addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of the state, local, and tribal recipients of federal dollars.

It is true, just as Sabri says, that not every bribe or kickback offered or paid to agents of governments covered by § 666(b) will be traceably skimmed from specific federal pay-

ments, or show up in the guise of a *quid pro quo* for some dereliction in spending a federal grant. Cf. *Salinas* v. *United States*, 522 U. S. 52, 56–57 (1997) (The "expansive, unqualified" language of the statute "does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B)"). But this possibility portends no enforcement beyond the scope of federal interest, for the reason that corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value. Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there. And officials are not any the less threatening to the objects behind federal spending just because they may accept general retainers. See *Westfall* v. *United States*, 274 U. S. 256, 259 (1927) (majority opinion by Holmes, J.) (upholding federal law criminalizing fraud on a state bank member of federal system, even where federal funds not directly implicated). It is certainly enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here.

For those of us who accept help from legislative history, it is worth noting that the legislative record confirms that § 666(a)(2) is an instance of necessary and proper legislation. The design was generally to "protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery," see S. Rep. No. 98–225, p. 370 (1983), in contrast to prior federal law affording only two limited opportunities to prosecute such threats to the federal interest: 18 U. S. C. § 641, the federal theft statute, and § 201, the federal bribery law. Those laws had proven inadequate to the task. The former went only to outright theft of unadulterated federal funds, and prior to this Court's opinion in *Dixson* v. *United States*, 465 U. S. 482 (1984), which came after passage of § 666, the brib-

ery statute had been interpreted by lower courts to bar prosecution of bribes directed at state and local officials. See, *e. g.*, *United States* v. *Del Toro*, 513 F. 2d 656, 661–663 (CA2 1975) (overturning federal bribery conviction); see generally *Salinas*, 522 U. S., at 58–59 (recounting the limitations of the pre-existing statutory framework). Thus we said that § 666 "was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds," *id.*, at 58, thereby filling the regulatory gaps. Congress's decision to enact § 666 only after other legislation had failed to protect federal interests is further indication that it was acting within the ambit of the Necessary and Proper Clause.

Petitioner presses two more particular arguments against the constitutionality of § 666(a)(2), neither of which helps him. First, he says that § 666 is all of a piece with the legislation that a majority of this Court held to exceed Congress's authority under the Commerce Clause in *United States* v. *Lopez*, 514 U. S. 549 (1995), and *United States* v. *Morrison*, 529 U. S. 598 (2000). But these precedents do not control here. In *Lopez* and *Morrison*, the Court struck down federal statutes regulating gun possession near schools and gender-motivated violence, respectively, because it found the effects of those activities on interstate commerce insufficiently robust. The Court emphasized the noneconomic nature of the regulated conduct, commenting on the law at issue in *Lopez*, for example, "that by its terms [it] has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U. S., at 561. The Court rejected the Government's contentions that the gun law was valid Commerce Clause legislation because guns near schools ultimately bore on social prosperity and productivity, reasoning that on that logic, Commerce Clause authority would effectively know no limit. Cf. *Morrison*, *supra*, at 615–616 (rejecting comparable congressional justification for Violence Against Women Act of

1994). In order to uphold the legislation, the Court concluded, it would be necessary "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U. S., at 567.

No piling is needed here to show that Congress was within its prerogative to protect spending objects from the menace of local administrators on the take. The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place, and Sabri would be hard pressed to claim, in the words of the *Lopez* Court, that § 666(a)(2) "has nothing to do with" the congressional spending power. *Id.*, at 561.

Sabri next argues that § 666(a)(2) amounts to an unduly coercive, and impermissibly sweeping, condition on the grant of federal funds as judged under the criterion applied in *South Dakota* v. *Dole*, 483 U. S. 203 (1987). This is not so. Section 666(a)(2) is authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain, not a means for bringing federal economic might to bear on a State's own choices of public policy.*

III

We add an afterword on Sabri's technique for challenging his indictment by facial attack on the underlying statute, and begin by recalling that facial challenges are best when infrequent. See, *e. g.*, *United States* v. *Raines*, 362 U. S. 17, 22 (1960) (laws should not be invalidated by "reference to hypothetical cases"); *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219–220 (1912) (same). Al-

*In enacting § 666, Congress addressed a legitimate federal concern by licensing federal prosecution in an area historically of state concern. In upholding the constitutionality of the law, we mean to express no view as to its soundness as a policy matter.

though passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of "premature interpretatio[n] of statutes" on the basis of factually barebones records. *Raines*, *supra*, at 22.

As exemplified here, facial challenge can carry a further risk that a skeptical approach by district courts may avoid. Sabri was able to call his challenge a facial one in the strictest sense of saying that no application of the statute could be constitutional, only by claiming that proof of the congressional jurisdictional basis must be an element of the statute, a position that is of course not generally true at all. If that particular claim had been peeled away, it would have been obvious that the acts charged against Sabri himself were well within the limits of legitimate congressional concern. It would have been correspondingly clear that if Sabri was making any substantive constitutional claim, it had to be seen as an overbreadth challenge; the most he could say was that the statute could not be enforced against him, because it could not be enforced against someone else whose behavior would be outside the scope of Congress's Article I authority to legislate.

Facial challenges of this sort are especially to be discouraged. Not only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand. See, *e. g.*, *Chicago* v. *Morales*, 527 U. S. 41, 55–56, n. 22 (1999) (plurality opinion). Accordingly, we have recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons

weighty enough to overcome our well-founded reticence. See, *e. g.*, *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973) (free speech); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964) (right to travel); *Stenberg* v. *Carhart*, 530 U. S. 914, 938–946 (2000) (abortion); *City of Boerne* v. *Flores*, 521 U. S. 507, 532–535 (1997) (legislation under § 5 of the Fourteenth Amendment). See generally Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1351 (2000) (emphasizing role of various doctrinal tests in determining viability of facial attack); Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 24 (observing that overbreadth is a function of substantive First Amendment law). Outside these limited settings, and absent a good reason, we do not extend an invitation to bring overbreadth claims.

IV

We remand for proceedings consistent with this opinion. The judgment of the Court of Appeals for the Eighth Circuit is

Affirmed.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring in part.

I join all but Part III of the Court's opinion. I do not join Part III but do make this comment with reference to it. The Court in Part III does not specifically question the practice we have followed in cases such as *United States* v. *Lopez*, 514 U. S. 549 (1995), and *United States* v. *Morrison*, 529 U. S. 598 (2000). In those instances the Court did resolve the basic question whether Congress, in enacting the statutes challenged there, had exceeded its legislative power under the Constitution.

JUSTICE THOMAS, concurring in the judgment.

Title 18 U. S. C. § 666(a)(2) is a valid exercise of Congress' power to regulate commerce, at least under this Court's

precedent. Cf. *Perez* v. *United States*, 402 U. S. 146, 154 (1971). I continue to doubt that we have correctly interpreted the Commerce Clause. See *United States* v. *Morrison*, 529 U. S. 598, 627 (2000) (THOMAS, J., concurring); *United States* v. *Lopez*, 514 U. S. 549, 584–585 (1995) (THOMAS, J., concurring). But until this Court reconsiders its precedents, and because neither party requests us to do so here, our prior case law controls the outcome of this case.

I write further because I find questionable the scope the Court gives to the Necessary and Proper Clause as applied to Congress' authority to spend. In particular, the Court appears to hold that the Necessary and Proper Clause authorizes the exercise of any power that is no more than a "rational means" to effectuate one of Congress' enumerated powers. *Ante*, at 605. This conclusion derives from the Court's characterization of the seminal case *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), as having established a "means-ends rationality" test, *ante*, at 605, a characterization that I am not certain is correct.

In *McCulloch*, the Court faced the question whether the United States had the power to incorporate a national bank. The Court was forced to navigate between the one extreme of the "absolute necessity" construction advocated by the State of Maryland, 4 Wheat., at 387 (argument of counsel), which would "clog and embarrass" the execution of the enumerated powers "by withholding the most appropriate means" for its execution, *id.*, at 408, and the other extreme, an interpretation that would destroy the Framers' purpose of establishing a National Government of limited and enumerated powers, see *id.*, at 423; cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195 (1824). The Court, speaking through Chief Justice Marshall, carefully and effectively refuted Maryland's proposed "absolute necessity" test. "It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution," the Court stated; "[t]his could not be done

by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end." *McCulloch*, 4 Wheat., at 415. The Court opined that it would render the Constitution "a splendid bauble" if "the right to legislate on that vast mass of incidental powers which must be involved in the constitution" were not within the power of Congress. *Id.*, at 421.

But the Court did not then conclude that the Necessary and Proper Clause gives unrestricted power to the Federal Government. See *ibid.* ("[T]he powers of the government are limited, and . . . its limits are not to be transcended"). Rather, it set forth the following test:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Ibid.*[1]

"[A]ppropriate" and "plainly adapted" are hardly synonymous with "means-end rationality." Indeed, "plain" means "evident to the mind or senses: OBVIOUS," "CLEAR," and "characterized by simplicity: not complicated." Webster's Ninth New Collegiate Dictionary 898 (1991); see also N. Webster, American Dictionary of the English Language (1828) (facsimile edition) (defining "plainly" as "[i]n a manner to be easily seen or comprehended," and "[e]vidently; clearly; not obscurely"). A statute can have a "rational" connection to an enumerated power without being obviously or clearly tied to that enumerated power. To show that a statute is

[1] We have recently used a very similar formulation in describing the appropriate test under the Necessary and Proper Clause. In *Jinks* v. *Richland County*, 538 U. S. 456 (2003), we upheld the constitutionality of 28 U. S. C. § 1367(d) only after carefully concluding that the statute was both "conducive to" Congress' "power to constitute Tribunals inferior to the supreme Court," and also "plainly adapted" to that end. 538 U. S., at 462, 464 (internal quotation marks omitted).

"plainly adapted" to a legitimate end, then, one must seemingly show more than that a particular statute is a "rational means," *ante*, at 605, to safeguard that end; rather, it would seem necessary to show some obvious, simple, and direct relation between the statute and the enumerated power. Cf. 8 Writings of James Madison 448 (G. Hunt ed. 1908).

Under the *McCulloch* formulation, I have doubts that § 666(a)(2) is a proper use of the Necessary and Proper Clause as applied to Congress' power to spend. Section 666 states that, for any "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program," § 666(b), any person who

> "corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of [such] organization or of [such] State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more," § 666(a)(2),

commits a federal crime. All that is necessary for § 666(a)(2) to apply is that the organization, government, or agency in question receives more than $10,000 in federal benefits of any kind, and that an agent of the entity is bribed regarding a substantial transaction of that entity. No connection whatsoever between the corrupt transaction and the federal benefits need be shown.

The Court does a not-wholly-unconvincing job of tying the broad scope of § 666(a)(2) to a federal interest in federal funds and programs. See *ante*, at 605–606. But simply noting that "[m]oney is fungible," *ante*, at 606, for instance, does not explain how there could be any federal interest in "prosecut[ing] a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of $10,000,"

United States v. *Santopietro*, 166 F. 3d 88, 93 (CA2 1999). It would be difficult to describe the chain of inferences and assumptions in which the Court would have to indulge to connect such a bribe to a federal interest in any federal funds or programs as being "plainly adapted" to their protection. And, this is just one example of many in which any federal interest in protecting federal funds is equally attenuated, and yet the bribe is covered by the expansive language of § 666(a)(2). Overall, then, § 666(a)(2) appears to be no more plainly adapted to protecting federal funds or federally funded programs than a hypothetical federal statute criminalizing fraud of any kind perpetrated on any individual who happens to receive federal welfare benefits.[2]

Because I would decide this case on the Court's Commerce Clause jurisprudence, I do not ultimately decide whether Congress' power to spend combined with the Necessary and Proper Clause could authorize the enactment of § 666(a)(2). But regardless of the particular outcome of this case under the correct test, the Court's approach seems to greatly and improperly expand the reach of Congress' power under the Necessary and Proper Clause. Accordingly, I concur in the judgment.

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[2] Criminalizing the theft (by fraud or otherwise) or embezzlement of federal funds themselves fits comfortably within Congress' powers. See *United States* v. *Hall*, 98 U. S. 343 (1879) (embezzlement of a soldier's federal pension).

Syllabus

THORNTON *v.* UNITED STATES

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

No. 03–5165. Argued March 31, 2004—Decided May 24, 2004

Before Officer Nichols could pull over petitioner, petitioner parked and got out of his car. Nichols then parked, accosted petitioner, and arrested him after finding drugs in his pocket. Incident to the arrest, Nichols searched petitioner's car and found a handgun under the driver's seat. Petitioner was charged with federal drug and firearms violations. In denying his motion to suppress the firearm as the fruit of an unconstitutional search, the District Court found, *inter alia*, the automobile search valid under *New York* v. *Belton*, 453 U. S. 454, in which this Court held that, when a police officer makes a lawful custodial arrest of an automobile's occupant, the Fourth Amendment allows the officer to search the vehicle's passenger compartment as a contemporaneous incident of arrest, *id.*, at 460. Petitioner appealed his conviction, arguing that *Belton* was limited to situations where the officer initiated contact with an arrestee while he was still in the car. The Fourth Circuit affirmed.

Held: Belton governs even when an officer does not make contact until the person arrested has left the vehicle. In *Belton*, the Court placed no reliance on the fact that the officer ordered the occupants out of the vehicle, or initiated contact with them while they remained within it. And here, there is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he was in the car. In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and evidence destruction as one who is inside. Under petitioner's proposed "contact initiation" rule, officers who decide that it may be safer and more effective to conceal their presence until a suspect has left his car would be unable to search the passenger compartment in the event of a custodial arrest, potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble. *Belton* allows police to search a car's passenger compartment incident to a lawful arrest of both "occupant[s]" and "recent occupant[s]." *Ibid.* While an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to

the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car when the officer first initiated contact with him. Although not all contraband in the passenger compartment is likely to be accessible to a "recent occupant," the need for a clear rule, readily understood by police and not depending on differing estimates of what items were or were not within an arrestee's reach at any particular moment, justifies the sort of generalization which *Belton* enunciated. Under petitioner's rule, an officer would have to determine whether he actually confronted or signaled confrontation with the suspect while he was in his car, or whether the suspect exited the car unaware of, and for reasons unrelated to, the officer's presence. Such a rule would be inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that *Belton* sought to avoid. Pp. 619–624.

325 F. 3d 189, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court except as to footnote 4. KENNEDY, THOMAS, and BREYER, JJ., joined that opinion in full, and O'CONNOR, J., joined as to all but footnote 4. O'CONNOR, J., filed an opinion concurring in part, *post*, p. 624. SCALIA, J., filed an opinion concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 625. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post*, p. 633.

Frank W. Dunham, Jr., argued the cause for petitioner. With him on the briefs were *Walter B. Dalton*, *Frances H. Pratt*, and *Kenneth P. Troccoli*.

Gregory G. Garre argued the cause for the United States. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Wray*, and *Deputy Solicitor General Dreeben*.*

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*A brief of *amici curiae* urging reversal was filed for the American Civil Liberties Union et al. by *Tracey Maclin*, *Steven R. Shapiro*, and *Lisa Kemler*.

A brief of *amici curiae* urging affirmance was filed for the State of Arizona et al. by *Terry Goddard*, Attorney General of Arizona, *Mary R. O'Grady*, Solicitor General, *Randall M. Howe*, Chief Counsel, and *Kathleen P. Sweeney* and *Eric J. Olsson*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.*,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court except as to footnote 4.

In *New York* v. *Belton*, 453 U. S. 454 (1981), we held that when a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest. We have granted certiorari twice before to determine whether *Belton*'s rule is limited to situations where the officer makes contact with the occupant while the occupant is inside the vehicle, or whether it applies as well when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle. We did not reach the merits in either of those two cases. *Arizona* v. *Gant*, 540 U. S. 963 (2003) (vacating and remanding for reconsideration in light of *State* v. *Dean*, 206 Ariz. 158, 76 P. 3d 429 (2003) (en banc)); *Florida* v. *Thomas*, 532 U. S. 774 (2001) (dismissing for lack of jurisdiction). We now reach that question and conclude that *Belton* governs even when an officer does not make contact until the person arrested has left the vehicle.

Officer Deion Nichols of the Norfolk, Virginia, Police Department, who was in uniform but driving an unmarked police car, first noticed petitioner Marcus Thornton when petitioner slowed down so as to avoid driving next to him. Nichols suspected that petitioner knew he was a police officer and for some reason did not want to pull next to him. His suspicions aroused, Nichols pulled off onto a side street

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of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Henry D. McMaster* of South Carolina, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Jerry W. Kilgore* of Virginia, and *Patrick J. Crank* of Wyoming.

Shashank S. Upadhye, pro se, filed a brief as *amicus curiae.*

and petitioner passed him. After petitioner passed him, Nichols ran a check on petitioner's license tags, which revealed that the tags had been issued to a 1982 Chevy two-door and not to a Lincoln Town Car, the model of car petitioner was driving. Before Nichols had an opportunity to pull him over, petitioner drove into a parking lot, parked, and got out of the vehicle. Nichols saw petitioner leave his vehicle as he pulled in behind him. He parked the patrol car, accosted petitioner, and asked him for his driver's license. He also told him that his license tags did not match the vehicle that he was driving.

Petitioner appeared nervous. He began rambling and licking his lips; he was sweating. Concerned for his safety, Nichols asked petitioner if he had any narcotics or weapons on him or in his vehicle. Petitioner said no. Nichols then asked petitioner if he could pat him down, to which petitioner agreed. Nichols felt a bulge in petitioner's left front pocket and again asked him if he had any illegal narcotics on him. This time petitioner stated that he did, and he reached into his pocket and pulled out two individual bags, one containing three bags of marijuana and the other containing a large amount of crack cocaine. Nichols handcuffed petitioner, informed him that he was under arrest, and placed him in the back seat of the patrol car. He then searched petitioner's vehicle and found a BryCo 9-millimeter handgun under the driver's seat.

A grand jury charged petitioner with possession with intent to distribute cocaine base, 84 Stat. 1260, 21 U. S. C. § 841(a)(1), possession of a firearm after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, 18 U. S. C. § 922(g)(1), and possession of a firearm in furtherance of a drug trafficking crime, § 924(c)(1). Petitioner sought to suppress, *inter alia*, the firearm as the fruit of an unconstitutional search. After a hearing, the District Court denied petitioner's motion to suppress, holding that the automobile search was valid under

New York v. *Belton*, *supra*, and alternatively that Nichols could have conducted an inventory search of the automobile. A jury convicted petitioner on all three counts; he was sentenced to 180 months' imprisonment and 8 years of supervised release.

Petitioner appealed, challenging only the District Court's denial of the suppression motion. He argued that *Belton* was limited to situations where the officer initiated contact with an arrestee while he was still an occupant of the car. The United States Court of Appeals for the Fourth Circuit affirmed. 325 F. 3d 189 (2003). It held that "the historical rationales for the search incident to arrest doctrine—'the need to disarm the suspect in order to take him into custody' and 'the need to preserve evidence for later use at trial,'" *id.*, at 195 (quoting *Knowles* v. *Iowa*, 525 U. S. 113, 116 (1998)), did not require *Belton* to be limited solely to situations in which suspects were still in their vehicles when approached by the police. Noting that petitioner conceded that he was in "close proximity, both temporally and spatially," to his vehicle, the court concluded that the car was within petitioner's immediate control, and thus Nichols' search was reasonable under *Belton*.[1] 325 F. 3d, at 196. We granted certiorari, 540 U. S. 980 (2003), and now affirm.

In *Belton*, an officer overtook a speeding vehicle on the New York Thruway and ordered its driver to pull over. 453 U. S., at 455. Suspecting that the occupants possessed marijuana, the officer directed them to get out of the car and arrested them for unlawful possession. *Id.*, at 454–455. He searched them and then searched the passenger compartment of the car. *Id.*, at 455. We considered the constitutionally permissible scope of a search in these circumstances and sought to lay down a workable rule governing that situation.

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[1] The Court of Appeals did not reach the District Court's alternative holding that Nichols could have conducted a lawful inventory search. 325 F. 3d, at 196.

We first referred to *Chimel* v. *California,* 395 U. S. 752 (1969), a case where the arrestee was arrested in his home, and we had described the scope of a search incident to a lawful arrest as the person of the arrestee and the area immediately surrounding him. 453 U. S., at 457 (citing *Chimel, supra,* at 763). This rule was justified by the need to remove any weapon the arrestee might seek to use to resist arrest or to escape, and the need to prevent the concealment or destruction of evidence. 453 U. S., at 457. Although easily stated, the *Chimel* principle had proved difficult to apply in specific cases. We pointed out that in *United States* v. *Robinson,* 414 U. S. 218 (1973), a case dealing with the scope of the search of the arrestee's person, we had rejected a suggestion that " 'there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority' " to conduct such a search. 453 U. S., at 459 (quoting *Robinson, supra,* at 235). Similarly, because "courts ha[d] found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably include[d] the interior of an automobile and the arrestee [wa]s its recent occupant," 453 U. S., at 460, we sought to set forth a clear rule for police officers and citizens alike. We therefore held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Ibid.* (footnote omitted).

In so holding, we placed no reliance on the fact that the officer in *Belton* ordered the occupants out of the vehicle, or initiated contact with them while they remained within it. Nor do we find such a factor persuasive in distinguishing the current situation, as it bears no logical relationship to *Belton*'s rationale. There is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the

vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car. We recognized as much, albeit in dicta, in *Michigan* v. *Long*, 463 U. S. 1032 (1983), where officers observed a speeding car swerve into a ditch. The driver exited and the officers met him at the rear of his car. Although there was no indication that the officers initiated contact with the driver while he was still in the vehicle, we observed that "[i]t is clear . . . that if the officers had arrested [respondent] . . . they could have searched the passenger compartment under *New York* v. *Belton*." *Id.*, at 1035–1036, and n. 1.

In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect's vehicle under *Belton* only if the suspect is arrested. See *Knowles*, *supra*, at 117–118. A custodial arrest is fluid and "[t]he danger to the police officer flows from *the fact of the arrest*, and its attendant proximity, stress, and uncertainty," *Robinson*, *supra*, at 234–235, and n. 5 (emphasis added). See *Washington* v. *Chrisman*, 455 U. S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer"). The stress is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation.

In some circumstances it may be safer and more effective for officers to conceal their presence from a suspect until he has left his vehicle. Certainly that is a judgment officers should be free to make. But under the strictures of petitioner's proposed "contact initiation" rule, officers who do so would be unable to search the car's passenger compartment

in the event of a custodial arrest, potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble.

Petitioner argues, however, that *Belton* will fail to provide a "bright-line" rule if it applies to more than vehicle "occupants." Brief for Petitioner 29–34. But *Belton* allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both "occupant[s]" and "recent occupant[s]." 453 U. S., at 460. Indeed, the respondent in *Belton* was not inside the car at the time of the arrest and search; he was standing on the highway. In any event, while an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest and search,[2] it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him.

To be sure, not all contraband in the passenger compartment is likely to be readily accessible to a "recent occupant." It is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile. But the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton*. The

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[2] Petitioner argues that if we reject his proposed "contact initiation" rule, we should limit the scope of *Belton* to "recent occupant[s]" who are within "reaching distance" of the car. Brief for Petitioner 35–36. We decline to address petitioner's argument, however, as it is outside the question on which we granted certiorari, see this Court's Rule 14.1(a), and was not addressed by the Court of Appeals, see *Peralta* v. *Heights Medical Center, Inc.*, 485 U. S. 80, 86 (1988). We note that it is unlikely that petitioner would even meet his own standard as he apparently conceded in the Court of Appeals that he was in "close proximity, both temporally and spatially," to his vehicle when he was approached by Nichols. 325 F. 3d 189, 196 (CA4 2003).

need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated.[3] Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

Rather than clarifying the constitutional limits of a *Belton* search, petitioner's "contact initiation" rule would obfuscate them. Under petitioner's proposed rule, an officer approaching a suspect who has just alighted from his vehicle would have to determine whether he actually confronted or signaled confrontation with the suspect while he remained in the car, or whether the suspect exited his vehicle unaware of, and for reasons unrelated to, the officer's presence. This determination would be inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that *Belton* sought to avoid. *Id.*, at 459–460. Experience has shown that such a rule is impracticable, and we refuse to adopt it. So long as an arrestee is the sort of "re-

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[3] JUSTICE STEVENS contends that *Belton*'s bright-line rule "is not needed for cases in which the arrestee is first accosted when he is a pedestrian, because *Chimel* [v. *California*, 395 U. S. 752 (1969),] itself provides all the guidance that is necessary." *Post*, at 636 (dissenting opinion). Under JUSTICE STEVENS' approach, however, even if the car itself was within the arrestee's reaching distance under *Chimel*, police officers and courts would still have to determine whether a particular object within the passenger compartment was also within an arrestee's reaching distance under *Chimel*. This is exactly the type of unworkable and fact-specific inquiry that *Belton* rejected by holding that the entire passenger compartment may be searched when "'the area within the immediate control of the arrestee' . . . arguably includes the interior of an automobile and the arrestee is its recent occupant." 453 U. S., at 460.

cent occupant" of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.[4]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE O'CONNOR, concurring in part.

I join all but footnote 4 of the Court's opinion. Although the opinion is a logical extension of the holding of *New York* v. *Belton*, 453 U. S. 454 (1981), I write separately to express my dissatisfaction with the state of the law in this area. As JUSTICE SCALIA forcefully argues, *post*, at 627–629 (opinion concurring in judgment), lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel* v. *California*, 395 U. S. 752 (1969). That erosion is a direct consequence of *Belton*'s shaky foundation. While the approach

[4] Whatever the merits of JUSTICE SCALIA's opinion concurring in the judgment, this is the wrong case in which to address them. Petitioner has never argued that *Belton* should be limited "to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle," *post*, at 632, nor did any court below consider JUSTICE SCALIA's reasoning. See *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212–213 (1998) ("'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them'" (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970))). The question presented—"[w]hether the bright-line rule announced in *New York* v. *Belton* is confined to situations in which the police initiate contact with the occupant of a vehicle while that person is in the vehicle," Pet. for Cert.—does not fairly encompass JUSTICE SCALIA's analysis. See this Court's Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court"). And the United States has never had an opportunity to respond to such an approach. See *Yee* v. *Escondido*, 503 U. S. 519, 536 (1992). Under these circumstances, it would be imprudent to overrule, for all intents and purposes, our established constitutional precedent, which governs police authority in a common occurrence such as automobile searches pursuant to arrest, and we decline to do so at this time.

JUSTICE SCALIA proposes appears to be built on firmer ground, I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit.

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

In *Chimel* v. *California*, 395 U. S. 752, 762–763 (1969), we held that a search incident to arrest was justified only as a means to find weapons the arrestee might use or evidence he might conceal or destroy. We accordingly limited such searches to the area within the suspect's "'immediate control'"—*i. e.*, "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." *Id.*, at 763. In *New York* v. *Belton*, 453 U. S. 454, 460 (1981), we set forth a bright-line rule for arrests of automobile occupants, holding that, because the vehicle's entire passenger compartment is "in fact generally, even if not inevitably," within the arrestee's immediate control, a search of the whole compartment is justified in every case.

When petitioner's car was searched in this case, he was neither in, nor anywhere near, the passenger compartment of his vehicle. Rather, he was handcuffed and secured in the back of the officer's squad car. The risk that he would nevertheless "grab a weapon or evidentiary ite[m]" from his car was remote in the extreme. The Court's effort to apply our current doctrine to this search stretches it beyond its breaking point, and for that reason I cannot join the Court's opinion.

I

I see three reasons why the search in this case might have been justified to protect officer safety or prevent concealment or destruction of evidence. None ultimately persuades me.

The first is that, despite being handcuffed and secured in the back of a squad car, petitioner might have escaped and

retrieved a weapon or evidence from his vehicle—a theory that calls to mind Judge Goldberg's reference to the mythical arrestee "possessed of the skill of Houdini and the strength of Hercules." *United States* v. *Frick*, 490 F. 2d 666, 673 (CA5 1973) (opinion concurring in part and dissenting in part). The United States, endeavoring to ground this seemingly speculative fear in reality, points to a total of seven instances over the past 13 years in which state or federal officers were attacked with weapons by handcuffed or formerly handcuffed arrestees. Brief for United States 38–39, and n. 12. These instances do not, however, justify the search authority claimed. Three involved arrestees who retrieved weapons concealed *on their own person.* See *United States* v. *Sanders*, 994 F. 2d 200, 210, n. 60 (CA5 1993) (two instances); U. S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 49 (2001). Three more involved arrestees who seized a weapon *from the arresting officer.* See *Sanders*, *supra*, at 210, n. 60 (two instances); U. S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted 49 (1998). Authority to search the arrestee's own person is beyond question; and of course no search could prevent seizure of the officer's gun. Only one of the seven instances involved a handcuffed arrestee who escaped from a squad car to retrieve a weapon from somewhere else: In *Plakas* v. *Drinski*, 19 F. 3d 1143, 1144–1146 (CA7 1994), the suspect jumped out of the squad car and ran through a forest to a house, where (still in handcuffs) he struck an officer on the wrist with a fireplace poker before ultimately being shot dead.

Of course, the Government need not document specific instances in order to justify measures that avoid obvious risks. But the risk here is far from obvious, and in a context as frequently recurring as roadside arrests, the Government's inability to come up with even a single example of a handcuffed arrestee's retrieval of arms or evidence from his vehi-

cle undermines its claims. The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger we held insufficient to justify a search in *Chimel*, *supra*, at 763.

The second defense of the search in this case is that, since the officer could have conducted the search at the time of arrest (when the suspect was still near the car), he should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first. As one Court of Appeals put it: "'[I]t does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures.'" *United States* v. *Mitchell*, 82 F. 3d 146, 152 (CA7 1996) (quoting *United States* v. *Karlin*, 852 F. 2d 968, 971 (CA7 1988)); see also *United States* v. *Wesley*, 293 F. 3d 541, 548–549 (CADC 2002). The weakness of this argument is that it assumes that, one way or another, the search must take place. But conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful. If "sensible police procedures" require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search. Indeed, if an officer leaves a suspect unrestrained nearby just to manufacture authority to search, one could argue that the search is unreasonable *precisely because* the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures.

The third defense of the search is that, even though the arrestee posed no risk here, *Belton* searches in general are reasonable, and the benefits of a bright-line rule justify upholding that small minority of searches that, on their particular facts, are not reasonable. The validity of this argument rests on the accuracy of *Belton*'s claim that the passenger compartment is "in fact generally, even if not inevitably," within the suspect's immediate control. 453 U. S., at 460.

By the United States' own admission, however, "[t]he practice of restraining an arrestee on the scene before searching a car that he just occupied is so prevalent that holding that *Belton* does not apply in that setting would . . . 'largely render *Belton* a dead letter.'" Brief for United States 36–37 (quoting *Wesley*, *supra*, at 548). Reported cases involving this precise factual scenario—a motorist handcuffed and secured in the back of a squad car when the search takes place—are legion. See, *e. g.*, *United States* v. *Doward*, 41 F. 3d 789, 791 (CA1 1994); *United States* v. *White*, 871 F. 2d 41, 44 (CA6 1989); *Mitchell*, *supra*, at 152; *United States* v. *Snook*, 88 F. 3d 605, 606 (CA8 1996); *United States* v. *McLaughlin*, 170 F. 3d 889, 890 (CA9 1999); *United States* v. *Humphrey*, 208 F. 3d 1190, 1202 (CA10 2000); *Wesley*, *supra*, at 544; see also 3 W. LaFave, Search and Seizure § 7.1(c), pp. 448–449, n. 79 (3d ed. 1996 and Supp. 2004) (citing cases). Some courts uphold such searches even when the squad car carrying the handcuffed arrestee has already left the scene. See, *e. g.*, *McLaughlin*, *supra*, at 890–891 (upholding search because only five minutes had elapsed since squad car left).

The popularity of the practice is not hard to fathom. If *Belton entitles* an officer to search a vehicle upon arresting the driver despite having taken measures that eliminate any danger, what rational officer would not take those measures? Cf. Moskovitz, A Rule in Search of a Reason: An Empirical Reexamination of *Chimel* and *Belton*, 2002 Wis. L. Rev. 657, 665–666 (citing police training materials). If it was ever true that the passenger compartment is "in fact generally, even if not inevitably," within the arrestee's immediate control at the time of the search, 453 U. S., at 460, it certainly is not true today. As one judge has put it: "[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find."

McLaughlin, supra, at 894 (Trott, J., concurring). I agree entirely with that assessment.

II

If *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested. This more general sort of evidence-gathering search is not without antecedent. For example, in *United States* v. *Rabinowitz,* 339 U. S. 56 (1950), we upheld a search of the suspect's place of business after he was arrested there. We did not restrict the officers' search authority to "the area into which [the] arrestee might reach in order to grab a weapon or evidentiary ite[m]," *Chimel,* 395 U. S., at 763, and we did not justify the search as a means to prevent concealment or destruction of evidence.[1] Rather, we relied on a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested. See 339 U. S., at 60–64; see also *Harris* v. *United States,* 331 U. S. 145, 151–152 (1947); *Marron* v. *United States,* 275 U. S. 192, 199 (1927); *Agnello* v. *United States,* 269 U. S. 20, 30 (1925); cf. *Weeks* v. *United States,* 232 U. S. 383, 392 (1914).

Numerous earlier authorities support this approach, referring to the general interest in gathering evidence related to the crime of arrest with no mention of the more specific interest in preventing its concealment or destruction. See *United States* v. *Wilson,* 163 F. 338, 340, 343 (CC SDNY 1908); *Smith* v. *Jerome,* 47 Misc. 22, 23–24, 93 N. Y. S. 202, 202–203 (Sup. Ct. 1905); *Thornton* v. *State,* 117 Wis. 338, 346–347, 93 N. W. 1107, 1110 (1903); *Ex parte Hurn,* 92 Ala. 102, 112, 9 So. 515, 519–520 (1891); *Thatcher* v. *Weeks,* 79 Me. 547,

[1] We did characterize the entire office as under the defendant's "immediate control," 339 U. S., at 61, but we used the term in a broader sense than the one it acquired in *Chimel.* Compare 339 U. S., at 61, with 395 U. S., at 763.

548–549, 11 A. 599, 599–600 (1887); 1 F. Wharton, Criminal Procedure § 97, pp. 136–137 (J. Kerr 10th ed. 1918); 1 J. Bishop, Criminal Procedure § 211, p. 127 (2d ed. 1872); cf. *Spalding* v. *Preston*, 21 Vt. 9, 15 (1848) (seizure authority); *Queen* v. *Frost*, 9 Car. & P. 129, 131–134 (1839) (same); *King* v. *Kinsey*, 7 Car. & P. 447 (1836) (same); *King* v. *O'Donnell*, 7 Car. & P. 138 (1835) (same); *King* v. *Barnett*, 3 Car. & P. 600, 601 (1829) (same). Bishop's 1872 articulation is typical:

> "The officer who arrests a man on a criminal charge should consider the nature of the charge; and, if he finds about the prisoner's person, or otherwise in his possession, either goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, he may take the same, and hold them to be disposed of as the court may direct." Bishop, *supra*, § 211, at 127.

Only in the years leading up to *Chimel* did we start consistently referring to the narrower interest in frustrating concealment or destruction of evidence. See *Sibron* v. *New York*, 392 U. S. 40, 67 (1968); *Preston* v. *United States*, 376 U. S. 364, 367 (1964).

There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.

Nevertheless, *Chimel*'s narrower focus on concealment or destruction of evidence also has historical support. See *Holker* v. *Hennessey*, 141 Mo. 527, 539–540, 42 S. W. 1090,

1093 (1897); *Dillon* v. *O'Brien*, 16 Cox C. C. 245, 250 (Exch. Div. Ir. 1887); *Reifsnyder* v. *Lee*, 44 Iowa 101, 103 (1876); S. Welch, Essay on the Office of Constable 17 (1758).[2] And some of the authorities supporting the broader rule address only searches of the arrestee's *person*, as to which *Chimel*'s limitation might fairly be implicit. Moreover, carried to its logical end, the broader rule is hard to reconcile with the influential case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1031, 1063–1074 (C. P. 1765) (disapproving search of plaintiff's private papers under general warrant, despite arrest). But cf. *Dillon*, *supra*, at 250–251 (distinguishing *Entick*); *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 303–304 (1967).

In short, both *Rabinowitz* and *Chimel* are plausible accounts of what the Constitution requires, and neither is so persuasive as to justify departing from settled law. But if we are going to continue to allow *Belton* searches on *stare decisis* grounds, we should at least be honest about why we are doing so. *Belton* cannot reasonably be explained as a mere application of *Chimel*. Rather, it is a return to the broader sort of search incident to arrest that we allowed before *Chimel*—limited, of course, to searches of motor vehicles, a category of "effects" which give rise to a reduced expectation of privacy, see *Wyoming* v. *Houghton*, 526 U. S. 295, 303 (1999), and heightened law enforcement needs, see *id.*, at 304; *Rabinowitz*, *supra*, at 73 (Frankfurter, J., dissenting).

Recasting *Belton* in these terms would have at least one important practical consequence. In *United States* v. *Robinson*, 414 U. S. 218, 235 (1973), we held that authority to search an arrestee's person does not depend on the actual

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[2] *Chimel*'s officer-safety rationale has its own pedigree. See *Thornton* v. *State*, 117 Wis. 338, 346–347, 93 N. W. 1107, 1110 (1903); *Ex parte Hurn*, 92 Ala. 102, 112, 9 So. 515, 519–520 (1891); *Closson* v. *Morrison*, 47 N. H. 482, 484–485 (1867); *Leigh* v. *Cole*, 6 Cox C. C. 329, 332 (Oxford Cir. 1853); Welch, Essay on the Office of Constable, at 17.

presence of one of *Chimel*'s two rationales in the particular case; rather, the fact of arrest alone justifies the search. That holding stands in contrast to *Rabinowitz*, where we did not treat the fact of arrest alone as sufficient, but upheld the search only after noting that it was "not general or exploratory for whatever might be turned up" but reflected a reasonable belief that evidence would be found. 339 U. S., at 62–63; see also *Smith*, 47 Misc., at 24, 93 N. Y. S., at 203 ("This right and duty of search and seizure extend, however, only to articles which furnish evidence against the accused"); cf. *Barnett*, *supra*, at 601 (seizure authority limited to relevant evidence); Bishop, *supra*, § 211, at 127 (officer should "consider the nature of the charge" before searching). The two different rules make sense: When officer safety or imminent evidence concealment or destruction is at issue, officers should not have to make fine judgments in the heat of the moment. But in the context of a general evidence-gathering search, the state interests that might justify any overbreadth are far less compelling. A motorist may be arrested for a wide variety of offenses; in many cases, there is no reasonable basis to believe relevant evidence might be found in the car. See *Atwater* v. *Lago Vista*, 532 U. S. 318, 323–324 (2001); cf. *Knowles* v. *Iowa*, 525 U. S. 113, 118 (1998). I would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

In this case, as in *Belton*, petitioner was lawfully arrested for a drug offense. It was reasonable for Officer Nichols to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest. I would affirm the decision below on that ground.[3]

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[3] The Court asserts that my opinion goes beyond the scope of the question presented, citing this Court's Rule 14.1(a). *Ante*, at 624, n. 4. That Rule, however, does not constrain our authority to reach issues presented

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

Prior to our decision in *New York* v. *Belton*, 453 U. S. 454 (1981), there was a widespread conflict among both federal and state courts over the question "whether, in the course of a search incident to the lawful custodial arrest of the occupants of an automobile, police may search inside the automobile after the arrestees are no longer in it." *Id.*, at 459. In answering that question, the Court expanded the authority of the police in two important respects. It allowed the police to conduct a broader search than our decision in *Chimel* v. *California*, 395 U. S. 752, 762–763 (1969), would have permitted,[1] and it authorized them to open closed containers that might be found in the vehicle's passenger compartment.[2]

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by the case, see *Vance* v. *Terrazas*, 444 U. S. 252, 259, n. 5 (1980); *Tennessee Student Assistance Corporation* v. *Hood*, *ante*, at 443, and in any event does not apply when the issue is necessary to an intelligent resolution of the question presented, see *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996).

[1] The Court gleaned from the case law "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Belton*, 453 U. S., at 460 (quoting *Chimel*, 395 U. S., at 763). "In order to establish the workable rule this category of cases require[d]," the Court then read "*Chimel*'s definition of the limits of the area that may be searched in light of that generalization." 453 U. S., at 460. Thus, *Belton* held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Ibid.* (footnote omitted).

[2] Because police lawfully may search the passenger compartment of the automobile, the Court reasoned, it followed "that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. . . . Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." *Id.*, at 460–461 (footnote omitted).

Belton's basic rationale for both expansions rested not on a concern for officer safety, but rather on an overriding desire to hew "to a straightforward rule, easily applied, and predictably enforced." 453 U. S., at 459.[3] When the case was decided, I was persuaded that the important interest in clarity and certainty adequately justified the modest extension of the *Chimel* rule to permit an officer to examine the interior of a car pursuant to an arrest for a traffic violation. But I took a different view with respect to the search of containers within the car absent probable cause, because I thought "it palpably unreasonable to require the driver of a car to open his briefcase or his luggage for inspection by the officer." *Robbins* v. *California*, 453 U. S. 420, 451–452 (1981) (dissenting opinion).[4] I remain convinced that this aspect of the *Belton* opinion was both unnecessary and erroneous. Whether one agrees or disagrees with that view, however, the interest in certainty that supports *Belton*'s bright-line rule surely does not justify an expansion of the rule that only blurs those clear lines. Neither the rule in *Chimel* nor *Belton*'s modification of that rule would have allowed the search of petitioner's car.

A fair reading of the *Belton* opinion itself, and of the conflicting cases that gave rise to our grant of certiorari, makes

[3] The Court extolled the virtues of "'[a] single, familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *Id.*, at 458 (quoting *Dunaway* v. *New York*, 442 U. S. 200, 213–214 (1979)).

[4] In *Robbins*, a companion case to *Belton*, the Court held that police officers cannot open closed, opaque containers found in the trunk of a car during a lawful but warrantless search. 453 U. S., at 428 (plurality opinion). Because the officer in *Robbins* had probable cause to believe the car contained marijuana, I would have applied the automobile exception to sustain the search. *Id.*, at 452 (dissenting opinion). But I expressed concern that authorizing police officers to search containers in the passenger compartment without probable cause would "provide the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant." *Ibid.*

clear that we were not concerned with the situation presented in this case. The Court in *Belton* noted that the lower courts had discovered *Chimel*'s reaching-distance principle difficult to apply in the context of automobile searches incident to arrest, and that "no straightforward rule ha[d] emerged from the litigated cases." 453 U. S., at 458–459. None of the cases cited by the Court to demonstrate the disarray in the lower courts involved a pedestrian who was in the vicinity, but outside the reaching distance, of his or her car.[5] Nor did any of the decisions cited in the petition for a writ of certiorari[6] present such a case.[7] Thus, *Belton* was demonstrably concerned only with the narrow but common circumstance of a search occasioned by the arrest of a suspect who was seated in or driving an automobile at the time the law enforcement official approached. Normally, after such an arrest has occurred, the officer's safety is no

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[5] See *United States* v. *Benson*, 631 F. 2d 1336, 1337 (CA8 1980) (defendant arrested "while sitting in a car"); *United States* v. *Sanders*, 631 F. 2d 1309, 1311–1312 (CA8 1980) (occupants in car at time officers approached); *United States* v. *Rigales*, 630 F. 2d 364, 365 (CA5 1980) (defendant apprehended during traffic stop); *United States* v. *Dixon*, 558 F. 2d 919, 922 (CA9 1977) ("[T]he agents placed appellant under arrest while he was still in his car"); *United States* v. *Frick*, 490 F. 2d 666, 668, 669 (CA5 1973) (defendant arrested "at his car in the parking lot adjacent to his apartment building"; at time of arrest, attache case in question was lying on back seat of car "approximately two feet from the defendant" and "readily accessible" to him); *Hinkel* v. *Anchorage*, 618 P. 2d 1069 (Alaska 1980) (defendant arrested while in car immediately following collision); *Ulesky* v. *State*, 379 So. 2d 121, 123 (Fla. App. 1979) (defendant arrested while in car during traffic stop).

[6] Pet. for Cert. in *New York* v. *Belton*, O. T. 1980, No. 80–328, p. 7.

[7] See *United States* v. *Agostino*, 608 F. 2d 1035, 1036 (CA5 1979) (suspect in car when notified of police presence); *United States* v. *Neumann*, 585 F. 2d 355, 356 (CA8 1978) (defendant stopped by police while in car); *United States* v. *Foster*, 584 F. 2d 997, 999–1000 (CADC 1978) (suspects seated in parked car when approached by officer); *State* v. *Hunter*, 299 N. C. 29, 33, 261 S. E. 2d 189, 192 (1980) (defendant pulled over and arrested while in car); *State* v. *Wilkens*, 364 So. 2d 934, 936 (La. 1978) (defendant arrested in automobile).

longer in jeopardy, but he must decide what, if any, search for incriminating evidence he should conduct. *Belton* provided previously unavailable and therefore necessary guidance for that category of cases.

The bright-line rule crafted in *Belton* is not needed for cases in which the arrestee is first accosted when he is a pedestrian, because *Chimel* itself provides all the guidance that is necessary. The only genuine justification for extending *Belton* to cover such circumstances is the interest in uncovering potentially valuable evidence. In my opinion, that goal must give way to the citizen's constitutionally protected interest in privacy when there is already in place a well-defined rule limiting the permissible scope of a search of an arrested pedestrian. The *Chimel* rule should provide the same protection to a "recent occupant" of a vehicle as to a recent occupant of a house.

Unwilling to confine the *Belton* rule to the narrow class of cases it was designed to address, the Court extends *Belton*'s reach without supplying any guidance for the future application of its swollen rule. We are told that officers may search a vehicle incident to arrest "[s]o long as [the] arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here." *Ante*, at 623–624. But we are not told how recent is recent, or how close is close, perhaps because in this case "the record is not clear." 325 F. 3d 189, 196 (CA4 2003). As the Court cautioned in *Belton* itself, "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." 453 U. S., at 459–460. Without some limiting principle, I fear that today's decision will contribute to "a massive broadening of the automobile exception," *Robbins*, 453 U. S., at 452 (STEVENS, J., dissenting), when officers have probable cause to arrest an individual but not to search his car.

Accordingly, I respectfully dissent.

Syllabus

NELSON *v.* CAMPBELL, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

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

No. 03–6821. Argued March 29, 2004—Decided May 24, 2004

Three days before his scheduled execution by lethal injection, petitioner filed a 42 U. S. C. § 1983 action against respondent Alabama prison officials, alleging that the use of a "cut-down" procedure requiring an incision into his arm or leg to access his severely compromised veins constituted cruel and unusual punishment and deliberate indifference to his medical needs in violation of the Eighth Amendment. Petitioner, who had already filed an unsuccessful federal habeas application, sought a permanent injunction against the cut-down's use, a temporary stay of execution so the District Court could consider his claim's merits, and orders requiring respondents to furnish a copy of the protocol on the medical procedures for venous access and directing them to promulgate a venous access protocol that comports with contemporary standards. Respondents moved to dismiss the complaint for want of jurisdiction on the grounds that the § 1983 claim and stay request were the equivalent of a second or successive habeas application subject to 28 U. S. C. § 2244(b)'s gatekeeping requirements. Agreeing, the District Court dismissed the complaint because petitioner had not obtained authorization to file such an application. In affirming, the Eleventh Circuit held that method-of-execution challenges necessarily sound in habeas, and that it would have denied a habeas authorization request.

Held: Section 1983 is an appropriate vehicle for petitioner's Eighth Amendment claim seeking a temporary stay and permanent injunctive relief. Pp. 643–651.

(a) Section 1983 must yield to the federal habeas statute where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence. Such claims fall within the core of habeas. By contrast, constitutional claims challenging confinement conditions fall outside of that core and may be brought under § 1983 in the first instance. The Court need not reach here the difficult question of how method-of-execution claims should be classified generally. Respondents have conceded that § 1983 would be the appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the cut-down procedure's constitutionality if used to gain venous access for medical treatment. There is no reason on the com-

plaint's face to treat petitioner's claim differently solely because he has been condemned to die. Respondents claim that because the cut-down is part of the execution procedure, petitioner is actually challenging the fact of his execution. However, that venous access is a necessary prerequisite to execution does not imply that a particular means of gaining such access is likewise necessary. Petitioner has argued throughout the proceedings that the cut-down and the warden's refusal to provide reliable information on the cut-down protocol are *wholly unnecessary* to gaining venous access. If, after an evidentiary hearing, the District Court finds the cut-down necessary, it will need to address the broader method-of-execution question left open here. The instant holding is consistent with this Court's approach to civil rights damages actions, which also fall at the margins of habeas. Pp. 643–647.

(b) If a permanent injunction request does not sound in habeas, it follows that the lesser included request for a temporary stay (or preliminary injunction) does not either. Here, a fair reading of the complaint leaves no doubt that petitioner sought to enjoin the cut-down, not his execution by lethal injection. However, his stay request asked to stay his execution, seemingly without regard to whether the State did or did not resort to the cut-down. The execution warrant has now expired. If the State reschedules the execution while this case is pending on remand and petitioner seeks another similarly broad stay, the District Court will need to address the question whether a request to enjoin the execution, rather than merely to enjoin an allegedly unnecessary precursor medical procedure, properly sounds in habeas. Pp. 647–648.

(c) Respondents are incorrect that a reversal here would open the floodgates to all manner of method-of-execution challenges and last-minute stay requests. Because this Court does not here resolve the question of how to treat method-of-execution claims generally, the instant holding is extremely limited. Moreover, merely stating a cognizable § 1983 claim does not warrant a stay as a matter of right. A court may consider a stay application's last-minute nature in deciding whether to grant such equitable relief. And the ability to bring a § 1983 claim does not free inmates from the substantive or procedural limitations of the Prison Litigation Reform Act of 1995. Pp. 649–651.

347 F. 3d 910, reversed and remanded.

O'Connor, J., delivered the opinion for a unanimous Court.

Bryan A. Stevenson argued the cause for petitioner. With him on the briefs were *Michael Kennedy McIntyre*, by appointment of the Court, 540 U. S. 1102, *H. Victoria Smith*, and *LaJuana Davis*.

Kevin C. Newsom, Solicitor General of Alabama, argued the cause for respondents. With him on the brief were *Richard F. Allen*, Acting Attorney General, and *Michael B. Billingsley*, Deputy Solicitor General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Three days before his scheduled execution by lethal injection, petitioner David Nelson filed a civil rights action in District Court, pursuant to Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging that the use of a "cut-down" procedure to access his veins would violate the Eighth Amendment. Petitioner, who had already filed one unsuccessful federal habeas application, sought a stay of execution so that the District Court could consider the merits of his constitutional claim. The question before us is whether § 1983 is an appropriate vehicle for petitioner's Eighth Amendment claim seeking a temporary stay and permanent injunctive relief. We answer that question in the affirmative, reverse the contrary judgment

*Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Jim Petro*, Attorney General of Ohio, *Douglas R. Cole*, State Solicitor, *Christopher D. Stock*, Deputy Solicitor, *Charles L. Wille*, Assistant Attorney General, by *Christopher L. Morano*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Charlie Crist* of Florida, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Gerald J. Pappert* of Pennsylvania, *Henry Dargan McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, and *Patrick J. Crank* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for Senator Orrin G. Hatch et al. by *Ed R. Haden.*

George H. Kendall filed a brief for Laurie Dill, M. D., et al. as *amici curiae.*

of the Eleventh Circuit, and remand the case for further proceedings consistent with this opinion.

I

Because the District Court dismissed the suit at the pleading stage, we assume the allegations in petitioner's complaint to be true. Petitioner was found guilty by a jury in 1979 of capital murder and sentenced to death. Following two resentencings, the Eleventh Circuit, on June 3, 2002, affirmed the District Court's denial of petitioner's first federal habeas petition challenging the most recent death sentence. *Nelson* v. *Alabama*, 292 F. 3d 1291. Up until and at the time of that disposition, Alabama employed electrocution as its sole method of execution. On July 1, 2002, Alabama changed to lethal injection, though it still allowed inmates to opt for electrocution upon written notification within 30 days of the Alabama Supreme Court's entry of judgment or July 1, 2002, whichever is later. Ala. Code § 15–18–82.1 (Lexis Supp. 2003). Because he failed to make a timely request, petitioner waived his option to be executed by electrocution.

This Court denied petitioner's request for certiorari review of the Eleventh Circuit's decision on March 24, 2003. *Nelson* v. *Alabama*, 538 U. S. 926. Two weeks later, the Alabama Attorney General's office moved the Alabama Supreme Court to set an execution date. App. 81. Petitioner responded by letter that he "ha[d] no plans to contest [the] motion," agreeing "that an execution date should be set promptly by the court in the immediate future." *Id.*, at 89. Hearing no objection, the Alabama Supreme Court, on September 3, 2003, set petitioner's execution for October 9, 2003.

Due to years of drug abuse, petitioner has severely compromised peripheral veins, which are inaccessible by standard techniques for gaining intravenous access, such as a needle. *Id.*, at 7. In August 2003, counsel for petitioner contacted Grantt Culliver, warden of Holman Correctional Facility where the execution was to take place, to discuss

how petitioner's medical condition might impact the lethal injection procedure. Counsel specifically requested a copy of the State's written protocol for gaining venous access prior to execution, and asked that a privately retained or prison physician consult with petitioner about the procedure. *Id.*, at 8–9, 25–26. The warden advised counsel that the State had such a protocol, but stated that he could not provide it to her. He nevertheless assured counsel that "medical personnel" would be present during the execution and that a prison physician would evaluate and speak with petitioner upon his arrival at Holman Correctional Facility. *Id.*, at 8, 26.

Petitioner was transferred to Holman shortly after the Alabama Supreme Court set the execution date. Warden Culliver and a prison nurse met with and examined petitioner on September 10, 2003. *Id.*, at 9–10. Upon confirming that petitioner had compromised veins, Warden Culliver informed petitioner that prison personnel would cut a 0.5-inch incision in petitioner's arm and catheterize a vein 24 hours before the scheduled execution. *Id.*, at 11. At a second meeting on Friday, October 3, 2003, the warden dramatically altered the prognosis: prison personnel would now make a 2-inch incision in petitioner's arm or leg; the procedure would take place one hour before the scheduled execution; and only local anesthesia would be used. *Id.*, at 12. There was no assurance that a physician would perform or even be present for the procedure. Counsel immediately contacted the Alabama Department of Corrections Legal Department requesting a copy of the State's execution protocol. *Id.*, at 13, 27. The legal department denied counsel's request. *Id.*, at 28.

The following Monday, three days before his scheduled execution, petitioner filed the present § 1983 action alleging that the so-called "cut-down" procedure constituted cruel and unusual punishment and deliberate indifference to his serious medical needs in violation of the Eighth Amendment. *Id.*, at 21 (complaint), 102 (amended complaint). Petitioner

sought: a permanent injunction against use of the cut-down; a temporary stay of execution to allow the District Court to consider the merits of his claim; an order requiring respondents to furnish a copy of the protocol setting forth the medical procedures to be used to gain venous access; and an order directing respondents, in consultation with medical experts, to promulgate a venous access protocol that comports with contemporary standards of medical care. *Id.*, at 22. Appended to the complaint was an affidavit from Dr. Mark Heath, a board certified anesthesiologist and assistant professor at Columbia University College of Physicians and Surgeons, attesting that the cut-down is a dangerous and antiquated medical procedure to be performed only by a trained physician in a clinical environment with the patient under deep sedation. In light of safer and less-invasive contemporary means of venous access, Dr. Heath concluded that "there is no comprehensible reason for the State of Alabama to be planning to employ the cut-down procedure to obtain intravenous access, unless there exists an intent to render the procedure more painful and risky than it otherwise needs to be." *Id.*, at 37.

Respondents moved to dismiss the complaint for want of jurisdiction on the grounds that petitioner's § 1983 claim and accompanying stay request were the "'functional equivalent'" of a second or successive habeas application subject to the gatekeeping provisions of 28 U. S. C. § 2244(b). App. 82. The District Court agreed and, because petitioner had not obtained authorization to file a second or successive application as required by § 2244(b)(3), dismissed the complaint. A divided panel of the Eleventh Circuit affirmed. Relying on *Fugate* v. *Department of Corrections*, 301 F. 3d 1287 (2002), in which the Eleventh Circuit had held that § 1983 claims challenging the method of execution necessarily sound in habeas, the majority held that petitioner should have sought authorization to file a second or successive habeas application. 347 F. 3d 910, 912 (2003). The majority also con-

cluded that, even were it to construe petitioner's appeal as a request for such authorization, it would nevertheless deny the request because petitioner could not show that, but for the purported Eighth Amendment violation, "'no reasonable factfinder would have found [him] guilty of the underlying offense.'" *Ibid.* (quoting 28 U. S. C. § 2244(b)(2)(B)(ii)). Thus, the Eleventh Circuit held that petitioner was without recourse to challenge the constitutionality of the cut-down procedure in Federal District Court. We granted certiorari, 540 U. S. 1046 (2003), and now reverse.

II

A

Section 1983 authorizes a "suit in equity, or other proper proceeding for redress," against any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." Petitioner's complaint states such a claim. Despite its literal applicability, however, § 1983 must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements, where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 489 (1973). Such claims fall within the "core" of habeas corpus and are thus not cognizable when brought pursuant to § 1983. *Ibid.* By contrast, constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core and may be brought pursuant to § 1983 in the first instance. See *Muhammad* v. *Close*, 540 U. S. 749, 750 (2004) *(per curiam); Preiser*, *supra*, at 498–499.

We have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution—*e. g.*, lethal injection or electrocution—fall within the core of federal habeas corpus or, rather, whether

they are properly viewed as challenges to the conditions of a condemned inmate's death sentence. Neither the "conditions" nor the "fact or duration" label is particularly apt. A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the "fact" or "validity" of the sentence itself—by simply altering its method of execution, the State can go forward with the sentence. Cf. *Weaver* v. *Graham*, 450 U. S. 24, 32–33, n. 17 (1981) (no *ex post facto* violation to change method of execution to more humane method). On the other hand, imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, see Ala. Code § 15–18–82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. See *Calderon* v. *Thompson*, 523 U. S. 538, 556–557 (1998); *In re Blodgett*, 502 U. S. 236, 238 (1992) *(per curiam); McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them").

We need not reach here the difficult question of how to categorize method-of-execution claims generally. Respondents at oral argument conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the constitutionality of the cut-down procedure if used to gain venous access for purposes of providing medical treatment. Tr. of Oral Arg. 40 ("I don't disagree . . . that a cut-down occurring for purposes of venous access, wholly divorced from an exe-

cution, is indeed a valid conditions of confinement claim"); see also *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" (citation omitted)). We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die.

Respondents counter that, because the cut-down is part of the execution procedure, petitioner's challenge is, in fact, a challenge to the fact of his execution. They offer the following argument: A challenge to the use of lethal injection as a method of execution sounds in habeas; venous access is a necessary prerequisite to, and thus an indispensable part of, any lethal injection procedure; therefore, a challenge to the State's means of achieving venous access must be brought in a federal habeas application. Even were we to accept as given respondents' premise that a challenge to lethal injection sounds in habeas, the conclusion does not follow. That venous access is a necessary prerequisite does not imply that a particular means of gaining such access is likewise necessary. Indeed, the gravamen of petitioner's entire claim is that use of the cut-down would be *gratuitous*. Merely labeling something as part of an execution procedure is insufficient to insulate it from a § 1983 attack.

If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. But petitioner has been careful throughout these proceedings, in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are *wholly unnecessary* to gaining venous

access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled. App. 17 (complaint) (proffering as "less invasive, less painful, faster, cheaper, and safer" the alternative procedure of "percutaneous central line placement"); *id.*, at 37–38 (affidavit of Dr. Mark Heath) (describing relative merits of the cut-down and percutaneous central line placement). No Alabama statute requires use of the cut-down, see Ala. Code § 15–18–82 (Lexis Supp. 2003) (saying only that method of execution is lethal injection), and respondents have offered no duly-promulgated regulations to the contrary.

If on remand and after an evidentiary hearing the District Court concludes that use of the cut-down procedure as described in the complaint is necessary for administering the lethal injection, the District Court will need to address the broader question, left open here, of how to treat method-of-execution claims generally. An evidentiary hearing will in all likelihood be unnecessary, however, as the State now seems willing to implement petitioner's proposed alternatives. See Tr. of Oral Arg. 45–46 ("I think there is no disagreement here that percutaneous central line placement is the preferred method and will, in fact, be used, a cut-down to be used only if actually necessary").

We note that our holding here is consistent with our approach to civil rights damages actions, which, like method-of-execution challenges, fall at the margins of habeas. Although damages are not an available habeas remedy, we have previously concluded that a § 1983 suit for damages that would "necessarily imply" the invalidity of the fact of an inmate's conviction, or "necessarily imply" the invalidity of the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence. *Heck* v. *Humphrey*, 512 U. S. 477, 487 (1994); *Edwards* v. *Balisok*, 520 U. S. 641, 648 (1997). This "favorable

termination" requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief—challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute. *Muhammad*, 540 U. S., at 751. Even so, we were careful in *Heck* to stress the importance of the term "necessarily." For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not "*necessarily* imply that the plaintiff's conviction was unlawful." 512 U. S., at 487, n. 7 (noting doctrines such as inevitable discovery, independent source, and harmless error). To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination—suits that could otherwise have gone forward had the plaintiff not been convicted. In the present context, focusing attention on whether petitioner's challenge to the cut-down procedure would *necessarily* prevent Alabama from carrying out its execution both protects against the use of § 1983 to circumvent any limits imposed by the habeas statute and minimizes the extent to which the fact of a prisoner's imminent execution will require differential treatment of his otherwise cognizable § 1983 claims.

B

There remains the question whether petitioner's request for a temporary stay of execution, subsequently recharacterized by petitioner as a request for a preliminary injunction, App. 49, transformed his conditions of confinement claim into a challenge to the validity of his death sentence. Normally, it would not. If a request for a permanent injunction does not sound in habeas, it follows that the lesser included request for a temporary stay (or preliminary injunction) does not either.

There is a complication in the present case, however. In his prayer for relief, petitioner asked the District Court, among other things, to "[e]nter an order granting injunctive relief and staying [petitioner's] execution, which is currently scheduled for October 9, 2003." *Id.*, at 22. Though he did not specify what permanent injunctive relief he was seeking, a fair reading of the complaint leaves no doubt that petitioner was asking only to enjoin the State's use of the cut-down, not his execution by lethal injection. The same cannot be said of petitioner's stay request. There, he explicitly requested that the District Court stay his execution, seemingly without regard to whether the State did or did not resort to the cut-down. This observation is potentially significant given the fact that the State has maintained, from the outset of this litigation, that it would attempt other methods of venous access prior to engaging in the cut-down. See *id.*, at 51–52; *id.*, at 93–94 (affidavit of Warden Culliver). By asking for broader relief than necessary, petitioner undermines his assertions that: (1) his § 1983 suit is not a tactic for delay, and (2) he is not challenging the fact of his execution, but merely a dispensable preliminary procedure.

Whatever problem this failing might have caused before this Court entered a stay, the execution warrant has now expired. If the State reschedules the execution while this case is pending on remand and petitioner seeks another similarly broad stay, the District Court will need to address the question whether a request to enjoin the execution, rather than merely to enjoin an allegedly unnecessary precursor medical procedure, properly sounds in habeas. See also 18 U. S. C. § 3626(a)(2) ("Preliminary injunctive relief [in prison conditions cases] must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm").

C

Respondents argue that a decision to reverse the judgment of the Eleventh Circuit would open the floodgates to all manner of method-of-execution challenges, as well as last minute stay requests. But, because we do not here resolve the question of how to treat method-of-execution claims generally, our holding is extremely limited.

Moreover, as our previous decision in *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653 (1992) *(per curiam)*, makes clear, the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right. *Gomez* came to us on a motion by the State to vacate a stay entered by an en banc panel of the Court of Appeals for the Ninth Circuit that would have allowed the District Court time to consider the merits of a condemned inmate's last-minute § 1983 action challenging the constitutionality of California's use of the gas chamber. We left open the question whether the inmate's claim was cognizable under § 1983, but vacated the stay nonetheless. The inmate, Robert Alton Harris, who had already filed four unsuccessful federal habeas applications, waited until the eleventh hour to file his challenge despite the fact that California's method of execution had been in place for years: "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*, at 654.

A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." *Ibid.* Thus, before granting a stay, a district court must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the

inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, see *Blodgett*, 502 U. S., at 239; *McCleskey*, 499 U. S., at 491, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

Finally, the ability to bring a § 1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The Prison Litigation Reform Act of 1995 (Act) imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." 18 U. S. C. § 3626(a)(1); accord, § 3626(a)(2). It requires that inmates exhaust available state administrative remedies before bringing a § 1983 action challenging the conditions of their confinement. 110 Stat. 1321–71, 42 U. S. C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted"). The Act mandates that a district court "shall," on its own motion, dismiss "any action brought with respect to prison conditions under section 1983 of this title . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." § 1997e(c)(1). Indeed, if the claim is frivolous on its face, a district court may dismiss the suit before the plaintiff has exhausted his state remedies. § 1997e(c)(2).

For the reasons stated herein, the judgment of the Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

YARBOROUGH, WARDEN *v.* ALVARADO

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

No. 02–1684. Argued March 1, 2004—Decided June 1, 2004

Respondent Alvarado helped Paul Soto try to steal a truck, leading to the death of the truck's owner. Alvarado was called in for an interview with Los Angeles detective Comstock. Alvarado was 17 years old at the time, and his parents brought him to the station and waited in the lobby during the interview. Comstock took Alvarado to a small room where only the two of them were present. The interview lasted about two hours, and Alvarado was not given a warning under *Miranda* v. *Arizona*, 384 U. S. 436. Although he at first denied being present at the shooting, Alvarado slowly began to change his story, finally admitting that he had helped Soto try to steal the victim's truck and to hide the gun after the murder. Comstock twice asked Alvarado if he needed a break and, when the interview was over, returned him to his parents, who drove him home. After California charged Alvarado with murder and attempted robbery, the trial court denied his motion to suppress his interview statements on *Miranda* grounds. In affirming Alvarado's conviction, the District Court of Appeal (hereinafter state court) ruled that a *Miranda* warning was not required because Alvarado had not been in custody during the interview under the test articulated in *Thompson* v. *Keohane*, 516 U. S. 99, 112, which requires a court to consider the circumstances surrounding the interrogation and then determine whether a reasonable person would have felt at liberty to leave. The Federal District Court agreed with the state court on habeas review, but the Ninth Circuit reversed, holding that the state court erred in failing to account for Alvarado's youth and inexperience when evaluating whether a reasonable person in his position would have felt free to leave the interview. Noting that this Court has considered a suspect's juvenile status in other criminal law contexts, see, *e. g.*, *Haley* v. *Ohio*, 332 U. S. 596, 599, the Court of Appeals held that the state court's error warranted habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) because it "resulted in a decision that . . . involved an unreasonable application of . . . clearly established Federal law, as determined by [this] Court," 28 U. S. C. § 2254(d)(1).

Held: The state court considered the proper factors and reached a reasonable conclusion that Alvarado was not in custody for *Miranda* purposes during his police interview. Pp. 660–669.

Syllabus

(a) AEDPA requires federal courts to consider whether the state-court decision involved an unreasonable application of clearly established law. Clearly established law "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams* v. *Taylor*, 529 U. S. 362, 412. The *Miranda* custody test is an objective test. Two discrete inquiries are essential: (1) the circumstances surrounding the interrogation, and (2) given those circumstances, whether a reasonable person would have felt free to terminate the interrogation and leave. "Once the . . . players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Thompson*, *supra*, at 112. Pp. 660–663.

(b) The state-court adjudication did not involve an unreasonable application of clearly established law when it concluded that Alvarado was not in custody. The meaning of "unreasonable" can depend in part on the specificity of the relevant legal rule. If a rule is specific, the range of reasonable judgment may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over time. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations. Cf. *Wright* v. *West*, 505 U. S. 277, 308–309. Fair-minded jurists could disagree over whether Alvarado was in custody. The custody test is general, and the state court's application of this Court's law fits within the matrix of the Court's prior decisions. Certain facts weigh against a finding that Alvarado was in custody. The police did not transport him to the station or require him to appear at a particular time, cf. *Oregon* v. *Mathiason*, 429 U. S. 492, 495; they did not threaten him or suggest he would be placed under arrest, *ibid.;* his parents remained in the lobby during the interview, suggesting that the interview would be brief, see *Berkemer* v. *McCarty*, 468 U. S. 420, 441–442; Comstock appealed to Alvarado's interest in telling the truth and being helpful to a police officer, cf. *Mathiason*, 429 U. S., at 495; Comstock twice asked Alvarado if he wanted to take a break; and, at the end of the interview, Alvarado went home, *ibid.* Other facts point in the opposite direction. Comstock interviewed Alvarado at the police station; the interview lasted four times longer than the 30-minute interview in *Mathiason;* Comstock did not tell Alvarado that he was free to leave; he was brought to the station by his legal guardians rather than arriving on his own accord; and his parents allegedly asked to be present at the interview but were rebuffed. Given these differing indications, the state court's application of this Court's custody standard was reasonable. Indeed, a number of the facts echo those in *Mathiason*, a *per*

curiam summary reversal in which we found it clear that the suspect was not in custody. Pp. 663–666.

(c) The state court's failure to consider Alvarado's age and inexperience does not provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law. The Court's opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration. The only indications in those opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors. See, *e. g.*, *Berkemer*, *supra*, at 442, n. 35, 430–432. It was therefore improper for the Court of Appeals to grant relief on the basis of the state court's failure to consider them. There is an important conceptual difference between the *Miranda* test and the line of cases from other contexts considering age and experience. The *Miranda* custody inquiry is an objective test, see *Thompson*, *supra*, at 112, that furthers "the clarity of [*Miranda*'s] rule," *Berkemer*, 468 U. S., at 430, ensuring that the police need not "gues[s] as to [the circumstances] at issue before deciding how they may interrogate the suspect," *id.*, at 431. This objective inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect, where the Court does consider a suspect's age and experience. In concluding that such factors should also apply to the *Miranda* custody inquiry, the Ninth Circuit ignored the argument that that inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry, cf. *Mathiason*, *supra*, at 495–496. Reliance on Alvarado's prior history with law enforcement was improper not only under § 2254(d)(1)'s deferential standard, but also as a *de novo* matter. In most cases, the police will not know a suspect's interrogation history. See *Berkemer*, *supra*, at 430–431. Even if they do, the relationship between a suspect's experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative. Officers should not be asked to consider these contingent psychological factors when deciding when suspects should be advised of *Miranda* rights. See *Berkemer*, *supra*, at 431–432. Pp. 666–669.

316 F. 3d 841, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 669. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 669.

Deborah Jane Chuang, Deputy Attorney General of California, argued the cause for petitioner. With her on the

briefs were *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Pamela C. Hamanaka*, Senior Assistant Attorney General, *Donald E. De Nicola*, Deputy Attorney General, and *Kenneth C. Byrne*, Supervising Deputy Attorney General.

John P. Elwood argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Wray*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.

Tara K. Allen, by appointment of the Court, 540 U. S. 1043, argued the cause for respondent. With her on the briefs were *Thomas J. Phalen* and *John H. Blume*.*

JUSTICE KENNEDY delivered the opinion of the Court.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a federal court can grant an application for a writ of habeas corpus on behalf of a person held pursuant to a state-court judgment if the state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1). The United States Court of Appeals for the Ninth Circuit ruled that a state court unreasonably applied clearly established law when it held that the respondent was not in custody for *Miranda* purposes. *Alvarado* v. *Hickman*, 316 F. 3d 841 (2002). We disagree and reverse.

I

Paul Soto and respondent Michael Alvarado attempted to steal a truck in the parking lot of a shopping mall in Santa

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**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Juvenile Law Center et al. by *Marsha L. Levick* and *Lourdes M. Rosado;* and for the National Association of Criminal Defense Lawyers by *Jeffrey T. Green* and *David M. Porter*.

Fe Springs, California. Soto and Alvarado were part of a larger group of teenagers at the mall that night. Soto decided to steal the truck, and Alvarado agreed to help. Soto pulled out a .357 Magnum and approached the driver, Francisco Castaneda, who was standing near the truck emptying trash into a dumpster. Soto demanded money and the ignition keys from Castaneda. Alvarado, then five months short of his 18th birthday, approached the passenger side door of the truck and crouched down. When Castaneda refused to comply with Soto's demands, Soto shot Castaneda, killing him. Alvarado then helped hide Soto's gun.

Los Angeles County Sheriff's detective Cheryl Comstock led the investigation into the circumstances of Castaneda's death. About a month after the shooting, Comstock left word at Alvarado's house and also contacted Alvarado's mother at work with the message that she wished to speak with Alvarado. Alvarado's parents brought him to the Pico Rivera Sheriff's Station to be interviewed around lunchtime. They waited in the lobby while Alvarado went with Comstock to be interviewed. Alvarado contends that his parents asked to be present during the interview but were rebuffed.

Comstock brought Alvarado to a small interview room and began interviewing him at about 12:30 p.m. The interview lasted about two hours, and was recorded by Comstock with Alvarado's knowledge. Only Comstock and Alvarado were present. Alvarado was not given a warning under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Comstock began the interview by asking Alvarado to recount the events on the night of the shooting. On that night, Alvarado explained, he had been drinking alcohol at a friend's house with some other friends and acquaintances. After a few hours, part of the group went home and the rest walked to a nearby mall to use its public telephones. In Alvarado's initial telling, that was the end of it. The group went back to the friend's home and "just went to bed." App. 101.

Unpersuaded, Comstock pressed on:

"Q. Okay. We did real good up until this point and everything you've said it's pretty accurate till this point, except for you left out the shooting.

"A. The shooting?

"Q. Uh huh, the shooting.

"A. Well I had never seen no shooting.

"Q. Well I'm afraid you did.

"A. I had never seen no shooting.

"Q. Well I beg to differ with you. I've been told quite the opposite and we have witnesses that are saying quite the opposite.

"A. That I had seen the shooting?

"Q. So why don't you take a deep breath, like I told you before, the very best thing is to be honest. . . . You can't have that many people get involved in a murder and expect that some of them aren't going to tell the truth, okay? Now granted if it was maybe one person, you might be able to keep your fingers crossed and say, god I hope he doesn't tell the truth, but the problem is is that they have to tell the truth, okay? Now all I'm simply doing is giving you the opportunity to tell the truth and when we got that many people telling a story and all of a sudden you tell something way far fetched different." *Id.*, at 101–102 (punctuation added).

At this point, Alvarado slowly began to change his story. First he acknowledged being present when the carjacking occurred but claimed that he did not know what happened or who had a gun. When he hesitated to say more, Comstock tried to encourage Alvarado to discuss what happened by appealing to his sense of honesty and the need to bring the man who shot Castaneda to justice. See, *e. g.*, *id.*, at 106 ("[W]hat I'm looking for is to see if you'll tell the truth"); *id.*, at 105–106 ("I know it's very difficult when it comes time to 'drop the dime' on somebody[,] . . . [but] if that had been

your parent, your mother, or your brother, or your sister, you would darn well want [the killer] to go to jail 'cause no one has the right to take someone's life like that . . .''). Alvarado then admitted he had helped the other man try to steal the truck by standing near the passenger side door. Next he admitted that the other man was Paul Soto, that he knew Soto was armed, and that he had helped hide the gun after the murder. Alvarado explained that he had expected Soto to scare the driver with the gun, but that he did not expect Soto to kill anyone. *Id.*, at 127. Toward the end of the interview, Comstock twice asked Alvarado if he needed to take a break. Alvarado declined. When the interview was over, Comstock returned with Alvarado to the lobby of the sheriff's station where his parents were waiting. Alvarado's father drove him home.

A few months later, the State of California charged Soto and Alvarado with first-degree murder and attempted robbery. Citing *Miranda*, *supra*, Alvarado moved to suppress his statements from the Comstock interview. The trial court denied the motion on the ground that the interview was noncustodial. App. 196. Alvarado and Soto were tried together, and Alvarado testified in his own defense. He offered an innocent explanation for his conduct, testifying that he happened to be standing in the parking lot of the mall when a gun went off nearby. The government's cross-examination relied on Alvarado's statement to Comstock. Alvarado admitted having made some of the statements but denied others. When Alvarado denied particular statements, the prosecution countered by playing excerpts from the audio recording of the interview.

During cross-examination, Alvarado agreed that the interview with Comstock "was a pretty friendly conversation," *id.*, at 438, that there was "sort of a free flow between [Alvarado] and Detective Comstock," *id.*, at 439, and that Alvarado did not "feel coerced or threatened in any way" during the interview, *ibid.* The jury convicted Soto and Alvarado of first-degree murder and attempted robbery. The

trial judge later reduced Alvarado's conviction to second-degree murder for his comparatively minor role in the offense. The judge sentenced Soto to life in prison and Alvarado to 15-years-to-life.

On direct appeal, the Second Appellate District Court of Appeal (hereinafter state court) affirmed. *People* v. *Soto*, 74 Cal. App. 4th 1099, 88 Cal. Rptr. 2d 688 (1999) (unpublished in relevant part). The state court rejected Alvarado's contention that his statements to Comstock should have been excluded at trial because no *Miranda* warnings were given. The court ruled Alvarado had not been in custody during the interview, so no warning was required. The state court relied upon the custody test articulated in *Thompson* v. *Keohane*, 516 U. S. 99, 112 (1995), which requires a court to consider the circumstances surrounding the interrogation and then determine whether a reasonable person would have felt at liberty to leave. The state court reviewed the facts of the Comstock interview and concluded Alvarado was not in custody. App. to Pet. for Cert. C–17. The court emphasized the absence of any intense or aggressive tactics and noted that Comstock had not told Alvarado that he could not leave. The California Supreme Court denied discretionary review.

Alvarado filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. The District Court agreed with the state court that Alvarado was not in custody for *Miranda* purposes during the interview. *Alvarado* v. *Hickman*, No. ED CV–00–326–VAP(E) (2000), App. to Pet. for Cert. B–1 to B–10. "At a minimum," the District Court added, the deferential standard of review provided by 28 U. S. C. § 2254(d) foreclosed relief. App. to Pet. for Cert. B–7.

The Court of Appeals for the Ninth Circuit reversed. *Alvarado* v. *Hickman*, 316 F. 3d 841 (2002). First, the Court of Appeals held that the state court erred in failing to account for Alvarado's youth and inexperience when evaluating whether a reasonable person in his position would have felt

free to leave. It noted that this Court has considered a suspect's juvenile status when evaluating the voluntariness of confessions and the waiver of the privilege against self-incrimination. See *id.*, at 843 (citing, *inter alia*, *Haley* v. *Ohio*, 332 U. S. 596, 599–601 (1948), and *In re Gault*, 387 U. S. 1, 45 (1967)). The Court of Appeals held that in light of these authorities, Alvarado's age and experience must be a factor in the *Miranda* custody inquiry. 316 F. 3d, at 843. A minor with no criminal record would be more likely to feel coerced by police tactics and conclude he is under arrest than would an experienced adult, the Court of Appeals reasoned. This required extra "safeguards . . . commensurate with the age and circumstances of a juvenile defendant." See *id.*, at 850. According to the Court of Appeals, the effect of Alvarado's age and inexperience was so substantial that it turned the interview into a custodial interrogation.

The Court of Appeals next considered whether Alvarado could obtain relief in light of the deference a federal court must give to a state-court determination on habeas review. The deference required by AEDPA did not bar relief, the Court of Appeals held, because the relevance of juvenile status in Supreme Court case law as a whole compelled the "extension of the principle that juvenile status is relevant" to the context of *Miranda* custody determinations. 316 F. 3d, at 853. In light of the clearly established law considering juvenile status, it was "simply unreasonable to conclude that a reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was at liberty to terminate the interrogation and leave." *Id.*, at 854–855 (internal quotation marks omitted).

We granted certiorari. 539 U. S. 986 (2003).

II

We begin by determining the relevant clearly established law. For purposes of 28 U. S. C. § 2254(d)(1), clearly established law as determined by this Court "refers to the holdings, as opposed to the dicta, of this Court's decisions as of

the time of the relevant state-court decision." *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000). We look for "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer* v. *Andrade*, 538 U. S. 63, 71–72 (2003).

Miranda itself held that preinterrogation warnings are required in the context of custodial interrogations given "the compulsion inherent in custodial surroundings." 384 U. S., at 458. The Court explained that "custodial interrogation" meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, at 444. The *Miranda* decision did not provide the Court with an opportunity to apply that test to a set of facts.

After *Miranda*, the Court first applied the custody test in *Oregon* v. *Mathiason*, 429 U. S. 492 (1977) *(per curiam)*. In *Mathiason*, a police officer contacted the suspect after a burglary victim identified him. The officer arranged to meet the suspect at a nearby police station. At the outset of the questioning, the officer stated his belief that the suspect was involved in the burglary but that he was not under arrest. During the 30-minute interview, the suspect admitted his guilt. He was then allowed to leave. The Court held that the questioning was not custodial because there was "no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way." *Id.*, at 495. The Court noted that the suspect had come voluntarily to the police station, that he was informed that he was not under arrest, and that he was allowed to leave at the end of the interview. *Ibid.*

In *California* v. *Beheler*, 463 U. S. 1121 (1983) *(per curiam)*, the Court reached the same result in a case with facts similar to those in *Mathiason*. In *Beheler*, the state court had distinguished *Mathiason* based on what it described as differences in the totality of the circumstances. The police interviewed Beheler shortly after the crime occurred; Beheler had been drinking earlier in the day; he was emotion-

ally distraught; he was well known to the police; and he was a parolee who knew it was necessary for him to cooperate with the police. 463 U. S., at 1124–1125. The Court agreed that "the circumstances of each case must certainly influence" the custody determination, but reemphasized that "the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.*, at 1125 (internal quotation marks omitted). The Court found the case indistinguishable from *Mathiason*. It noted that how much the police knew about the suspect and how much time had elapsed after the crime occurred were irrelevant to the custody inquiry. 463 U. S., at 1125.

Our more recent cases instruct that custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances. In *Berkemer* v. *McCarty*, 468 U. S. 420 (1984), a police officer stopped a suspected drunk driver and asked him some questions. Although the officer reached the decision to arrest the driver at the beginning of the traffic stop, he did not do so until the driver failed a sobriety test and acknowledged that he had been drinking beer and smoking marijuana. The Court held the traffic stop noncustodial despite the officer's intent to arrest because he had not communicated that intent to the driver. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time," the Court explained. *Id.*, at 442. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Ibid.* In a footnote, the Court cited a New York state case for the view that an objective test was preferable to a subjective test in part because it does not "'place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.'" *Id.*, at 442, n. 35 (quoting *People* v. *P.*, 21 N. Y. 2d 1, 9–10, 233 N. E. 2d 255, 260 (1967)).

Stansbury v. *California*, 511 U. S. 318 (1994) *(per curiam)*, confirmed this analytical framework. *Stansbury* explained that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.*, at 323. Courts must examine "all of the circumstances surrounding the interrogation" and determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Id.*, at 322, 325 (internal quotation marks and alteration omitted).

Finally, in *Thompson* v. *Keohane*, 516 U. S. 99 (1995), the Court offered the following description of the *Miranda* custody test:

> "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." 516 U. S., at 112 (internal quotation marks and footnote omitted).

We turn now to the case before us and ask if the state-court adjudication of the claim "involved an unreasonable application" of clearly established law when it concluded that Alvarado was not in custody. 28 U. S. C. § 2254(d)(1). See *Williams*, 529 U. S., at 413 ("Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case"). The term "'unreasonable'" is "a common term in the legal world and,

accordingly, federal judges are familiar with its meaning." *Id.*, at 410. At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. Cf. *Wright* v. *West*, 505 U. S. 277, 308–309 (1992) (KENNEDY, J., concurring in judgment).

Based on these principles, we conclude that the state court's application of our clearly established law was reasonable. Ignoring the deferential standard of § 2254(d)(1) for the moment, it can be said that fairminded jurists could disagree over whether Alvarado was in custody. On one hand, certain facts weigh against a finding that Alvarado was in custody. The police did not transport Alvarado to the station or require him to appear at a particular time. Cf. *Mathiason*, 429 U. S., at 495. They did not threaten him or suggest he would be placed under arrest. *Ibid.* Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief. See *Berkemer*, *supra*, at 441–442. In fact, according to trial counsel for Alvarado, he and his parents were told that the interview was "'not going to be long.'" App. 186. During the interview, Comstock focused on Soto's crimes rather than Alvarado's. Instead of pressuring Alvarado with the threat of arrest and prosecution, she appealed to his interest in telling the truth and being helpful to a police officer. Cf. *Mathiason*, *supra*, at 495. In addition, Comstock twice asked Alvarado if he wanted to take a break. At the end of the interview, Alvarado went home. App. 186. All of these objective

facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave. Indeed, a number of the facts echo those of *Mathiason*, a *per curiam* summary reversal in which we found it "clear from these facts" that the suspect was not in custody. 494 U. S., at 495.

Other facts point in the opposite direction. Comstock interviewed Alvarado at the police station. The interview lasted two hours, four times longer than the 30-minute interview in *Mathiason*. Unlike the officer in *Mathiason*, Comstock did not tell Alvarado that he was free to leave. Alvarado was brought to the police station by his legal guardians rather than arriving on his own accord, making the extent of his control over his presence unclear. Counsel for Alvarado alleges that Alvarado's parents asked to be present at the interview but were rebuffed, a fact that—if known to Alvarado—might reasonably have led someone in Alvarado's position to feel more restricted than otherwise. These facts weigh in favor of the view that Alvarado was in custody.

These differing indications lead us to hold that the state court's application of our custody standard was reasonable. The Court of Appeals was nowhere close to the mark when it concluded otherwise. Although the question of what an "unreasonable application" of law might be is difficult in some cases, it is not difficult here. The custody test is general, and the state court's application of our law fits within the matrix of our prior decisions. We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." *Woodford* v. *Visciotti*, 537 U. S. 19, 24–25 (2002) *(per curiam)*. Relief is available under § 2254(d)(1) only if the state court's decision is objectively unreasonable. See *Williams*,

529 U. S., at 410; *Andrade*, 538 U. S., at 75. Under that standard, relief cannot be granted.

III

The Court of Appeals reached the opposite result by placing considerable reliance on Alvarado's age and inexperience with law enforcement. Our Court has not stated that a suspect's age or experience is relevant to the *Miranda* custody analysis, and counsel for Alvarado did not press the importance of either factor on direct appeal or in habeas proceedings. According to the Court of Appeals, however, our Court's emphasis on juvenile status in other contexts demanded consideration of Alvarado's age and inexperience here. The Court of Appeals viewed the state court's failure to "'extend a clearly established legal principle [of the relevance of juvenile status] to a new context'" as objectively unreasonable in this case, requiring issuance of the writ. 316 F. 3d, at 853 (quoting *Anthony* v. *Cambra*, 236 F. 3d 568, 578 (CA9 2000)).

The petitioner contends that if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision. Brief for Petitioner 10–24. See also *Hawkins* v. *Alabama*, 318 F. 3d 1302, 1306, n. 3 (CA11 2003) (asserting a similar argument). There is force to this argument. Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law. Cf. *Teague* v. *Lane*, 489 U. S. 288 (1989). At the same time, the difference between applying a rule and extending it is not always clear. Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.

This is not such a case, however. Our opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration. The only indica-

tions in the Court's opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors. See *Beheler*, 463 U. S., at 1125 (rejecting a lower court's view that the defendant's prior interview with the police was relevant to the custody inquiry); *Berkemer*, 468 U. S., at 442, n. 35 (citing *People* v. *P.*, 21 N. Y. 2d, at 9–10, 233 N. E. 2d, at 260, which noted the difficulties of a subjective test that would require police to " 'anticipat[e] the frailties or idiosyncrasies of every person whom they question' "); 468 U. S., at 430–432 (describing a suspect's criminal past and police record as a circumstance "unknowable to the police").

There is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience. The *Miranda* custody inquiry is an objective test. As we stated in *Keohane*, "[o]nce the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry." 516 U. S., at 112 (internal quotation marks omitted). The objective test furthers "the clarity of [*Miranda*'s] rule," *Berkemer*, 468 U. S., at 430, ensuring that the police do not need "to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect," *id.*, at 431. To be sure, the line between permissible objective facts and impermissible subjective experiences can be indistinct in some cases. It is possible to subsume a subjective factor into an objective test by making the latter more specific in its formulation. Thus the Court of Appeals styled its inquiry as an objective test by considering what a "reasonable 17-year-old, with no prior history of arrest or police interviews," would perceive. 316 F. 3d, at 854–855 (case below).

At the same time, the objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect, where we do consider a suspect's age and experience. For example, the voluntariness of a statement is often said to

depend on whether "the defendant's will was overborne," *Lynumn* v. *Illinois*, 372 U. S. 528, 534 (1963), a question that logically can depend on "the characteristics of the accused," *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973). The characteristics of the accused can include the suspect's age, education, and intelligence, see *ibid.*, as well as a suspect's prior experience with law enforcement, see *Lynumn*, *supra*, at 534. In concluding that there was "no principled reason" why such factors should not also apply to the *Miranda* custody inquiry, 316 F. 3d, at 850, the Court of Appeals ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry. Cf. *Mathiason*, 429 U. S., at 495–496 (noting that facts arguably relevant to whether an environment is coercive may have "nothing to do with whether respondent was in custody for purposes of the *Miranda* rule"). For these reasons, the state court's failure to consider Alvarado's age does not provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law.

Indeed, reliance on Alvarado's prior history with law enforcement was improper not only under the deferential standard of 28 U. S. C. § 2254(d)(1), but also as a *de novo* matter. In most cases, police officers will not know a suspect's interrogation history. See *Berkemer*, *supra*, at 430–431. Even if they do, the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative. True, suspects with prior law enforcement experience may understand police procedures and reasonably feel free to leave unless told otherwise. On the other hand, they may view past as prologue and expect another in a string of arrests. We do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights. See *Berkemer*,

supra, at 431–432. The inquiry turns too much on the suspect's subjective state of mind and not enough on the "objective circumstances of the interrogation." *Stansbury*, 511 U. S., at 323.

The state court considered the proper factors and reached a reasonable conclusion. The judgment of the Court of Appeals is

Reversed.

JUSTICE O'CONNOR, concurring.

I join the opinion of the Court, but write separately to express an additional reason for reversal. There may be cases in which a suspect's age will be relevant to the "custody" inquiry under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In this case, however, Alvarado was almost 18 years old at the time of his interview. It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority. Even when police do know a suspect's age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave. That is especially true here; 17½-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults. Given these difficulties, I agree that the state court's decision in this case cannot be called an unreasonable application of federal law simply because it failed explicitly to mention Alvarado's age.

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

In my view, Michael Alvarado clearly was "in custody" when the police questioned him (without *Miranda* warnings) about the murder of Francisco Castaneda. To put the question in terms of federal law's well-established legal standards: Would a "reasonable person" in Alvarado's "position" have felt he was "at liberty to terminate the interrogation

and leave"? *Thompson* v. *Keohane*, 516 U. S. 99, 112 (1995); *Stansbury* v. *California*, 511 U. S. 318, 325 (1994) *(per curiam)*. A court must answer this question in light of "all of the circumstances surrounding the interrogation." *Id.*, at 322. And the obvious answer here is "no."

I

A

The law in this case asks judges to apply, not arcane or complex legal directives, but ordinary common sense. Would a reasonable person in Alvarado's position have felt free simply to get up and walk out of the small room in the station house at will during his 2-hour police interrogation? I ask the reader to put himself, or herself, in Alvarado's circumstances and then answer that question: Alvarado hears from his parents that he is needed for police questioning. His parents take him to the station. On arrival, a police officer separates him from his parents. His parents ask to come along, but the officer says they may not. App. 185–186. Another officer says, "'What do we have here; we are going to question a suspect.'" *Id.*, at 189.

The police take Alvarado to a small interrogation room, away from the station's public area. A single officer begins to question him, making clear in the process that the police have evidence that he participated in an attempted carjacking connected with a murder. When he says that he never saw any shooting, the officer suggests that he is lying, while adding that she is "giving [him] the opportunity to tell the truth" and "tak[e] care of [him]self." *Id.*, at 102, 105. Toward the end of the questioning, the officer gives him permission to take a bathroom or water break. After two hours, by which time he has admitted he was involved in the attempted theft, knew about the gun, and helped to hide it, the questioning ends.

What reasonable person in the circumstances—brought to a police station by his parents at police request, put in a

small interrogation room, questioned for a solid two hours, and confronted with claims that there is strong evidence that he participated in a serious crime, could have thought to himself, "Well, anytime I want to leave I can just get up and walk out"? If the person harbored any doubts, would he still think he might be free to leave once he recalls that the police officer has just refused to let his parents remain with him during questioning? Would he still think that he, rather than the officer, controls the situation?

There is only one possible answer to these questions. A reasonable person would *not* have thought he was free simply to pick up and leave in the middle of the interrogation. I believe the California courts were clearly wrong to hold the contrary, and the Ninth Circuit was right in concluding that those state courts unreasonably applied clearly established federal law. See 28 U. S. C. § 2254(d)(1).

B

What about the Court's view that "fairminded jurists could disagree over whether Alvarado was in custody"? *Ante*, at 664. Consider each of the facts it says "weigh against a finding" of custody:

(1) "*The police did not transport Alvarado to the station or require him to appear at a particular time.*" *Ibid.* (emphasis added). True. His parents brought him to the station at police request. But why does that matter? The relevant question is whether Alvarado came to the station of his own free will or submitted to questioning voluntarily. Cf. *Oregon* v. *Mathiason*, 429 U. S. 492, 493–495 (1977) *(per curiam); California* v. *Beheler*, 463 U. S. 1121, 1122–1123 (1983) *(per curiam); Thompson*, *supra*, at 118 (THOMAS, J., dissenting). And the involvement of Alvarado's parents suggests *in*voluntary, not voluntary, behavior on Alvarado's part.

(2) *"Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief. In*

fact, [Alvarado] and his parents were told that the interview was '"not going to be long."'" *Ante*, at 664 (citation omitted and emphasis added). Whatever was communicated to Alvarado *before* the questioning began, the fact is that the interview was not brief, nor, after the first half hour or so, would Alvarado have expected it to be brief. And those are the relevant considerations. See *Berkemer* v. *McCarty*, 468 U. S. 420, 441 (1984).

(3) "*At the end of the interview, Alvarado went home.*" *Ante*, at 664 (emphasis added). As the majority acknowledges, our recent case law makes clear that the relevant question is how a reasonable person would have gauged his freedom to leave *during*, not *after*, the interview. See *ante*, at 663 (citing *Stansbury*, *supra*, at 325).

(4) "*During the interview, [Officer] Comstock focused on Soto's crimes rather than Alvarado's.*" *Ante*, at 664 (emphasis added). In fact, the police officer characterized Soto as the ringleader, while making clear that she knew Alvarado had participated in the attempted carjacking during which Castaneda was killed. See App. 102–103, 109. Her questioning would have reinforced, not diminished, Alvarado's fear that he was not simply a witness, but also suspected of having been involved in a serious crime. See *Stansbury*, *supra*, at 325.

(5) "*[The officer did not] pressur[e] Alvarado with the threat of arrest and prosecution . . . [but instead] appealed to his interest in telling the truth and being helpful to a police officer.*" *Ante*, at 664 (emphasis added). This factor might be highly significant were the question one of "coercion." But it is not. The question is whether Alvarado would have felt free to terminate the interrogation and leave. In respect to that question, police politeness, while commendable, does not significantly help the majority.

(6) "*Comstock twice asked Alvarado if he wanted to take a break.*" *Ibid.* (emphasis added). This circumstance, emphasizing the officer's control of Alvarado's movements,

makes it *less* likely, not *more* likely, that Alvarado would have thought he was free to leave at will.

The facts to which the majority points make clear what the police did *not* do, for example, come to Alvarado's house, tell him he was under arrest, handcuff him, place him in a locked cell, threaten him, or tell him explicitly that he was not free to leave. But what is important here is what the police *did* do—namely, have Alvarado's parents bring him to the station, put him with a single officer in a small room, keep his parents out, let him know that he was a suspect, and question him for two hours. These latter facts compel a single conclusion: A reasonable person in Alvarado's circumstances would *not* have felt free to terminate the interrogation and leave.

C

What about Alvarado's youth? The fact that Alvarado was 17 helps to show that he was unlikely to have felt free to ignore his parents' request to come to the station. See *Schall* v. *Martin*, 467 U. S. 253, 265 (1984) (juveniles assumed "to be subject to the control of their parents"). And a 17-year-old is more likely than, say, a 35-year-old, to take a police officer's assertion of authority to keep parents outside the room as an assertion of authority to keep their child inside as well.

The majority suggests that the law might *prevent* a judge from taking account of the fact that Alvarado was 17. See *ante*, at 666–668. I can find nothing in the law that supports that conclusion. Our cases do instruct lower courts to apply a "reasonable person" standard. But the "reasonable person" standard does not require a court to pretend that Alvarado was a 35-year-old with aging parents whose middle-aged children do what their parents ask only out of respect. Nor does it say that a court should pretend that Alvarado was the statistically determined "average person"—a working, married, 35-year-old white female with a high school de-

gree. See U. S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2003 (123d ed.).

Rather, the precise legal definition of "reasonable person" may, depending on legal context, appropriately account for certain personal characteristics. In negligence suits, for example, the question is what would a "reasonable person" do "'under the same or similar circumstances.'" In answering that question, courts enjoy "latitude" and may make "allowance not only for external facts, but sometimes for certain characteristics of the actor himself," including physical disability, youth, or advanced age. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 32, pp. 174–179 (5th ed. 1984); see *id.*, at 179–181; see also Restatement (Third) of Torts § 10, Comment *b*, pp. 128–130 (Tent. Draft No. 1, Mar. 28, 2001) (all American jurisdictions count a person's childhood as a "relevant circumstance" in negligence determinations). This allowance makes sense in light of the tort standard's recognized purpose: deterrence. Given that purpose, why pretend that a child is an adult or that a blind man can see? See O. Holmes, The Common Law 85–89 (M. Howe ed. 1963).

In the present context, that of *Miranda*'s "in custody" inquiry, the law has introduced the concept of a "reasonable person" to avoid judicial inquiry into subjective states of mind, and to focus the inquiry instead upon objective circumstances that are known to both the officer and the suspect and that are likely relevant to the way a person would understand his situation. See *Stansbury*, 511 U. S., at 323–325; *Berkemer*, *supra*, at 442, and n. 35. This focus helps to keep *Miranda* a workable rule. See *Berkemer*, *supra*, at 430–431.

In this case, Alvarado's youth is an objective circumstance that was known to the police. It is not a special quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception. To focus on the circumstance of age in a case like this does not

complicate the "in custody" inquiry. And to say that courts should ignore widely shared, objective characteristics, like age, on the ground that only a (large) *minority* of the population possesses them would produce absurd results, the present instance being a case in point. I am not surprised that the majority points to no case suggesting any such limitation. Cf. *Alvarado* v. *Hickman*, 316 F. 3d 841, 848, 850–851, n. 5 (CA9 2002) (case below) (listing 12 cases from 12 different jurisdictions suggesting the contrary).

Nor am I surprised that the majority makes no real argument at all explaining *why* any court would believe that the objective fact of a suspect's age could *never* be relevant. But see *ante*, at 669 (O'CONNOR, J., concurring) ("There may be cases in which a suspect's age will be relevant to the *Miranda* 'custody' inquiry"). The majority does discuss a suspect's "history with law enforcement," *ante*, at 668—a bright red herring in the present context where Alvarado's youth (an objective fact) simply helps to show (with the help of a legal presumption) that his appearance at the police station was not voluntary. See *supra*, at 673.

II

As I have said, the law in this case is clear. This Court's cases establish that, even if the police do not tell a suspect he is under arrest, do not handcuff him, do not lock him in a cell, and do not threaten him, he may nonetheless reasonably believe he is not free to leave the place of questioning—and thus be in custody for *Miranda* purposes. See *Stansbury*, *supra*, at 325–326; *Berkemer*, 468 U. S., at 440.

Our cases also make clear that to determine how a suspect would have "gaug[ed]" his "freedom of movement," a court must carefully examine "all of the circumstances surrounding the interrogation," *Stansbury*, *supra*, at 322, 325 (internal quotation marks omitted), including, for example, how long the interrogation lasted (brief and routine or protracted?), see, *e. g.*, *Berkemer*, *supra*, at 441; how the suspect came to

be questioned (voluntarily or against his will?), see, *e. g.*, *Mathiason*, 429 U. S., at 495; where the questioning took place (at a police station or in public?), see, *e. g.*, *Berkemer*, *supra*, at 438–439; and what the officer communicated to the individual during the interrogation (that he was a suspect? that he was under arrest? that he was free to leave at will?), see, *e. g.*, *Stansbury*, *supra*, at 325. In the present case, every one of these factors argues—and argues strongly—that Alvarado was in custody for *Miranda* purposes when the police questioned him.

Common sense, and an understanding of the law's basic purpose in this area, are enough to make clear that Alvarado's age—an objective, widely shared characteristic about which the police plainly knew—is also relevant to the inquiry. Cf. *Kaupp* v. *Texas*, 538 U. S. 626, 629–631 (2003) *(per curiam)*. Unless one is prepared to pretend that Alvarado is someone he is not, a middle-aged gentleman, well versed in police practices, it seems to me clear that the California courts made a serious mistake. I agree with the Ninth Circuit's similar conclusions. Consequently, I dissent.

Syllabus

REPUBLIC OF AUSTRIA ET AL. *v.* ALTMANN

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

No. 03–13. Argued February 25, 2004—Decided June 7, 2004

Upon evidence that certain of her uncle's valuable art works had either been seized by the Nazis or expropriated by Austria after World War II, respondent filed this action in Federal District Court to recover six of the paintings from petitioners, Austria and its instrumentality, the Austrian Gallery. She asserts jurisdiction under § 2 of the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U. S. C. § 1330(a), which authorizes federal civil suits against foreign states "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity" under another section of the FSIA or under "any applicable international agreement." She further asserts that petitioners are not entitled to immunity under the FSIA's "expropriation exception," § 1605(a)(3), which expressly exempts from immunity certain cases involving "rights in property taken in violation of international law." Petitioners moved to dismiss based on, *inter alia*, the two-part claim that (1) as of 1948, when much of their alleged wrongdoing took place, they would have enjoyed absolute sovereign immunity from suit in United States courts, and that (2) nothing in the FSIA retroactively divests them of that immunity. Rejecting this argument, the District Court concluded, among other things, that the FSIA applies retroactively to pre-1976 actions. The Ninth Circuit affirmed.

Held: The FSIA applies to conduct, like petitioners' alleged wrongdoing, that occurred prior to the Act's 1976 enactment and even prior to the United States' 1952 adoption of the so-called "restrictive theory" of sovereign immunity. Pp. 688–702.

(a) This Court has long deferred to Executive Branch sovereign immunity decisions. Until 1952, Executive policy was to request immunity in all actions against friendly sovereigns. In that year, the State Department began to apply the "restrictive theory," whereby immunity is recognized with regard to a foreign state's sovereign or public acts, but not its private acts. Although this change had little impact on federal courts, which continued to abide by the Department's immunity suggestions, *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 487, the change threw immunity decisions into some disarray: Foreign nations' diplomatic pressure sometimes prompted the Department to file

suggestions of immunity in cases in which immunity would not have been available under the restrictive theory; and when foreign nations failed to ask the Department for immunity, the courts had to determine whether immunity existed, so responsibility for such determinations lay with two different branches, *ibid.* To remedy these problems, the FSIA codified the restrictive principle and transferred primary responsibility for immunity determinations to the Judicial Branch. The Act grants federal courts jurisdiction over civil actions against foreign states and carves out the expropriation and other exceptions to its general grant of immunity. In any such action, the district court's subject-matter jurisdiction depends on the applicability of one of those exceptions. *Id.*, at 493–494. Pp. 688–691.

(b) This case is not controlled by *Landgraf* v. *USI Film Products*, 511 U. S. 244. In describing the general presumption against retroactive application of a statute, the Court there declared, *inter alia*, that, if a federal law enacted after the events in suit does not expressly prescribe its own proper reach but does operate retroactively—*i. e.*, would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed—it does not govern absent clear congressional intent favoring that result. *Id.*, at 280. Though seemingly comprehensive, this inquiry does not provide a clear answer here. None of the three examples of retroactivity mentioned above fits the FSIA's clarification of sovereign immunity law. However, the preliminary conclusion that the FSIA does not appear to "operate retroactively" within the meaning of *Landgraf*'s default rule creates some tension with the Court's observation in *Verlinden* that the FSIA is not simply a jurisdictional statute, but a codification of "the standards governing foreign sovereign immunity as an aspect of *substantive* federal law." 461 U. S., at 496–497 (emphasis added). And while the FSIA's preamble suggests that it applies to preenactment conduct, that statement by itself falls short of the requisite express prescription. Thus *Landgraf*'s default rule does not definitively resolve this case. While *Landgraf*'s antiretroactivity presumption aims to avoid unnecessary *post hoc* changes to legal rules on which private parties relied in shaping their primary conduct, however, foreign sovereign immunity's principal purpose is to give foreign states and their instrumentalities some *present* protection from the inconvenience of suit, *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 479. In this *sui generis* context, it is more appropriate, absent contraindications, to defer to the most recent decision of the political branches on whether to take jurisdiction, the FSIA, than to presume that decision *inapplicable* merely because it postdates the conduct in question. Pp. 692–696.

Syllabus

(c) Nothing in the FSIA or the circumstances surrounding its enactment suggests that it should not be applied to petitioners' 1948 actions. Indeed, clear evidence that Congress intended it to apply to preenactment conduct lies in its preamble's statement that foreign states' immunity *"[c]laims . . .* should *henceforth* be decided by [American] courts . . . in conformity with the principles set forth in this chapter," § 1602 (emphasis added). Though perhaps not sufficient to satisfy *Landgraf*'s "express command" requirement, 511 U. S., at 280, this language is unambiguous: Immunity "claims"—not actions protected by immunity, but assertions of immunity to suits arising from those actions—are the relevant conduct regulated by the Act and are "henceforth" to be decided by the courts. Thus, Congress intended courts to resolve *all* such claims "in conformity with [FSIA] principles" regardless of when the underlying conduct occurred. The FSIA's overall structure strongly supports this conclusion: Many of its provisions unquestionably apply to cases arising out of conduct that occurred before 1976, see, *e. g.*, *Dole Food Co.*, *supra,* and its procedural provisions undoubtedly apply to all pending cases. In this context, it would be anomalous to presume that an isolated provision (such as the expropriation exception on which respondent relies) is of purely prospective application absent any statutory language to that effect. Finally, applying the FSIA to all pending cases regardless of when the underlying conduct occurred is most consistent with two of the Act's principal purposes: clarifying the rules judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims. Pp. 697–700.

(d) This holding is extremely narrow. The Court does not review the lower courts' determination that § 1605(a)(3) applies here, comment on the application of the so-called "act of state" doctrine to petitioners' alleged wrongdoing, prevent the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity, or express an opinion on whether deference should be granted such filings in cases covered by the FSIA. The issue here concerns only the interpretation of the FSIA's reach—a "pure question of statutory construction . . . well within the province of the Judiciary." *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446, 448. Pp. 700–702.

317 F. 3d 954 and 327 F. 3d 1246, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a concurring opinion, *post,* p. 702. BREYER, J., filed a concurring opinion, in which SOUTER, J., joined, *post,* p. 704. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post,* p. 715.

Scott P. Cooper argued the cause for petitioners. With him on the briefs were *Charles S. Sims* and *Jonathan E. Rich.*

Deputy Solicitor General Hungar argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Kneedler*, *Jeffrey P. Minear*, *Mark B. Stern*, *Douglas Hallward-Driemeier*, *William H. Taft IV*, and *Elizabeth M. Teel.*

E. Randol Schoenberg argued the cause for respondent. With him on the brief was *Donald S. Burris.**

JUSTICE STEVENS delivered the opinion of the Court.

In 1998 an Austrian journalist, granted access to the Austrian Gallery's archives, discovered evidence that certain valuable works in the Gallery's collection had not been donated by their rightful owners but had been seized by the Nazis or expropriated by the Austrian Republic after World War II. The journalist provided some of that evidence to respondent, who in turn filed this action to recover possession of six Gustav Klimt paintings. Prior to the Nazi invasion of Austria, the paintings had hung in the palatial Vienna home of respondent's uncle, Ferdinand Bloch-Bauer, a Czechoslovakian Jew and patron of the arts. Respondent claims ownership of the paintings under a will executed by her uncle after he fled Austria in 1938. She alleges that the

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*Briefs of *amici curiae* urging reversal were filed for Japan by *Craig A. Hoover*, *Jonathan S. Franklin*, and *Lorane F. Hebert;* and for the United Mexican States by *Jonathan I. Blackman.*

Briefs of *amici curiae* urging affirmance were filed for the Austrian Jewish Community et al. by *Charles G. Moerdler*, *James A. Shifren*, *Thomas R. Kline*, and *Marc D. Stern;* for Bet Tzedek Legal Services et al. by *Janie F. Schulman*, *Jeffrey P. Sinensky*, and *David J. Bederman;* and for Michael Berenbaum et al. by *Edward McGlynn Gaffney, Jr.*, *Arthur Miller*, and *Melvyn Weiss.*

Andreas F. Lowenfeld filed a brief for the Société Nationale des Chemins de Fer Français as *amicus curiae.*

Gallery obtained possession of the paintings through wrongful conduct in the years during and after World War II.

The defendants (petitioners here)—the Republic of Austria and the Austrian Gallery (Gallery), an instrumentality of the Republic—filed a motion to dismiss the complaint asserting, among other defenses, a claim of sovereign immunity. The District Court denied the motion, 142 F. Supp. 2d 1187 (CD Cal. 2001), and the Court of Appeals affirmed, 317 F. 3d 954 (CA9 2002), as amended, 327 F. 3d 1246 (2003). We granted certiorari limited to the question whether the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U. S. C. § 1602 *et seq.*, which grants foreign states immunity from the jurisdiction of federal and state courts but expressly exempts certain cases, including "case[s] . . . in which rights in property taken in violation of international law are in issue," § 1605(a)(3), applies to claims that, like respondent's, are based on conduct that occurred before the Act's enactment, and even before the United States adopted the so-called "restrictive theory" of sovereign immunity in 1952. 539 U. S. 987 (2003).

I

Because this case comes to us from the denial of a motion to dismiss on the pleadings, we assume the truth of the following facts alleged in respondent's complaint.

Born in Austria in 1916, respondent Maria V. Altmann escaped the country after it was annexed by Nazi Germany in 1938. She settled in California in 1942 and became an American citizen in 1945. She is a niece, and the sole surviving named heir, of Ferdinand Bloch-Bauer, who died in Zurich, Switzerland, on November 13, 1945.

Prior to 1938 Ferdinand, then a wealthy sugar magnate, maintained his principal residence in Vienna, Austria, where the six Klimt paintings and other valuable works of art were housed. His wife, Adele, was the subject of two of the paintings. She died in 1925, leaving a will in which she "ask[ed]" her husband "after his death" to bequeath the paintings to

the Gallery.[1] App. 187a, ¶ 81. The attorney for her estate advised the Gallery that Ferdinand intended to comply with his wife's request, but that he was not legally obligated to do so because he, not Adele, owned the paintings. Ferdinand never executed any document transferring ownership of any of the paintings at issue to the Gallery. He remained their sole legitimate owner until his death. His will bequeathed his entire estate to respondent, another niece, and a nephew.

On March 12, 1938, in what became known as the "Anschluss," the Nazis invaded and claimed to annex Austria. Ferdinand, who was Jewish and had supported efforts to resist annexation, fled the country ahead of the Nazis, ultimately settling in Zurich. In his absence, according to the complaint, the Nazis "Aryanized" the sugar company he had directed, took over his Vienna home, and divided up his artworks, which included the Klimts at issue here, many other valuable paintings, and a 400-piece porcelain collection. A Nazi lawyer, Dr. Erich Führer, took possession of the six Klimts. He sold two to the Gallery in 1941[2] and a third in 1943, kept one for himself, and sold another to the Museum of the City of Vienna. The immediate fate of the sixth is not known. 142 F. Supp. 2d, at 1193.

In 1946 Austria enacted a law declaring all transactions motivated by Nazi ideology null and void. This did not result in the immediate return of looted artwork to exiled Austrians, however, because a different provision of Austrian

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[1] Adele's will mentions six Klimt paintings, Adele Bloch-Bauer I, Adele Bloch-Bauer II, Apple Tree I, Beechwood, Houses in Unterach am Attersee, and Schloss Kammer am Attersee III. The last of these, Schloss Kammer am Attersee III, is not at issue in this case because Ferdinand donated it to the Gallery in 1936. The sixth painting in this case, Amalie Zuckerkandl, is not mentioned in Adele's will. For further details, see 142 F. Supp. 2d 1187, 1192–1193 (CD Cal. 2001).

[2] More precisely, he traded Adele Bloch-Bauer I and Apple Tree I to the Gallery for Schloss Kammer am Attersee III, which he then sold to a third party.

law proscribed export of "artworks . . . deemed to be important to [the country's] cultural heritage" and required anyone wishing to export art to obtain the permission of the Austrian Federal Monument Agency. App. 168a, ¶ 32. Seeking to profit from this requirement, the Gallery and the Federal Monument Agency allegedly adopted a practice of "forc[ing] Jews to donate or trade valuable artworks to the [Gallery] in exchange for export permits for other works." *Id.*, at 168a, ¶ 33.

The next year Robert Bentley, respondent's brother and fellow heir, retained a Viennese lawyer, Dr. Gustav Rinesch, to locate and recover property stolen from Ferdinand during the war. In January 1948 Dr. Rinesch wrote to the Gallery requesting return of the three Klimts purchased from Dr. Führer. A Gallery representative responded, asserting—falsely, according to the complaint—that Adele had bequeathed the paintings to the Gallery, and the Gallery had merely permitted Ferdinand to retain them during his lifetime. *Id.*, at 170a, ¶ 40.

Later the same year Dr. Rinesch enlisted the support of Gallery officials to obtain export permits for many of Ferdinand's remaining works of art. In exchange, Dr. Rinesch, purporting to represent respondent and her fellow heirs, signed a document "acknowledg[ing] and accept[ing] Ferdinand's declaration that in the event of his death he wished to follow the wishes of his deceased wife to donate" the Klimt paintings to the Gallery. *Id.*, at 177a, ¶ 56. In addition, Dr. Rinesch assisted the Gallery in obtaining both the painting Dr. Führer had kept for himself and the one he had sold to the Museum of the City of Vienna.[3] At no time during these transactions, however, did Dr. Rinesch have respondent's permission either "to negotiate on her behalf or to allow

[3] The sixth painting, which disappeared from Ferdinand's collection in 1938, apparently remained in private hands until 1988, when a private art dealer donated it to the Gallery. *Id.*, at 1193.

the [Gallery] to obtain the Klimt paintings." *Id.*, at 178a, ¶ 61.

In 1998 a journalist examining the Gallery's files discovered documents revealing that at all relevant times Gallery officials knew that neither Adele nor Ferdinand had, in fact, donated the six Klimts to the Gallery. The journalist published a series of articles reporting his findings, and specifically noting that Klimt's first portrait of Adele, "which all the [Gallery] publications represented as having been donated to the museum in 1936," had actually been received in 1941, accompanied by a letter from Dr. Führer signed "'Heil Hitler.'" *Id.*, at 181a, ¶ 67.

In response to these revelations, Austria enacted a new restitution law under which individuals who had been coerced into donating artworks to state museums in exchange for export permits could reclaim their property. Respondent—who had believed, prior to the journalist's investigation, that Adele and Ferdinand had "freely donated" the Klimt paintings to the Gallery before the war—immediately sought recovery of the paintings and other artworks under the new law. *Id.*, at 178a–179a, ¶ 61, 182a. A committee of Austrian Government officials and art historians agreed to return certain Klimt drawings and porcelain settings that the family had donated in 1948. After what the complaint terms a "sham" proceeding, however, the committee declined to return the six paintings, concluding, based on an allegedly purposeful misreading of Adele's will, that her precatory request had created a binding legal obligation that required her husband to donate the paintings to the Gallery on his death. *Id.*, at 185a.

Respondent then announced that she would file a lawsuit in Austria to recover the paintings. Because Austrian court costs are proportional to the value of the recovery sought (and in this case would total several million dollars, an amount far beyond respondent's means), she requested a

waiver. *Id.*, at 189a. The court granted this request in part but still would have required respondent to pay approximately $350,000 to proceed. *Ibid.* When the Austrian Government appealed even this partial waiver, respondent voluntarily dismissed her suit and filed this action in the United States District Court for the Central District of California.

II

Respondent's complaint advances eight causes of action and alleges violations of Austrian, international, and California law.[4] It asserts jurisdiction under § 2 of the FSIA, which grants federal district courts jurisdiction over civil actions against foreign states "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity" under either another provision of the FSIA or "any applicable international agreement." 28 U. S. C. § 1330(a). The complaint further asserts that petitioners are not entitled to immunity under the FSIA because the Act's "expropriation exception," § 1605(a)(3), expressly exempts from immunity all cases involving "rights in property taken in violation of international law," provided the property has a commercial connection to the United States or the agency

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[4] As the District Court described these claims:

"[Respondent's] first cause of action is for declaratory relief pursuant to 28 U. S. C. § 2201; [she] seeks a declaration that the Klimt paintings should be returned pursuant to the 1998 Austrian law. [Her] second cause of action is for replevin, presumably under California law; [she] seeks return of the paintings. [Her] third cause of action seeks rescission of any agreements by the Austrian lawyer with the Gallery or the Federal Monument Agency due to mistake, duress, and/or lack of authorization. [Her] fourth cause of action seeks damages for expropriation and conversion, and her fifth cause of action seeks damages for violation of international law. [Her] sixth cause of action seeks imposition of a constructive trust, and her seventh cause of action seeks restitution based on unjust enrichment. Finally, [her] eighth cause of action seeks disgorgement of profits under the California Unfair Business Practices law." *Id.*, at 1197.

or instrumentality that owns the property is engaged in commercial activity here.[5]

Petitioners filed a motion to dismiss raising several defenses including a claim of sovereign immunity.[6] Their immunity argument proceeded in two steps. First, they claimed that as of 1948, when much of their alleged wrongdoing took place, they would have enjoyed absolute immunity from suit in United States courts.[7] Proceeding from this premise, petitioners next contended that nothing in the FSIA should be understood to divest them of that immunity retroactively.

The District Court rejected this argument, concluding both that the FSIA applies retroactively to pre-1976 actions and that the Act's expropriation exception extends to re-

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[5] The provision reads:

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . . . .

"(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

[6] Petitioners claimed (1) "they are immune from suit under the doctrine of sovereign immunity," and the FSIA, 28 U. S. C. §§ 1602–1611, "does not strip them of this immunity"; (2) the District Court "should decline to exercise jurisdiction . . . under the doctrine of *forum non conveniens*"; (3) respondent "fail[ed] to join indispensable parties under Fed. R. Civ. P. 19"; and (4) venue in the Central District of California is improper. 142 F. Supp. 2d, at 1197.

[7] As the District Court noted, *id.*, at 1201, n. 16, respondent alleges that petitioners' wrongdoing continued well past 1948 in the form of concealment of the paintings' true provenance and deliberate misinterpretation of Adele's will. Because we conclude that the FSIA may be applied to petitioners' 1948 actions, we need not address the District Court's alternative suggestion that petitioners' subsequent alleged wrongdoing would be sufficient, in and of itself, to establish jurisdiction.

spondent's specific claims. Only the former conclusion concerns us here. Presuming that our decision in *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994), governed its retroactivity analysis, the court "first consider[ed] whether Congress expressly stated the [FSIA's] reach." 142 F. Supp. 2d, at 1199. Finding no such statement, the court then asked whether application of the Act to petitioners' 1948 actions "would impair rights [petitioners] possessed when [they] acted, impose new duties on [them], or increase [their] liability for past conduct." *Ibid.* Because it deemed the FSIA "a jurisdictional statute that does not alter substantive legal rights," the court answered this second question in the negative and accordingly found the Act controlling. *Id.*, at 1201. As further support for this finding, the court noted that the FSIA itself provides that "'[c]laims of foreign states to immunity should *henceforth be decided* by courts of the United States . . . *in conformity with the principles set forth in this chapter.*'" *Ibid.* (quoting 28 U. S. C. § 1602) (emphasis in District Court opinion). In the court's view, this language suggests the Act "is to be applied to all cases decided after its enactment regardless of when the plaintiff's cause of action may have accrued." 142 F. Supp. 2d, at 1201.

The Court of Appeals agreed that the FSIA applies to this case.[8] Rather than endorsing the District Court's reliance on the Act's jurisdictional nature, however, the panel reasoned that applying the FSIA to Austria's alleged wrongdoing was not impermissibly retroactive because Austria could not legitimately have expected to receive immunity for that wrongdoing even in 1948 when it occurred. The court rested that conclusion on an analysis of American courts' then-prevalent practice of deferring to case-by-case immunity determinations by the State Department, and on that

[8] The Court of Appeals also affirmed the District Court's conclusion that 28 U. S. C. § 1605(a)(3) covers respondent's claims. 317 F. 3d 954, 967–969, 974 (CA9 2002). We declined to review that aspect of the panel's ruling. 539 U. S. 987 (2003).

Department's expressed policy, as of 1949, of "'reliev[ing] American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.'" 317 F. 3d, at 965 (quoting Press Release No. 296, Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers (emphasis deleted)).

We granted certiorari, 539 U. S. 987 (2003), and now affirm the judgment of the Court of Appeals, though on different reasoning.

III

Chief Justice Marshall's opinion in *Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812), is generally viewed as the source of our foreign sovereign immunity jurisprudence. In that case, the libellants claimed to be the rightful owners of a French ship that had taken refuge in the port of Philadelphia. The Court first emphasized that the jurisdiction of the United States over persons and property within its territory "is susceptible of no limitation not imposed by itself," and thus foreign sovereigns have no right to immunity in our courts. *Id.*, at 136. Chief Justice Marshall went on to explain, however, that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign.[9] Accepting a suggestion advanced by the Executive Branch, see *id.*, at 134, the Chief Justice concluded that the implied waiver theory also served to exempt the *Schooner Exchange*—"a national armed ves-

[9] "Th[e] perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave *[sic]* the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." *Schooner Exchange*, 7 Cranch, at 137.

sel . . . of the emperor of France"—from United States courts' jurisdiction. *Id.*, at 145–146.[10]

In accordance with Chief Justice Marshall's observation that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement, this Court has "consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction" over particular actions against foreign sovereigns and their instrumentalities. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983) (citing *Ex parte Peru*, 318 U. S. 578, 586–590 (1943); *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 33–36 (1945)). Until 1952 the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns. 461 U. S., at 486. In that year, however, the State Department concluded that "immunity should no longer be granted in certain types of cases."[11] App. A to Brief for Petitioners 1a. In a letter to the Acting Attorney General, the Acting Legal Adviser for the Secretary of State, Jack B. Tate, explained

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[10] Chief Justice Marshall noted, however, that the outcome might well be different if the case involved a sovereign's *private* property:

"Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern." *Id.*, at 145.

[11] Letter from Jack B. Tate, Acting Legal Adviser, U. S. Dept. of State, to Acting U. S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–985 (1952), and in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 711–715 (1976) (App. 2 to opinion of the Court).

that the Department would thereafter apply the "restrictive theory" of sovereign immunity:

> "A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts *(jure imperii)* of a state, but not with respect to private acts *(jure gestionis)*. . . . [I]t will hereafter be the Department's policy to follow the restrictive theory . . . in the consideration of requests of foreign governments for a grant of sovereign immunity." *Id.*, at 1a, 4a–5a.

As we explained in our unanimous opinion in *Verlinden*, the change in State Department policy wrought by the "Tate Letter" had little, if any, impact on federal courts' approach to immunity analyses: "As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department," and courts continued to "abid[e] by" that Department's "'suggestions of immunity.'" 461 U. S., at 487. The change did, however, throw immunity determinations into some disarray, as "foreign nations often placed diplomatic pressure on the State Department," and political considerations sometimes led the Department to file "suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Id.*, at 487–488. Complicating matters further, when foreign nations failed to request immunity from the State Department:

> "[T]he responsibility fell to the courts to determine whether sovereign immunity existed, generally by reference to prior State Department decisions. . . . Thus,

> sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Ibid.*

In 1976 Congress sought to remedy these problems by enacting the FSIA, a comprehensive statute containing a "set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Id.*, at 488. The Act "codifies, as a matter of federal law, the restrictive theory of sovereign immunity," *ibid.*, and transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch. The preamble states that "henceforth" both federal and state courts should decide claims of sovereign immunity in conformity with the Act's principles. 28 U. S. C. § 1602.

The Act itself grants federal courts jurisdiction over civil actions against foreign states, § 1330(a),[12] and over diversity actions in which a foreign state is the plaintiff, § 1332(a)(4); it contains venue and removal provisions, §§ 1391(f), 1441(d); it prescribes the procedures for obtaining personal jurisdiction over a foreign state, § 1330(b); and it governs the extent to which a state's property may be subject to attachment or execution, §§ 1609–1611. Finally, the Act carves out certain exceptions to its general grant of immunity, including the expropriation exception on which respondent's complaint relies. See *supra*, at 685–686, and n. 5. These exceptions are central to the Act's functioning: "At the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the exceptions applies," as "subject-matter jurisdiction in any such action depends" on that application. *Verlinden*, 461 U. S., at 493–494.

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[12] The Act defines the term "foreign state" to include a state's political subdivisions, agencies, and instrumentalities. 28 U. S. C. § 1603(a).

IV

The District Court agreed with respondent that the FSIA's expropriation exception covers petitioners' alleged wrongdoing, 142 F. Supp. 2d, at 1202, and the Court of Appeals affirmed that holding, 317 F. 3d, at 967–969, 974. As noted above, however, we declined to review this aspect of the courts' opinions, confining our grant of certiorari to the issue of the FSIA's general applicability to conduct that occurred prior to the Act's 1976 enactment, and more specifically, prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity. See *supra*, at 681, 687–688, and n. 8. We begin our analysis of that issue by explaining why, contrary to the assumption of the District Court, 142 F. Supp. 2d, at 1199–1201, and Court of Appeals, 317 F. 3d, at 963–967, the default rule announced in our opinion in *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994), does not control the outcome in this case.

In *Landgraf* we considered whether § 102 of the Civil Rights Act of 1991, which permits a party to seek compensatory and punitive damages for certain types of intentional employment discrimination, Rev. Stat. § 1977A, as added, 105 Stat. 1072, 42 U. S. C. § 1981a(a), and to demand a jury trial if such damages are sought, § 1981a(c), applied to an employment discrimination case that was pending on appeal when the statute was enacted. The issue forced us to confront the "'apparent tension'" between our rule that "'a court is to apply the law in effect at the time it renders its decision,'" 511 U. S., at 264 (quoting *Bradley* v. *School Bd. of Richmond*, 416 U. S. 696, 711 (1974)), and the seemingly contrary "axiom that '[r]etroactivity is not favored in the law'" and thus that "'congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result,'" 511 U. S., at 264 (quoting *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988)).

Acknowledging that, in most cases, the antiretroactivity presumption is just that—a presumption, rather than a con-

stitutional command[13]—we examined the rationales that support it. We noted, for example, that "[t]he Legislature's . . . responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals," *Landgraf*, 511 U. S., at 266, and that retroactive statutes may upset settled expectations by "'tak[ing] away or impair[ing] vested rights acquired under existing laws, or creat[ing] a new obligation, impos[ing] a new duty, or attach[ing] a new disability, in respect to transactions or considerations already past,'" *id.*, at 269 (quoting *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CC NH 1814) (Story, J.)). We further observed that these antiretroactivity concerns are most pressing in cases involving "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." 511 U. S., at 271.

In contrast, we sanctioned the application to all pending and future cases of "intervening" statutes that merely "confe[r] or ous[t] jurisdiction." *Id.*, at 274. Such application, we stated, "usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Ibid.* (internal quotation marks omitted). Similarly, the "diminished reliance interests in matters of procedure" permit courts to apply changes in procedural rules "in suits arising before [the rules'] enactment without raising concerns about retroactivity." *Id.*, at 275.

Balancing these competing concerns, we described the presumption against retroactive application in the following terms:

> "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine

[13] But see *Landgraf*, 511 U. S., at 266–268 (identifying several constitutional provisions that express the antiretroactivity principle, including the *Ex Post Facto* Clause, Art. I, § 10, cl. 1, and the prohibition on "Bills of Attainder," Art. I, §§ 9–10).

> whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command the court must determine whether the new statute would have retroactive effect, *i. e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*, at 280.[14]

Though seemingly comprehensive, this inquiry does not provide a clear answer in this case. Although the FSIA's preamble suggests that it applies to preenactment conduct, see *infra*, at 697–698, that statement by itself falls short of an "expres[s] prescri[ption of] the statute's proper reach." Under *Landgraf*, therefore, it is appropriate to ask whether the Act affects substantive rights (and thus would be impermissibly retroactive if applied to preenactment conduct) or addresses only matters of procedure (and thus may be applied to all pending cases regardless of when the underlying conduct occurred). But the FSIA defies such categorization. To begin with, none of the three examples of retroactivity mentioned in the above quotation fits the FSIA's clarification of the law of sovereign immunity. Prior to 1976 foreign states had a justifiable expectation that, as a matter of comity, United States courts would grant them immunity for their public acts (provided the State Department did not recommend otherwise), but they had no "right" to such im-

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[14] Applying this rule to the question in the case, we concluded that § 102 of the Civil Rights Act of 1991 should not apply to cases arising before its enactment. 511 U. S., at 293.

munity. Moreover, the FSIA merely opens United States courts to plaintiffs with pre-existing claims against foreign states; the Act neither "increase[s those states'] liability for past conduct" nor "impose[s] new duties with respect to transactions already completed." 511 U. S., at 280. Thus, the Act does not at first appear to "operate retroactively" within the meaning of the *Landgraf* default rule.

That preliminary conclusion, however, creates some tension with our observation in *Verlinden* that the FSIA is not simply a jurisdictional statute "concern[ing] access to the federal courts" but a codification of "the standards governing foreign sovereign immunity as an aspect of *substantive* federal law." 461 U. S., at 496–497 (emphasis added). Moreover, we noted in *Verlinden* that in any suit against a foreign sovereign, "the plaintiff will be barred from raising his claim in *any* court in the United States" unless one of the FSIA's exceptions applies, *id.*, at 497 (emphasis added), and we have stated elsewhere that statutes that "*creat[e]* jurisdiction" where none otherwise exists "spea[k] not just to the power of a particular court but to the substantive rights of the parties as well," *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 951 (1997) (emphasis in original). Such statutes, we continued, "even though phrased in 'jurisdictional' terms, [are] as much subject to our presumption against retroactivity as any other[s]." *Ibid.*[15]

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[15] Of course, the FSIA differs from the statutory amendment at issue in *Hughes Aircraft*. That amendment was attached to the statute that created the cause of action, see former 31 U. S. C. § 3730(b)(1) (1982 ed.), 96 Stat. 978; 31 U. S. C. § 3730(b)(1), 100 Stat. 3154, and it prescribed a limitation that any court entertaining the cause of action was bound to apply, see § 3730(e)(4)(A), 100 Stat. 3157. When a "jurisdictional" limitation adheres to the cause of action in this fashion—when it applies by its terms regardless of where the claim is brought—the limitation is essentially substantive. In contrast, the FSIA simply limits the jurisdiction of federal and state courts to entertain claims against foreign sovereigns. The Act does not create or modify any causes of action, nor does it purport to limit

Thus, *Landgraf*'s default rule does not definitively resolve this case. In our view, however, *Landgraf*'s antiretroactivity presumption, while not strictly confined to cases involving private rights, is most helpful in that context. Cf. 511 U. S., at 271, n. 25 ("[T]he great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties"). The aim of the presumption is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct. But the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* "protection from the inconvenience of suit as a gesture of comity." *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 479 (2003). Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the "decisions of the political branches . . . on whether to take jurisdiction." *Verlinden*, 461 U. S., at 486. In this *sui generis* context, we think it more appropriate, absent contraindications, to defer to the most recent such decision—namely, the FSIA—than to presume that decision *inapplicable* merely because it postdates the conduct in question.[16]

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foreign countries' decisions about what claims against which defendants their courts will entertain.

Even if the dissent is right that, like the provision at issue in *Hughes Aircraft*, the FSIA "create[s] jurisdiction where there was none before," *post*, at 723 (opinion of KENNEDY, J.), however, that characteristic is in some tension with other, less substantive aspects of the Act. This tension, in turn, renders the *Landgraf* approach inconclusive and requires us to examine the entire statute in light of the underlying principles governing our retroactivity jurisprudence.

[16] Between 1952 and 1976 courts and the State Department similarly presumed that the Tate Letter was applicable even in disputes concerning conduct that predated the letter. See, *e. g.*, *National City Bank of N. Y.*

V

This leaves only the question whether anything in the FSIA or the circumstances surrounding its enactment suggests that we should not apply it to petitioners' 1948 actions. Not only do we answer this question in the negative, but we find clear evidence that Congress intended the Act to apply to preenactment conduct.

To begin with, the preamble of the FSIA expresses Congress' understanding that the Act would apply to all postenactment claims of sovereign immunity. That section provides:

> "*Claims* of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U. S. C. § 1602 (emphasis added).

Though perhaps not sufficient to satisfy *Landgraf*'s "express command" requirement, 511 U. S., at 280, this language is unambiguous: Immunity "claims"—not actions protected by immunity, but assertions of immunity to suits arising from those actions—are the relevant conduct regulated by the Act;[17] those claims are "henceforth" to be decided by the courts. As the District Court observed, see *supra*, at 687 (citing 142 F. Supp. 2d, at 1201), this language suggests Con-

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v. *Republic of China*, 348 U. S. 356, 361 (1955) (assuming, in dicta, that the Tate Letter would govern the sovereign immunity analysis in a dispute concerning treasury notes purchased in 1920 and 1947–1948).

[17] Our approach to retroactivity in this case thus parallels that advocated by JUSTICE SCALIA in his concurrence in *Landgraf:*

"The critical issue, I think, is not whether the rule affects 'vested rights,' or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event." 511 U. S., at 291 (opinion concurring in judgment).

gress intended courts to resolve *all* such claims "in conformity with the principles set forth" in the Act, regardless of when the underlying conduct occurred.[18]

The FSIA's overall structure strongly supports this conclusion. Many of the Act's provisions unquestionably apply to cases arising out of conduct that occurred before 1976. In *Dole Food Co.* v. *Patrickson*, 538 U. S. 468 (2003), for example, we held that whether an entity qualifies as an "instrumentality" of a "foreign state" for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred. In addition, *Verlinden*, which upheld against constitutional challenge 28 U. S. C. § 1330's grant of subject-matter jurisdiction, involved a dispute over a contract that predated the Act. 461 U. S., at 482–483, 497. And there has never been any doubt that the Act's procedural provisions relating to venue, removal, execution, and attachment apply to all pending cases. Thus, the FSIA's preamble indicates that it applies "henceforth," and its body includes numerous provisions that unquestionably apply to claims based on pre-1976 conduct. In this context, it would be anomalous to presume that an isolated provision (such as the expropriation exception on which respondent relies) is of purely prospective application absent any statutory language to that effect.

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[18] The dissent is quite right that "'[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.'" *Post*, at 719. The provision of the FSIA to which this observation applies, however, is not the preamble but § 8, which states that the "Act shall take effect ninety days after the date of its enactment." 90 Stat. 2898, note following 28 U. S. C. § 1602. The office of the word "henceforth" is to make the statute effective with respect to claims to immunity thereafter asserted. Notably, any such claim asserted immediately after the statute became effective would necessarily have related to conduct that took place at an earlier date.

Finally, applying the FSIA to all pending cases regardless of when the underlying conduct occurred is most consistent with two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims. We have recognized that, to accomplish these purposes, Congress established a comprehensive framework for resolving any claim of sovereign immunity:

> "We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity. As we said in *Verlinden*, the FSIA 'must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.'" *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 434–435 (1989) (quoting *Verlinden*, 461 U. S., at 493).

The *Amerada Hess* respondents' claims concerned conduct that postdated the FSIA, so we had no occasion to consider the Act's retroactivity. Nevertheless, our observations about the FSIA's inclusiveness are relevant in this case: Quite obviously, Congress' purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in postenactment cases concerning preenactment conduct, courts were to continue to follow the same ambiguous and politically charged "'standards'" that the FSIA replaced. See *supra*, at 691 (quoting *Verlinden*, 461 U. S., at 487–488).

We do not endorse the reasoning of the Court of Appeals. Indeed, we think it engaged in precisely the kind of detailed historical inquiry that the FSIA's clear guidelines were intended to obviate. Nevertheless, we affirm the panel's judgment because the Act, freed from *Landgraf*'s antiretroactivity presumption, clearly applies to conduct, like petitioners' alleged wrongdoing, that occurred prior to 1976 and, for that matter, prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity.[19]

VI

We conclude by emphasizing the narrowness of this holding. To begin with, although the District Court and Court of Appeals determined that § 1605(a)(3) covers this case, we declined to review that determination. See *supra*, at 681, 687–688, and n. 8. Nor do we have occasion to comment on the application of the so-called "act of state" doctrine to petitioners' alleged wrongdoing. Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits. Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts.[20] See *Underhill* v. *Hernandez*, 168 U. S. 250, 252 (1897); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 401 (1964) ("The act of state doctrine in its

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[19] Petitioners suggest that the latter date is important because it marked the first shift in foreign states' expectations concerning the scope of their immunity. Whether or not the date would be significant to a *Landgraf*-type analysis of foreign states' settled expectations at various times prior to the FSIA's enactment, it is of no relevance in this case given our rationale for finding the Act applicable to preenactment conduct.

[20] Under the doctrine, redress of grievances arising from such acts must be obtained through diplomatic channels.

traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory"). Petitioners principally rely on the act of state doctrine to support their assertion that foreign expropriations are public acts for which, prior to the enactment of the FSIA, sovereigns expected immunity. Brief for Petitioners 18–20. Applying the FSIA in this case would upset that settled expectation, petitioners argue, and thus the Act "would operate retroactively" under *Landgraf*. 511 U. S., at 280. But because the FSIA in no way affects application of the act of state doctrine, our determination that the Act applies in this case in no way affects any argument petitioners may have that the doctrine shields their alleged wrongdoing.

Finally, while we reject the United States' recommendation to bar application of the FSIA to claims based on pre-enactment conduct, Brief for United States as *Amicus Curiae*, nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity.[21] The issue now before us, to which the Brief for United States as *Amicus Curiae* is addressed, concerns interpretation of the FSIA's reach—a "pure question of statutory construction . . . well within the province of the Judiciary." *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446, 448 (1987). While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference. See, *e. g.*, *ibid.* In con-

[21] See, *e. g.*, *Flatow* v. *Islamic Republic of Iran*, 305 F. 3d 1249, 1251–1252, and n. 4 (CADC 2002) (statement of interest concerning attachment of property that is owned by a foreign state but located in the United States); *Sea Hunt, Inc.* v. *Unidentified Shipwrecked Vessel or Vessels*, 221 F. 3d 634, 642 (CA4 2000) (statement of interest concerning sovereign immunity of a foreign state's vessels); *767 Third Ave. Assoc.* v. *Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F. 3d 152, 157 (CA2 2000) (statement of interest concerning successor states to the Socialist Federal Republic of Yugoslavia).

trast, should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct,[22] that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.[23] See, *e. g.*, *Verlinden*, 461 U. S., at 486; *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 414 (2003) (discussing the President's "'vast share of responsibility for the conduct of our foreign relations'"). We express no opinion on the question whether such deference should be granted in cases covered by the FSIA.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the Court's opinion, but add a few thoughts of my own.

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[22] We note that the United States Government has apparently indicated to the Austrian Federal Government that it will not file a statement of interest in this case. App. 243a (Letter from Hans Winkler, Legal Adviser, Austrian Federal Ministry for Foreign Affairs, to Deputy Secretary of the Treasury Stuart E. Eizenstat (Jan. 17, 2001)). The enforceability of that indication, of course, is not before us.

[23] Mislabeling this observation a "constitutional conclusion," the dissent suggests that permitting the Executive to comment on a party's assertion of sovereign immunity will result in "[u]ncertain prospective application of our foreign sovereign immunity law." *Post*, at 734, 737. We do not hold, however, that executive intervention could or would trump considered application of the FSIA's more neutral principles; we merely note that the Executive's views on questions within its area of expertise merit greater deference than its opinions regarding the scope of a congressional enactment. Furthermore, we fail to understand how our holding, which requires that courts apply the FSIA's sovereign immunity rules in *all* cases, somehow injects greater uncertainty into sovereign immunity law than the dissent's approach, which would require, for cases concerning pre-1976 conduct, case-by-case analysis of the status of that law at the time of the offending conduct—including analysis of the existence or nonexistence of any State Department statements on the subject.

In *Landgraf* v. *USI Film Products*, 511 U. S. 244, 292 (1994) (opinion concurring in judgments, joined by KENNEDY and THOMAS, JJ.), I noted our "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction." I explained this on the ground that "the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power" rather than to regulate primary conduct, so that the relevant time for purposes of retroactivity analysis is not when the underlying conduct occurred, but when judicial power was invoked. *Id.*, at 293. Thus, application of a new jurisdictional statute to cases filed after its enactment is not "retroactive" even if the conduct sued upon predates the statute. *Ibid.* I noted that this rule applied even when the *effect* of a jurisdiction-restricting statute in a particular case is to "deny a litigant a forum for his claim entirely, or [to] leave him with an alternate forum that will deny relief for some collateral reason." *Id.*, at 292–293 (citations omitted). The logical corollary of this last statement is that a jurisdiction-expanding statute should be applied to subsequent cases even if it sometimes has the effect of *creating* a forum where none existed.

The dissent rejects this approach and instead undertakes a case-specific inquiry into whether United States courts would have asserted jurisdiction at the time of the underlying conduct. *Post*, at 720–728 (opinion of KENNEDY, J.). It justifies this approach on the basis of *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939 (1997). For reasons noted by the Court, see *ante*, at 695–696, n. 15, I think reliance on that case is mistaken. The Foreign Sovereign Immunities Act of 1976 (FSIA), and the regime that it replaced, do not by their own force create or modify substantive rights; respondent's substantive claims are based primarily on California law, see *ante*, at 685, n. 4. Federal sovereign-immunity law limits the jurisdiction of federal and state courts to entertain those claims, see 28 U. S. C. §§ 1604–1605, but not respondent's right to seek redress elsewhere.

It is true enough that, as to a claim that no foreign court would entertain, the FSIA can have the accidental effect of rendering enforceable what was previously unenforceable. But unlike a *Hughes Aircraft*-type statute, which confers or limits "jurisdiction" in every court where the claim might be brought, the FSIA affects substantive rights only accidentally, and not as a necessary and intended consequence of the law. Statutes like the FSIA do not "*spea[k] . . . to* the substantive rights of the parties," *Hughes Aircraft*, *supra*, at 951 (emphasis added), even if they happen sometimes to affect them.

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring.

I join the Court's opinion and judgment, but I would rest that judgment upon several additional considerations.

I

A

For present purposes I assume the following:

1. Adele Bloch-Bauer died in Vienna in 1925. Her will asked her husband Ferdinand "'kindly'" to donate, "upon his death," six Klimt paintings to the Austrian Gallery (Gallery). A year later, Ferdinand "formally assured the Austrian probate court that he would honor his wife's gift." See *ante*, at 682; 317 F. 3d 954, 959 (CA9 2002); 142 F. Supp. 2d 1187, 1192–1193 (CD Cal. 2001); Brief for Petitioners 6.

2. When the Nazis seized power in Austria in 1938, Ferdinand fled to Switzerland. The Nazis took over Bloch-Bauer assets, and a Nazi lawyer, Dr. Führer, liquidated Ferdinand's estate. Dr. Führer disposed of five of the six Klimt paintings as follows: He sold or gave three to the Gallery; he sold one to the Museum of the City of Vienna; and he kept one. (The sixth somehow ended up in the hands of a private collector who gave it to the Gallery in 1988.) See *ante*, at 682, 683, n. 3; 317 F. 3d, at 959–960.

3. Ferdinand died in Switzerland in 1945. His will did not mention the paintings, but it did name a residuary legatee, namely, Ferdinand's niece, Maria Altmann, by then an American citizen. As a residuary legatee Altmann received Ferdinand's rights to the paintings. See *ante*, at 681; 317 F. 3d, at 960, 968; Brief for Petitioners 6–7.

4. In 1948, Bloch-Bauer family members, including Altmann, asked Austria to return a large number of family artworks. At that time Austrian law prohibited export of "artworks . . . deemed to be important to Austria's cultural heritage." But Austria granted Altmann permission to export some works of art *in return for* Altmann's recognition, in a legal agreement, of Gallery ownership of the five Klimt paintings. (The Gallery already had three, the Museum of the City of Vienna transferred the fourth, and the Bloch-Bauer family, having recovered the fifth, which Dr. Führer had kept, donated it to the Gallery.) See *ante*, at 683; 317 F. 3d, at 960; 142 F. Supp. 2d, at 1193–1195; Brief for Petitioners 6–8; App. 168a.

5. Fifty years later, newspaper stories suggested that in 1948 the Gallery had followed a policy of asserting ownership of Nazi-looted works of art that it did not own. Austria then enacted a restitution statute allowing individuals to reclaim properties that were subject to any such false assertion of ownership or coerced donation in exchange for export permits. The statute also created an advisory board to determine the validity of restitution claims. See *ante*, at 684; 142 F. Supp. 2d, at 1195–1196; Brief for Petitioners 8.

6. In 1999, Altmann brought claims for restitution of several items including the five Klimt paintings. She told the advisory board that, in 1948, her lawyer had wrongly told her that the Gallery owned the five Klimt paintings irrespective of Nazi looting (title flowing from Adele's will or Ferdinand's statement of donative intent to the probate court). In her view, her 1948 agreement amounted to a coerced donation. The advisory board ordered some items returned (16

Klimt drawings and 19 porcelain settings), but found that the 5 Klimt paintings belonged to the Gallery. See 317 F. 3d, at 960–962; 142 F. Supp. 2d, at 1195–1196; Brief for Petitioners 8, and n. 4.

7. Altmann then brought this lawsuit against the Gallery, an agency or instrumentality of the Austrian Government, in federal court in Los Angeles. She seeks return of the five Klimt paintings.

B

The question before us does not concern the legal validity of title passed through Nazi looting. Austria nowhere condones or bases its claim of ownership upon any such activity. Rather, its legal claim to the paintings rests upon any or all of the following: Adele's 1925 will, Ferdinand's probate-court confirmation, and Altmann's 1948 agreement. Nor does the locus of the lawsuit in Los Angeles reflect any legal determination about the merits of Austrian legal procedures. Cf. *ante*, at 684–685. The Court of Appeals rejected Austria's *forum non conveniens* claim, not because of the Austrian courts' required posting of a $135,000 filing fee that is potentially refundable, App. 229a–231a, but mainly because of Altmann's age, 317 F. 3d, at 973–974.

The sole issue before us is whether the "expropriation exception" of the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U. S. C. § 1605(a)(3), withdrawing an otherwise applicable sovereign immunity defense, applies to this case. The exception applies to "foreign state[s]" and to any "agency or instrumentality" of a foreign state. §§ 1603, 1605(a)(3). The exception deprives the entity of the sovereign immunity that the law might otherwise entitle it "in any case," § 1605, where that entity "is engaged in a commercial activity in the United States" *and* the case is one "in which rights in property taken in violation of international law are in issue," § 1605(a)(3).

It is conceded that the Gallery is an "agency or instrumentality" of a foreign state, namely, the Republic of Austria.

Nor can Austria now deny that the Gallery is "engaged in a commercial activity in the United States." The lower courts held that the Gallery's publishing and advertising activities satisfy this condition. 317 F. 3d, at 968–969; 142 F. Supp. 2d, at 1204–1205. And our grant of certiorari did not embrace that aspect of the lower courts' decision. 539 U. S. 987 (2003); see *ante*, at 692.

But what about the last element: Is this a "case . . . in which rights in property taken in violation of international law are in issue"? Altmann claims that Austria's 1948 actions (falsely asserting ownership of the paintings and extorting acknowledgment of its ownership in return for export permits) violated either customary international law or a 1907 Hague Convention. App. 203a–204a; Brief for Respondent 4, 35; Hague Convention (IV) on the Laws and Customs of War on Land, 36 Stat. 2277, 2309, Art. 56 (1907) ("All seizure of . . . works of art . . . is forbidden, and should be made the subject of legal proceedings").

Austria replies that, even so, this part of the statute is not "retroactive." Austria means that § 1605(a)(3), the expropriation exception, does not apply to events that occurred in 1948, almost 30 years before the FSIA's enactment. The upshot is that if the FSIA's general rule of immunity, § 1604, applies retroactively to events in 1948 (as is undisputed here), but the expropriation exception, § 1605(a)(3), does not apply retroactively, then the Gallery can successfully assert its sovereign immunity defense, preventing Altmann from pursuing her claim.

II

The question, then, is whether the Act's expropriation exception applies to takings that took place many years before its enactment. The Court notes that Congress, when enacting the FSIA in 1976, wrote that the Act should "henceforth" apply to any *claim* brought thereafter. § 1602; *ante*, at 697. The dissent believes that there is no logical inconsistency between an Act that applies "henceforth" and a reading of

§ 1605(a)(3) that limits it to "rights in property *taken after this Act came into force.*" See *post*, at 718–720 (opinion of KENNEDY, J.). I agree with the dissent that the word "henceforth" (and similar words) cannot resolve this disagreement by themselves. Nonetheless several additional considerations convince me that the Court is correct. As Altmann argues, Congress intended the expropriation exception to apply retroactively, removing a defense of sovereign immunity where "rights in property" were "taken in violation of international law," irrespective of when that taking occurred.

First, the literal language of the statute supports Altmann. Several similar statutes and conventions limit their temporal reach by explicitly stating, for example, that the Act does "not apply to proceedings *in respect of matters that occurred before the date of the coming into force of this Act.*" State Immunity Act 1978, § 23(3), 10 Halsbury's Statutes 829, 845 (4th ed. 2001 reissue) (U. K.) (emphasis added); see also State Immunity Act 1979, § 1(2) (Singapore); Foreign States Immunities Act 1985, § 7(1) (Austl.); European Convention on State Immunity, Art. 35(3). The 1976 Act says nothing explicitly suggesting any such limitation.

Second, the legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit. Thus King Farouk's sovereign status permitted him to ignore Christian Dior's payment demand for 11 "frocks and coats" bought (while king) for his wife; but once the king lost his royal status, Christian Dior could sue and collect (for clothes sold *before* the abdication). See *Ex-King Farouk of Egypt* v. *Christian Dior*, 84 Clunet 717, 24 I. L. R. 228, 229 (CA Paris 1957) (Christian Dior "is entitled . . . to bring" the ex-King to court "to answer for debts contracted" before his abdication "when, as from the date of his abdication, he is no longer entitled to claim . . . immunity" as "Hea[d] of State"); see also *Queen* v. *Bow Street Metropolitan Stipendiary Mag-*

istrate (Ex parte Pinochet Ugarte), [2000] 1 A. C., 147, 201–202 (1999) (opinion of Lord Browne-Wilkinson) ("[T]he head of state is entitled to the same immunity as the state itself. . . . He too loses immunity ratione personae on ceasing to be head of state"); cf. *Ter K.* v. *The Netherlands, Suriname & Indonesia*, 18 I. L. R. 223 (DC Hague 1951) (affording Indonesia sovereign immunity after it became independent while the suit was pending).

Indeed, just last Term, we unanimously reaffirmed this classic principle when we held that a now-private corporation could not assert sovereign immunity, even though the events in question took place while a foreign government was its owner. *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 479 (2003). We added that "[f]oreign sovereign immunity" is not about "chilling" or not chilling "foreign states or their instrumentalities in the conduct of their business." *Ibid.* (KENNEDY, J.). Rather, the objective of the "sovereign immunity" doctrine (in contrast to other *conduct*-related immunity doctrines) is simply to give foreign states and instrumentalities "some protection," at the time of suit, "from the inconvenience of suit as a gesture of comity." *Ibid.;* see also *ante*, at 694–695, 696. Compare conduct-related immunity discussed in, *e. g.*, *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749 (1982) (absolute official immunity); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 813 (1982) (qualified official immunity); *Pinochet*, *supra*, at 202 (conduct-related immunity for "public acts").

Third, the State Department's and our courts' own historical practice reflects this classic view. For example, in 1952, the Department issued the Tate Letter adopting a restrictive view of sovereign immunity, essentially holding foreign sovereign immunity inapplicable in respect to a foreign state's *commercial* activity. Letter from Jack B. Tate, Acting Legal Adviser, U. S. Dept. of State, to Acting U. S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–985 (1952), and in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 711–715

(1976) (App. 2 to opinion of the Court). As the dissent acknowledges:

> "After the Tate Letter's issuance, the Executive evaluated suits involving *pre-Tate Letter conduct under the Letter's new standard* when determining whether to submit suggestions of immunity to the courts. The Court, likewise, seems to have understood the Tate Letter to require this sort of application. In *National City Bank of N. Y.* [v. *Republic of China*, 348 U. S. 356 (1955)], the Court suggested that the Letter governed in a case involving pre-1952 conduct, though careful consideration of the question was unnecessary there. *[Id.]*, at 361." *Post*, at 725 (emphasis and alterations added).

Accord, *ante*, at 696–697, n. 16; see also, *e. g.*, *Arias* v. *S. S. Fletero*, Adm. No. 7492 (ED Va. 1952), reprinted in Digest of United States Practice in International Law 1025–1026 (1977) (State Department deferred decision on a request for immunity filed on May 7, 1952, 12 days before the Tate Letter was issued, and then declined to suggest immunity based on the Tate Letter standard); *New York & Cuba Mail Steamship Co.* v. *Republic of Korea*, 132 F. Supp. 684, 685–686 (SDNY 1955) (State Department declined to suggest immunity even though the suit concerned events over a year before the issuance of the Tate Letter); cf. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 482–483, 497 (1983) (applying the FSIA to a contract that predated the Act).

Fourth, contrary to the dissent's contention, see *post*, at 724–725, 729–730, neither "reliance" nor "expectation" can justify nonretroactivity here. Does the dissent mean by "reliance" and "expectation" something real, *i. e.*, an expropriating nation's actual reliance at the time of taking that other nations will continue to protect it from future lawsuits by continuing to apply the same sovereign immunity doctrine? Such actual reliance could not possibly exist in fact.

What taking in violation of international norms is likely to have been influenced, not by politics or revolution, but by knowledge of, or speculation about, the likely future shape of America's law of foreign sovereign immunity? To suggest any such possibility, in respect to the expropriations carried out by the Nazi or Communist regimes, or any other such as I am aware, would approach the realm of fantasy. While the matter is less clear in respect to less dramatic, more individualized, takings, I still find any actual reliance difficult to imagine.

More likely, the dissent is thinking in terms of "'reasonable reliance,'" *post*, at 723, a legal construct designed to protect against unfairness. But a sovereign's reliance on future immunity here would have been unreasonable, hence no such protection is warranted. A legally aware King Farouk or any of his counterparts would have or should have known that foreign sovereign immunity respects current status; it does not protect past conduct. And its application is a matter, not of legal right, but of "grace and comity." *Verlinden*, *supra*, at 486; see also *Dole*, *supra*, at 479; *supra*, at 708–709.

Indeed, the dissent itself ignores "reliance" or "expectation" insofar as it assumes an expropriating nation's awareness that the Executive Branch could intervene and change the rules, for example, by promulgating the Tate Letter and applying it retroactively to pre-Tate Letter conduct. Compare *post*, at 725–726, with Brief for Petitioners 11 (Austria expected absolute immunity in 1948), and Brief for United States as *Amicus Curiae* 8 (same). Nor does the dissent convincingly explain why, if the Executive Branch can change the scope of foreign sovereign immunity with retroactive effect, Congress (with Executive Branch approval) cannot "codify" Executive Branch efforts. H. R. Rep. No. 94–1487, p. 7 (1976) (hereinafter H. R. Rep.); S. Rep. No. 94–1310, p. 9 (1976) (hereinafter S. Rep.); *Verlinden*, *supra*, at 488; Digest of United States Practice in International Law 327 (1976).

Fifth, an attempt to read into § 1605(a)(3) a temporal qualification related to the time of conduct, based on a theory of "reliance" or "expectation," creates complications and anomalies. The Solicitor General, on behalf of the United States, proposes a solution that may, at first glance, seem simple: Choose the date of the FSIA, roughly 1976, as a cutoff date and apply the § 1605(a)(3) exception only to property "taken" after that time. See Brief for United States as *Amicus Curiae* 11–12. But the Solicitor General himself complicates the proposal by pointing out, correctly, that each of the different activities described in each of the separate paragraphs of § 1605(a) evolved from different common-law origins and consequently might demand a different cutoff date. *Ibid.* ("commercial activity exception" applies to events arising after 1952; "waiver exception" applies to all events). Moreover, the Solicitor General's limitation on the expropriation exception would give immunity to some entities that, before the FSIA, might not have expected immunity at all (say, because they were not then considered "sovereign"). Compare §§ 1603–1604 with Restatement (Second) of Foreign Relations Law of the United States § 66(g), Comment *c*, and Reporters' Note 2 (1965) (government corporations only entitled to immunity if exercising public functions); Harvard Research in International Law 483 (1932) ("The use of the term 'State' . . . results in excluding political subdivisions . . .").

The dissent's solution is even more complicated. It does not choose a cutoff date at all, but would remand for the lower courts to determine whether Austria's 1948 conduct would have fallen outside the scope of sovereign immunity under the Tate Letter's view of the matter. *Post*, at 727–728. Of course, Austria in 1948 could not possibly have relied on the Tate Letter, issued four years later. But, more importantly, consider the historical inquiry the dissent sets for the courts: Determine in the year 2004 what the State Department in the years 1952–1976 would have thought about the Tate Letter as applied to the actions of an Austrian

museum taken in the year 1948. That inquiry does not only demand rarified historical speculation, it also threatens to create the very kind of legal uncertainty that the FSIA's enactors hoped to put to rest. See *ante*, at 699.

Sixth, other legal principles, applicable to *past conduct*, adequately protect any actual past reliance and adequately prevent (in the dissent's words) "open[ing] foreign nations worldwide to vast and potential liability for expropriation claims in regards to conduct that occurred generations ago, including claims that have been the subject of international negotiation and agreement." *Post*, at 730.

For one thing, statutes of limitations, personal jurisdiction and venue requirements, and the doctrine of *forum non conveniens* will limit the number of suits brought in American courts. See, *e. g.*, 317 F. 3d, at 969–974; *Dayton* v. *Czechoslovak Socialist Republic*, 672 F. Supp. 7, 13 (DC 1986) (applying statute of limitations to expropriation claim). The number of lawsuits will be further limited if the lower courts are correct in their consensus view that § 1605(a)(3)'s reference to "violation of international law" does not cover expropriations of property belonging to a country's own nationals. See 317 F. 3d, at 968; Restatement (Third) of Foreign Relations Law of the United States § 712 (1986) (hereinafter Restatement (3d)).

Moreover, the act of state doctrine requires American courts to presume the validity of "an official act of a foreign sovereign performed within its own territory." *W. S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U. S. 400, 405 (1990); see also *ante*, at 700–701; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 423–424 (1964). The FSIA "in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable." H. R. Rep., at 20; S. Rep., at 19; see also *ante*, at 701. The Second Hickenlooper Amendment restricts application of that doctrine, but only in respect to "a confiscation or other taking after January 1, 1959." 22 U. S. C. § 2370(e)(2). The

State Department also has restricted the application of this doctrine, freeing courts to "'pass upon the validity of the acts of Nazi officials.'" *Bernstein* v. *N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375, 375–376 (CA2 1954) *(per curiam)* (quoting State Department press release). But that is a policy matter for the State Department to decide.

Further, the United States may enter a statement of interest counseling dismissal. *Ante*, at 701–702; 28 U. S. C. § 517. Such a statement may refer, not only to sovereign immunity, but also to other grounds for dismissal, such as the presence of superior alternative and exclusive remedies, see 22 U. S. C. §§ 1621–1645*o* (Foreign Claims Settlement Commission); *Dames & Moore* v. *Regan*, 453 U. S. 654, 679–683 (1981) (describing Executive settlement of claims), or the nonjusticiable nature (for that or other reasons) of the matters at issue. See, *e. g.*, *ante*, at 701, n. 21 (collecting cases); *Hwang Geum Joo* v. *Japan*, 172 F. Supp. 2d 52, 58, 64–67 (DC 2001) (finding claims to raise political questions that were settled by international agreements).

Finally, a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking. Cf. Restatement (3d) § 713, Comment *f* ("Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged"); *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 721 (1999) (requirement of exhausting available postdeprivation remedies under United States law); *Kirby Forest Industries, Inc.* v. *United States*, 467 U. S. 1, 10 (1984) (same). A plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the "expropriating" state may have trouble showing a "tak[ing] in violation of international law." 28 U. S. C. § 1605(a)(3).

Because sovereign immunity traditionally concerns status, not conduct, because other legal principles are available to protect a defendant's reasonable reliance on the state of the law at the time the conduct took place, and for other reasons set forth here and in the Court's opinion, I join the Court.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

This is an important decision for interpreting the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U. S. C. § 1602 *et seq.* As the Court's careful opinion illustrates, the case is difficult. In my respectful view, however, its decision is incorrect.

At the outset, here is a summary of my primary concerns with the majority opinion: To reach its conclusion the Court must weaken the reasoning and diminish the force of the rule against the retroactivity of statutes, a rule of fairness based on respect for expectations; the Court abruptly tells foreign nations this important principle of American law is unavailable to them in our courts; this is so despite the fact that treaties and agreements on the subject of expropriation have been reached against a background of the immunity principles the Court now rejects; as if to mitigate its harsh result, the Court adds that the Executive Branch has inherent power to intervene in cases like this; this, however, is inconsistent with the congressional purpose and design of the FSIA; the suggestion reintroduces, to an even greater degree than before, the same influences the FSIA sought to eliminate from sovereign immunity determinations; the Court's reasoning also implies a problematic answer to a separation-of-powers question that the case does not present and that should be avoided; the ultimate effect of the Court's inviting foreign nations to pressure the Executive is to risk inconsistent results for private citizens who sue, based on changes and nuances in foreign affairs, and to add prospective instability to the most sensitive area of foreign relations.

The majority's treatment of our retroactivity principles, its rejection of the considered congressional and Executive judgment behind the FSIA, and its questionable constitutional implications require this respectful dissent.

I

The FSIA's passage followed 10 years of academic and legislative effort to establish a consistent framework for the determination of sovereign immunity when foreign nations are haled into our courts. See H. R. Rep. No. 94–1487, p. 9 (1976) (hereinafter H. R. Rep.). As we explained in *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480 (1983), the preceding 30 years had been marked by an emerging or common-law regime in which courts followed the principles set out in the letter from Jack B. Tate, Acting Legal Adviser, U. S. Dept. of State, to Acting U. S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–985 (1952) (hereinafter Tate Letter or Letter). See *ante*, at 689–690. Even after the Tate Letter, however, courts continued to defer to the Executive's case-specific views on whether immunity was due. See *Verlinden*, *supra*, at 487–488. This regime created "considerable uncertainty," H. R. Rep., at 9, and a "troublesome" inconsistency in immunity determinations, 461 U. S., at 487. The inconsistency was the predictable result of changes in administrations and shifting political pressures. Congress acted to bring order to this legal uncertainty: "[U]niformity in decision . . . is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H. R. Rep., at 13. See also *id.*, at 7 (The "[FSIA] is urgently needed legislation"). Congress placed even greater emphasis on the implications that inconsistency had for our citizens, concluding that the Act was needed to "reduc[e] the foreign policy implications of immunity determinations and assur[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." *Ibid.*

There is no dispute that Congress enacted the FSIA to answer these problems, for the Act's purpose is codified along with its governing provisions. See 28 U. S. C. § 1602. To this end, the Act provides specific principles by which courts are to decide claims for foreign sovereign immunity. See *ibid.* So structured, the Act sought to implement its objectives by removing the Executive influence from the standard determination of sovereign immunity questions. See H. R. Rep., at 7 (under the FSIA "U. S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency").

II

A

The question is whether the courts, by applying the statutory principles the FSIA announced, will impose a retroactive effect in a case involving conduct that occurred over 50 years ago, and nearly 30 years before the FSIA's enactment. It is our general rule not to apply a statute if its application will impose a retroactive effect on the litigants. See *Landgraf* v. *USI Film Products*, 511 U. S. 244 (1994). This is not a rule announced for the first time in *Landgraf;* it is an old and well-established principle. "It is a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect." *Dash* v. *Van Kleeck*, 7 Johns. 477, 503 (N. Y. 1811) (Kent, C. J.); see also *Landgraf*, 511 U. S., at 265 ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"). The principle stems from fundamental fairness concerns. See *ibid.* ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted").

The single acknowledged exception to the rule against retroactivity is when the statute itself, by a clear statement, requires it. See *id.*, at 264 ("'[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result'" (quoting *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208 (1988))).

The FSIA does not meet this exception because it contains no clear statement requiring retroactive effect. The majority concedes this at the outset of its analysis, saying the text of the FSIA "falls short of an 'expres[s] prescri[ption of] the statute's proper reach.'" *Ante*, at 694 (alterations in original) (quoting *Landgraf*, *supra*, at 280).

In an awkward twist, however, the Court also maintains that the "[Act's] language is unambiguous," *ante*, at 697, and that it "suggests Congress intended courts to resolve *all* [foreign sovereign immunity] claims 'in conformity with the principles set forth' in the Act, regardless of when the underlying conduct occurred," *ante*, at 697–698. If the statute were in fact this clear, the exception would apply. Nothing in our cases suggests that statutory language might be "unambiguous," yet still "not sufficient to satisfy *Landgraf*'s 'express command.'" *Ante*, at 697. If the Court really thinks the statute is unambiguous, it should rest on that premise.

In any event, the Court's suggestion that the FSIA does command retroactive application unambiguously is not right. The Court's interpretation of § 1602 takes the pertinent "henceforth" language in isolation. See *ante*, at 697–698. When that language instead is read in the context of the full section, it is quite clear that it does not speak to retroactivity. The section is as follows:

> "Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdic-

> tion of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this [statute]."

The first two sentences in § 1602 describe the Act's intention to replace the former framework for sovereign immunity determinations with a new court-controlled regime. The third sentence, which contains the "henceforth" phrase, serves to make clear that the new regime replaces the old regime from that point on. Compare § 1602 ("immunity [claims] should henceforth be decided by [American] courts . . . in conformity with the [Act's] principles") with Webster's Third New International Dictionary 1056 (1976) (defining "henceforth" as "from this point on"). That does not address the topic of retroactivity.

If one of the Act's principles were that "the Act shall govern all claims, whenever filed, and involving conduct that occurred whenever in time," the provision would command retroactive application. A statement like this, however, cannot be found in the FSIA. The statute says only that it must be applied "henceforth." That says no more than that the principles immediately apply from the point of the Act's effective date on, the same type of command that *Landgraf* rejected as grounds for an express command of retroactive application. Cf. 511 U. S., at 257 (analyzing a statutory provision that provided it was to "'take effect upon enactment'"). As JUSTICE STEVENS noted for the Court in that case: "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Ibid.*

In order for the term "henceforth" to command retroactivity, it would have to be accompanied by reference to specific proceedings or claims (*i. e.*, specific as to when they were commenced, if they are pending, or when they were determined). To confirm this one need only compare the FSIA's isolated use of the term "henceforth" to those statutory provisions that have been interpreted to require retroactive effect. See, *e. g.*, *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23, 27 (1940) ("The statute applies to 'equity receiverships of railroad corporations now . . . pending in any court of the United States' "); *Freeborn* v. *Smith*, 2 Wall. 160, 162 (1865) (" 'all cases of appeal . . . heretofore prosecuted and now pending in the Supreme Court of the United States . . . may be heard and determined by the Supreme Court of the United States' "). See also *Landgraf*, 511 U. S., at 255–256 (explaining that before the FSIA was enacted, another bill was passed by Congress but vetoed by the President with "language expressly calling for [retroactive] application of many of its provisions"); *id.*, at 255, n. 8 (citing the following example of a provision containing an express command for retroactive applications: " '[These] sections . . . shall apply to all proceedings pending on or commenced after the date of the enactment of this Act' "). On its own, "henceforth" does not speak with the precision and clarity necessary to command retroactivity.

JUSTICE BREYER's suggestion that Congress' intention as to retroactivity can be measured by the fact that the FSIA does not bear the same language as some other statutes and conventions Congress has authored does not change the analysis. See *ante*, at 708 (concurring opinion). To accept that interpretive approach is to abandon our usual insistence on a clear statement.

B

Because the FSIA does not exempt itself from the usual rule against retroactivity with a clear statement, our cases require that we consider the character of the statute, and of

the rights and liabilities it creates, to determine if its application will impose retroactive effect on the parties. See *Landgraf*, 511 U. S., at 280 ("When . . . the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i. e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed"). If it does, we must refuse to apply it in that manner. *Ibid.*

The essential character of the FSIA is jurisdictional. The conclusion that it allows (or denies) jurisdiction follows from the language of the statute. See § 1602 (the Act involves "the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts"). By denying immunity in certain classes of cases—those in the Act's succeeding provisions—the FSIA, in effect, grants jurisdiction over those disputes. The Court as much as admits all this, saying that "the FSIA . . . opens United States courts to plaintiffs with pre-existing claims against foreign states." *Ante*, at 695.

The statute's mechanism of establishing jurisdictional effects (*i. e.*, either allowing jurisdiction or denying it) has important implications for the retroactivity question. On the one hand, jurisdictional statutes, as a class, tend not to impose retroactive effect. As the Court explained in *Landgraf:* "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " 511 U. S., at 274 (citations omitted).

On the other hand, there is a subclass of statutes that, though jurisdictional, do impose retroactive effect. These are statutes that confer jurisdiction where before there was none. That is, they altogether create jurisdiction. We explained the distinction in a unanimous opinion in *Hughes*

Aircraft Co. v. *United States ex rel. Schumer*, 520 U. S. 939, 951 (1997) (citations omitted):

> "Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other."

The principles of *Hughes Aircraft* establish that retroactivity analysis of a jurisdictional statute is incomplete unless it asks whether the provision confers jurisdiction where there was none before. Again, this is common ground between the majority and this dissent. The majority recognizes the import of *Hughes Aircraft*'s holding and affirms that courts may not apply statutes that confer jurisdiction over a cause of action for which no jurisdiction existed when the sued-upon conduct occurred. "Such statutes," the majority acknowledges, "'even though phrased in "jurisdictional" terms, [are] as much subject to our presumption against retroactivity as any other[s].'" *Ante*, at 695 (alterations in original) (quoting *Hughes Aircraft*, *supra*, at 951).

If the FSIA creates new jurisdiction, *Hughes Aircraft* controls and instructs us not to apply it to cases involving pre-enactment conduct. On the other hand, if the FSIA did not create new jurisdiction—including where it in fact stripped previously existing jurisdiction from the courts—we may apply its statutory terms without fear of working any retro-

active effect. See *Lindh* v. *Murphy*, 521 U. S. 320, 342–343, n. 3 (1997) (REHNQUIST, C. J., joined by SCALIA, KENNEDY, and THOMAS, JJ., dissenting) ("Although in *Hughes Aircraft* we recently rejected a presumption favoring retroactivity for jurisdiction-*creating* statutes, nothing in *Hughes* disparaged our longstanding practice of applying jurisdiction-*ousting* statutes to pending cases" (citation omitted)).

C

To this point, then, I am in agreement with the Court on certain relevant points—the FSIA does not contain a clear retroactivity command; the statute is jurisdictional in nature; and jurisdictional statutes impose retroactive effect when they confer jurisdiction where none before existed. Now, however, our paths diverge. For though the majority concedes these critical issues, it does not address the question to which they lead: Does the FSIA confer jurisdiction where before there was none? Rather than asking that obvious question, the Court retreats to non sequitur. After this recitation of the *Hughes Aircraft* rule and with no causal reasoning from it, the Court concludes: "Thus, *Landgraf*'s default rule does not definitively resolve this case." *Ante*, at 696. It requires a few steps to undertake the analysis the Court omits, but in the end the proper conclusion is that, assuming the court on remand found immunity existed under the pre-FSIA regime, the statute does create jurisdiction where there was none before.

The analysis begins with 1948, when the conduct occurred. See *INS* v. *St. Cyr*, 533 U. S. 289, 321 (2001) ("[T]he judgment whether a particular statute acts retroactively 'should be informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations"'" (quoting *Martin* v. *Hadix*, 527 U. S. 343, 358 (1999), in turn quoting *Landgraf*, *supra*, at 270)). The parties' expectations were then formed by an emerging or common-law frame-

work governing claims of foreign sovereign immunity in American courts.

Parties in 1948 would have expected courts to apply this general law of foreign sovereign immunity in the future, and so also to apply whatever rules the courts "discovered" (if one subscribes to Blackstone's view of common law) or "created" (if one subscribes to Holmes') in the intervening time between the party's conduct and its being subject to suit. Compare 1 W. Blackstone, Commentaries *68 ("[T]he only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it"), with Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 466 (1897) ("Behind the logical form [of common-law decisionmaking] lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding"). To conduct the analysis, then, we should ask how the jurisdictional effects the FSIA creates compare to those that would govern were the prior regime still in force.

There is little dispute that in 1948 foreign sovereigns, and all other litigants, understood foreign sovereign immunity law to support three valid expectations. (1) Nations could expect that a baseline rule of sovereign immunity would apply. (2) They could expect that if the Executive made a statement on the issue of sovereign immunity that would be controlling. And (3), they could expect that they would be able to petition the Executive for intervention on their behalf. See *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 358–361 (1955) (summing up the Court's approach to sovereign immunity questions); *id.*, at 366–368 (Reed, J., dissenting) (summing up the same principles).

These three expectations were little different in 1976, before the FSIA was passed. The Tate Letter did announce the policy of restrictive foreign sovereign immunity, and this was an important doctrinal development. The policy, how-

ever, was within the second expectation that the Executive could shape the framework for foreign sovereign immunity. Under the second category, a foreign sovereign would have expected its immunity to be controlled by such a statement.

The Executive's post-Tate Letter practices and a statement by the Court confirm this is the correct way to understand both the operation of the general law of foreign relations and the expectations it built. After the Tate Letter's issuance, the Executive evaluated suits involving pre-Tate Letter conduct under the Letter's new standard when determining whether to submit suggestions of immunity to the courts. The Court, likewise, seems to have understood the Tate Letter to require this sort of application. In *National City Bank of N. Y.*, the Court suggested that the Letter governed in a case involving pre-1952 conduct, though careful consideration of the question was unnecessary there. 348 U. S., at 361.

The governing weight the Tate Letter had as a statement of Executive policy does not detract from the third expectation foreign sovereigns continued to have—that they could petition the Executive for case-specific statements. Thus, in *National City Bank of N. Y.* the Court took note that the Government had not submitted a case-specific suggestion as to immunity. See *id.*, at 364 ("[O]ur State Department neither has been asked nor has it given the slightest intimation that in its judgment allowance of counterclaims in such a situation would embarrass friendly relations with the Republic of China").

Today, to measure a foreign sovereign's expectation of liability for conduct committed in 1948, the Court should apply the three discussed, interlocking principles of law, which the parties then expected. The Court of Appeals did not address the question in this necessary manner. Rather than determining how the jurisdictional result produced by the FSIA differs from the result a court would reach if it applied the legal principles that governed before the enactment of

the FSIA, the court instead asked what the Executive would have done in 1948. See 317 F. 3d 954, 965 (CA9 2002) ("Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States"). That is not the appropriate way to measure Austria's expectations. It is an unmanageable inquiry; and it usurps the authority the Executive, as it is constituted today, has under the pre-FSIA regime. In essence, the Court of Appeals wrongly assumed responsibility for the political question, rather than confining its judgment to the legal one.

Answering the legal question, in contrast, requires applying the principles noted above: We assume a baseline of sovereign immunity and then look to see if there is any Executive statement on the sovereign immunity issue that displaces the presumption of immunity. There is, of course, at least one Executive statement on the issue that displaces the immunity presumption to some degree. It is the Tate Letter itself. By the Tate Letter the Executive established, as a general rule, that the doctrine of restrictive sovereign immunity would be followed. In general, the doctrine provided immunity for suits involving public acts and denied it for suits involving commercial or private acts. 26 Dept. State Bull., at 984. These principles control, as the Executive has taken no case-specific position in the instant matter. If petitioners' conduct would not be subject to suit under the Tate Letter principles, the FSIA cannot alter that result without imposing retroactive effect, creating new jurisdiction in American courts.

Petitioners and the United States, appearing as *amicus curiae*, argue that the Tate Letter doctrine would grant immunity (*i. e.*, deny jurisdiction) for suits involving expropriation. They say the Tate Letter rules contain no principle that parallels § 1605(a)(3), the FSIA's expropriation exception on which respondent relies to establish jurisdiction:

> "The expropriation exception . . . was a new development in the doctrine of sovereign immunity when the FSIA was enacted . . . . [I]n *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354 (CA2 1964), cert. denied, 381 U. S. 934 (1965)[,] [t]he court explained that, even under the restrictive theory of sovereign immunity, foreign states continued to enjoy immunity with respect to . . . suits respecting the 'nationalization' of property." Brief for United States as *Amicus Curiae* 12.

This argument may be correct in the end; but, it should be noted, the petitioners' reliance on *Victory Transport Inc.* v. *Comisaria General*, 336 F. 2d 354 (CA2 1964), is not conclusive. *Victory Transport* does not say that nationalizations of property are *per se* exempt under the restrictive theory of sovereign immunity. The Court of Appeals for the Second Circuit said:

> "The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts. . . . Such [immune] acts are generally limited to the following categories:
>
> . . . . . .
>
> "(2) legislative acts, such as nationalization." *Id.*, at at 360 (citations omitted).

As the court's language makes clear, the pertinent category of exempt action is legislative action, of which nationalization was but one example. The expropriation alleged in this case was not a legislative act.

Petitioners can still prevail by showing that there would have been no jurisdiction under the pre-FSIA governing

principles. That could be established by showing that the conduct at issue was considered a public act under those principles and that the principles contain no expropriation exception similar to that codified in § 1605(a)(3), which would deny otherwise available immunity. We need not, and ought not, resolve the question in the first instance. Neither the District Court nor the Court of Appeals has yet addressed it. The issue is complex and would benefit from more specific briefing, arguments, and consideration of the international law sources bearing upon the scope of immunity the Tate Letter announced. I would vacate the judgment of the Court of Appeals and remand for further proceedings to consider the question.

D

By declaring that this statute is not subject to the usual presumption against retroactivity, and so avoiding the critical issue in this case, the Court puts the force and the validity of our precedent in *Hughes Aircraft* into serious question. The Court, in rejecting the usual analysis, states three rationales to justify its approach. The arguments neither distinguish this case from *Hughes Aircraft* nor suffice to explain rejecting the rule against retroactivity.

The Court suggests the retroactivity analysis should not apply because the rights at issue are not private rights. See *ante*, at 696 ("[The] antiretroactivity presumption, while not strictly confined to cases involving private rights, is most helpful in that context"). This is unconvincing. First, the language from *Landgraf* on which the Court relies undercuts its position. It confirms, in clear terms, that retroactivity presumptions work equally in favor of governments. Per JUSTICE STEVENS, the Court said:

> "While the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties, we have applied the presumption in cases involving new monetary

obligations that fell only on the government." 511 U. S., at 271, n. 25.

Even if *Landgraf*'s reference to private rights could be read to establish that retroactivity analysis does not strictly protect government—and I do not see how that is possible in light of the above-quoted language—the *Landgraf* passage refers to the Federal Government. If the distinction mattered for retroactivity purposes, presumably it would have been on the basis that Congress, by virtue of authoring the legislation, is itself fully capable of protecting the Federal Government from having its rights degraded by retroactive laws. Private parties, it might be said, do not have the same built-in assurance. Here, of course, the Federal Government is not a party; instead a foreign government is. Foreign governments are as vulnerable as private parties to the disruption caused by retroactive laws. Indeed, foreign sovereigns may have less recourse than private parties to prevent or remedy retroactive legislation, since they cannot hold Congress responsible through the election process. The Court's private-rights argument, therefore, does not sustain its departure from our usual presumption against retroactivity.

The majority tries to justify departing from our usual principles in a second way. It argues that the purposes of foreign sovereign immunity are not concerned with allowing "foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity." *Ante*, at 696. JUSTICE BREYER takes the suggestion further. He argues not that foreign sovereign immunity doctrine is not concerned with reliance interests but, even further, that in fact foreign sovereigns have no reliance interests in receiving immunity in our courts. See *ante*, at 709–711. This reasoning overlooks the plain fact that there are reliance interests of vast importance involved, interests surely as important as those stemming from contract rights between two private parties. As the Executive has made

clear to us, these interests span a range of time after the conduct, even up to the present day. See Brief for United States as *Amicus Curiae* 8. For example, at stake may be pertinent treaty rights and international agreements intended to remedy the earlier conduct. These are matters in which the negotiating parties may have acted on a likely assumption of sovereign immunity, as defined and limited by pre-FSIA expectations: "[The] conduct at issue [has been] extensively addressed through treaties, agreements, and separate legislation that were all adopted against the background assumption [of the pre-FSIA foreign sovereign immunity regime]." *Ibid.* Lurking in the Court's and JUSTICE BREYER's contrary suggestions is the implication that the expectations of foreign powers are minor or infrequent. Surely that is not the case. By today's decision the Court opens foreign nations worldwide to vast and potential liability for expropriation claims in regards to conduct that occurred generations ago, including claims that have been the subject of international negotiation and agreement. There are, then, reliance interests of magnitude, which support the usual presumption against retroactivity.

In addition, the statement that the purposes of foreign sovereign immunity have not much to do with the presumption against retroactivity carries little weight; the presumption against retroactivity has independent justification. The Court has noted this, saying that the purposes of the underlying substantive law are not conclusive of the retroactivity analysis. "It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption." *Landgraf,* 511 U. S., at 285–286. As a result, diminished concerns of unfair surprise and upset expectations—even assuming they existed—do not displace the usual presumption. That is why in *Landgraf,* though "concerns of unfair surprise and upsetting expectations [were] attenuated in the case of intentional employment discrimina-

tion, which ha[d] been unlawful for more than a generation," the Court concluded, nevertheless, that it could not give the statute retroactive effect. *Id.*, at 282–283, n. 35.

The Court, lastly, adds in a footnote that the "FSIA differs from the statutory amendment at issue in *Hughes Aircraft*" because in *Hughes Aircraft* the jurisdictional limitation attached directly to the cause of action and so ensured that suit could be brought only in accordance with the jurisdictional provision (and any changes to it). *Ante*, at 695, n. 15. With the FSIA, in contrast, the jurisdictional limitation is not attached to the cause of action. The result, the Court implies, is that even if a pre-FSIA jurisdictional bar applied in American courts, suit on the California cause of action might still have been able to have been brought in foreign courts, and such availability of suit would defeat retroactivity concerns. *Ante*, at 695–696, n. 15 ("The Act does not . . . purport to limit *foreign* countries' decisions about what claims against which defendants their courts will entertain"); see also *ante*, at 703 (SCALIA, J., concurring). What is of concern in the retroactivity analysis that *Hughes Aircraft* sets out, however, is the internal integrity of American statutes, not of whether an American law allows suit where before none was allowed elsewhere in the world. This is unsurprising, as the task of canvassing what causes of action foreign countries might have allowed before a new jurisdictional regime made such suits also viable in American courts would be a most difficult task to assign American courts.

In the end, the majority turns away from our usual retroactivity analysis because "this [is a] *sui generis* context." *Ante*, at 696. Having created a new, extra exception that frees it from the usual analysis, it can conclude simply that the usual rule "does not control the outcome in this case." *Ante*, at 692. The implications of this holding are not entirely clear, for the new exception does not rest on any apparent principle.

There is a stark contrast between the Court's analysis and that of the Courts of Appeals that have addressed the question. In this case the Court of Appeals for the Ninth Circuit, like every other Court of Appeals to have considered the question, concluded that the FSIA must be interpreted under the usual retroactivity principles, just like any other statute. See 317 F. 3d 954. Accord, *Hwang Geum Joo* v. *Japan*, 332 F. 3d 679 (CADC 2003); *Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F. 2d 26 (CA2 1988) *(per curiam); Jackson* v. *People's Republic of China*, 794 F. 2d 1490 (CA11 1986).

The conclusion to which the *sui generis* rule leads the Court shows the rule lacks a principled basis: "[W]e think it more appropriate, absent contraindications, to defer to the most recent [decision by the political branches on the foreign sovereign immunity question]—namely, the FSIA." *Ante*, at 696. The question, however, is not whether the FSIA governs, but how to interpret the FSIA. The Court seems to think the FSIA implicitly adopts a presumption of retroactivity, though our cases instruct just the opposite. "[I]n *Hughes Aircraft* . . . we . . . rejected a presumption favoring retroactivity for jurisdiction-*creating* statutes." *Lindh*, 521 U. S., at 342, n. 3 (REHNQUIST, C. J., joined by SCALIA, KENNEDY, and THOMAS, JJ., dissenting).

JUSTICE BREYER would supplement the rationale for the Court's deciding the case outside the bounds of our usual mode of retroactivity analysis. He says the Court can take this path because sovereign immunity "is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." *Ante*, at 708. The argument is a variant of that made by respondent. See Brief for Respondent 27 ("*Dole Food* controls the result in this case"). Respondent's argument fails, of course, because in this case the defendants' status at the time of suit is that of the sovereign, not that of private parties. That distinction alone makes misplaced reliance on *Dole Food Co.* v. *Patrickson*, 538 U. S. 468 (2003)

(holding that a now-private corporation could not assert sovereign immunity in a suit involving events that occurred when the entity was owned by a foreign sovereign). JUSTICE BREYER's further reasoning, however, is also unacceptable. When jurisdictional rules are at stake, status and conduct factors will at times intersect. Most assuredly, we would not disown the usual retroactivity principles in a case involving a status-based jurisdictional statute that creates jurisdiction over private litigants where before there was none simply because the creation of jurisdiction turned in part on the status of one of the litigants. JUSTICE BREYER's additional rationale, however, has this very implication.

We should not ignore the statutory retroactivity analysis just because the parties and the Court have failed to consider it before. See *ante*, at 710 (BREYER, J., concurring) (relying on the fact that in *Verlinden* the Court applied the FSIA to a contract that predated the Act). "'[T]his Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.' *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974)." *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 63, n. 4 (1989) (alteration in original). Reliance on the fact that the immunity principles were applied retroactively in the common-law context of the pre-FSIA regime is also irrelevant. See *ante*, at 709–710 (BREYER, J., concurring). This case concerns the retroactive effect of enacted statutory law, not of court decisions interpreting the common law.

III

Today's decision contains another proposition difficult to justify and that itself does considerable damage to the FSIA. Abandoning standard retroactivity principles, the Court attempts to compensate for the harsh results it reaches by inviting case-by-case intervention by the Executive. This does serious harm to the constitutional balance between the political branches.

The Court says that the Executive may make suggestions of immunity regarding FSIA determinations and implies that courts should give such suggestions deference. See *ante*, at 702 ("[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive" (footnote omitted)). That invitation would be justified if the Court recognized that the Executive's role was retrospective only, *i. e.*, implicated only in suits involving preenactment conduct and only as a means for resolving the retroactivity analysis. The law that governed before the FSIA's enactment allowed unilateral Executive authority in that regard. The Court's rejection of the *Landgraf* analysis, however, removes the possibility of that being the basis for the invitation.

The Court instead reaches its conclusion about the Executive's role by reliance on the general constitutional principle that the Executive has a "'"vast share of responsibility for the conduct of our foreign relations."'" *Ante*, at 702 (quoting *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 414 (2003)). This prospective constitutional conclusion, which the Court offers almost as an aside, has fundamental implications for the future of the statute and raises serious separation-of-powers concerns.

The question the Court seems inclined to resolve—can the foreign affairs power of the Executive supersede a statutory scheme set forth by Congress—is simply not presented by the facts of this case. We would confront the question only if the case involved postenactment conduct and if the Executive had filed a suggestion of immunity, which, by its insistence, superseded the statute's directive. Those circumstances would present a difficult question. Compare U. S. Const., Art. II, § 2, with Art. I, § 1; *id.*, § 8, cls. 3, 9–11, 18; Art. III, § 1; *id.*, § 2, cl. 1. See also H. R. Rep., at 12 (setting out the constitutional authority on which Congress relied to

enact the FSIA). See generally *International Bancorp, LLC* v. *Societe des Bains de Mer et du Cercle des Etrangers*, 329 F. 3d 359, 367–368 (CA4 2003) (noting the complicated intersection where the Executive's and the Legislature's foreign affairs responsibilities overlap, in a case involving foreign trade). The separation-of-powers principles at stake also implicate judicial independence, which is compromised by case-by-case, selective determinations of jurisdiction by the Executive.

The Court makes a serious mistake, in my view, to address the question when it is not presented. It magnifies this error by proceeding with so little explanation, particularly in light of the strong arguments against its conclusion. The Solicitor General, on behalf of the Executive, agrees that the statute "presents the sole basis for civil litigants to obtain jurisdiction over a foreign state in United States courts." Brief for United States as *Amicus Curiae* 1. This understanding is supported by the lack of textual support for the contrary position in the Act and by the majority's own assessment of the Act's purposes.

The Court's abrupt announcement that the FSIA may well be subject to Executive override undermines the Act's central purpose and structure. As the Court acknowledges, before the Act, "immunity determinations [had been thrown] into some disarray, as 'foreign nations often placed diplomatic pressure on the State Department,' and political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'" *Ante*, at 690 (quoting *Verlinden*, 461 U. S., at 487). See also *supra*, at 716–717. Congress intended the FSIA to replace this old and unsatisfactory methodology of Executive decisionmaking. *Ibid.* The President endorsed the objective in full, recommending the bill upon its introduction in Congress, H. R. Rep., at 6, and signing the bill into law upon its presentment. The majority's surprising constitutional con-

clusion suggests that the FSIA accomplished none of these aims. The Court states that the statute's directives may well be short circuited by the sole directive of the Executive.

The Court adds a disclaimer that it "express[es] no opinion on the question whether such deference should be granted [to the Executive] in cases covered by the FSIA." *Ante*, at 702. The disclaimer, however, is inadequate to remedy the harm done by the invitation, for it is belied by the Court's own terms: Executive statements "suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity . . . might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Ante*, at 701–702 (citing as an example a case in which Executive foreign policy superseded state law). Taking what the Court says at face value, the Court does express an opinion on the question: Its opinion is that the Executive statement may well be entitled to deference, and so may well supersede federal law that gives courts jurisdiction.

If, as it seems, the Court seeks to free the Executive from the dictates of enacted law because it fears that to do otherwise would consign some litigants to an unfair retroactive application of the law, it adds illogic to the illogic of its own creation. Only application of our traditional analysis guards properly against unfair retroactive effect, "ensur[ing] that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U. S., at 268.

Where postenactment conduct is at stake, the majority's approach promises unfortunate disruption. It promises to reintroduce Executive intervention in foreign sovereign immunity determinations to an even greater degree than existed before the FSIA's enactment. Before the Act, foreign nations only tended to need the Executive's protection from the courts' jurisdiction in instances involving private acts. The Tate Letter ensured their public acts would remain im-

mune from suit, even without Executive intervention. Now, there is a potential for Executive intervention in a much larger universe of claims. The FSIA has no public act/private act distinction with respect to certain categories of conduct, such as expropriations. Foreign nations now have incentive to seek Executive override of the Act's jurisdictional rules for both public and private acts in those categories of cases.

With the FSIA, Congress tried to settle foreign sovereigns' prospective expectations for being subject to suit in American courts and to ensure fair and evenhanded treatment to our citizens who have claims against foreign sovereigns. See *supra*, at 716–717. This was in keeping with strengthening the Executive's ability to secure negotiated agreements with foreign nations against whom our citizens may have claims. Over time, agreements of this sort have been an important tool for the Executive. See, *e. g.*, Agreement Relating to the Agreement of Oct. 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Jan. 23, 2001, U. S.-Aus., 2001 WL 935261 (settling claims with Austria); Claims of U. S. Nationals, Nov. 5, 1964, U. S.-Yugo., 16 U. S. T. 1, T. I. A. S. No. 5750 (same with Yugoslavia); Settlement of Claims of U. S. Nationals, July 16, 1960, U. S.-Pol., 11 U. S. T. 1953, T. I. A. S. No. 4545 (same with Poland). Uncertain prospective application of our foreign sovereign immunity law may weaken the Executive's ability to secure such agreements by compromising foreign sovereigns' ability to predict the liability they face in our courts and so to assess the ultimate costs and benefits of any agreement. See *supra*, at 729–730 (citing Brief for United States as *Amicus Curiae*).

* * *

The presumption against retroactivity has comprehended, and always has been intended to comprehend, the wide universe of cases that a court might confront. That includes

this one. The Court's departure from precedent should not be overlooked. It has disregarded our "widely held intuitions about how statutes ordinarily operate," *Landgraf*, *supra*, at 272, and treated the principles discussed in *Landgraf* as if they describe a limited and precise rule that courts should apply only in particularized contexts. Our unanimous rejection of this approach in *Hughes Aircraft* applies here as well:

> "To the extent [the Court] contends that *only* statutes with one of [*Landgraf*'s particularly stated] effects are subject to our presumption against retroactivity, [it] simply misreads our opinion in *Landgraf*. The language upon which [it] relies does not purport to define the outer limit of impermissible retroactivity. Rather, our opinion in *Landgraf*, like that of Justice Story, merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." 520 U. S., at 947.

The Court's approach further leads to the unprecedented conclusion that Congress' Article I power might well be insufficient to accomplish the central objective of the FSIA. The Court, in addition, injects great prospective uncertainty into our relations with foreign sovereigns. Application of our usual presumption against imposing retroactive effect would leave powerful precedent intact and avoid these difficulties.

With respect, I dissent.

Syllabus

CENTRAL LABORERS' PENSION FUND *v.* HEINZ ET AL.

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

No. 02–891. Argued April 19, 2004—Decided June 7, 2004

Respondents (collectively, Heinz) are retired participants in a multiemployer pension plan (hereinafter Plan) administered by petitioner. Heinz retired from the construction industry after accruing enough pension credits to qualify for early retirement payments under a "service only" pension scheme that pays him the same monthly benefit he would have received had he retired at the usual age. The Plan prohibits such beneficiaries from certain "disqualifying employment" after they retire, suspending monthly payments until they stop the forbidden work. When Heinz retired, the Plan defined "disqualifying employment" to include a job as a construction worker but not as a supervisor, the job Heinz took. In 1998, the Plan expanded its definition to include any construction industry job and stopped Heinz's payments when he did not leave his supervisor's job. Heinz sued to recover the suspended benefits, claiming that the suspension violated the "anti-cutback" rule of the Employee Retirement Income Security Act of 1974 (ERISA), which prohibits any pension plan amendment that would reduce a participant's "accrued benefit," ERISA § 204(g), 29 U. S. C. § 1054(g). The District Court granted the Plan judgment on the pleadings, but the Seventh Circuit reversed, holding that imposing new conditions on rights to benefits already accrued violates the anti-cutback rule.

Held: ERISA § 204(g) prohibits a plan amendment expanding the categories of postretirement employment that triggers suspension of the payment of early retirement benefits already accrued. Pp. 743–751.

(a) The anti-cutback provision is crucial to ERISA's central object of protecting employees' justified expectations of receiving the benefits that they have been promised, see *Lockheed Corp.* v. *Spink*, 517 U. S. 882, 887. The provision prohibits plan amendments that have "the effect of . . . eliminating or reducing an early retirement benefit." 29 U. S. C. § 1054(g)(2). The question here is whether the Plan's amendment had such an effect. Although the statutory text is not as helpful as it might be, it is clear as a matter of common sense that a benefit has suffered under the amendment. Heinz accrued benefits under a plan allowing him to supplement his retirement income, and he reasonably relied on that plan's terms in planning his retirement. The 1998 amend-

ment undercut that reliance, paying benefits only if he accepted a substantial curtailment of his opportunity to do the kind of work he knew. There is no way that, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits. Pp. 743–745.

(b) The Plan's technical responses are rejected. To give the anticutback rule the constricted reading urged by the Plan—applying it only to amendments directly altering the monthly payment's nominal dollar amount and not to a suspension when the amount that would be paid is unaltered—would take textual *force majeure*, and certainly something closer to irresistible than language in 29 U. S. C. § 1002(23)(A) to the effect that accrued benefits are ordinarily "expressed in the form of an annual benefit commencing at normal retirement age." And the Plan's argument that § 204(g)'s "eliminat[e] or reduc[e]" language does not apply to mere suspensions misses the point. ERISA permits conditions that are elements of the benefit itself but the question here is whether a new condition may be imposed after a benefit has accrued. The right to receive certain money on a certain date may not be limited by a new condition narrowing that right. Pp. 745–746.

(c) This Court's conclusion is confirmed by an Internal Revenue Service regulation that adopts the reading of § 204(g) approved here. Pp. 746–748.

(d) ERISA § 203(a)(3)(B), 29 U. S. C. § 1053(a)(3)(B)—which provides that the right to an accrued benefit "shall not be treated as forfeitable solely because the plan" suspends benefit payments when beneficiaries like respondents are employed in the same industry and the same geographic area covered by the plan—is irrelevant to the question here. Section 203(a) addresses the entirely distinct concept of benefit forfeitures. And read most simply and in context, § 203(a)(3)(B) is a statement about the terms that can be offered to plan participants up front, not as an authorization to adopt retroactive amendments. Pp. 748–751.

303 F. 3d 802, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court. BREYER, J., filed a concurring opinion, in which REHNQUIST, C. J., and O'CONNOR and GINSBURG, JJ., joined, *post*, p. 751.

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *Jeffery M. Wilday*, *Patrick J. O'Hara*, and *Amy Howe*.

John P. Elwood argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were

Solicitor General Olson, Assistant Attorney General O'Connor, Deputy Solicitor General Kneedler, Kenneth L. Greene, and *John A. Dudeck, Jr.*

David M. Gossett argued the cause for respondents. With him on the brief were *Charles A. Rothfeld* and *Gery R. Gasick.**

JUSTICE SOUTER delivered the opinion of the Court.

With few exceptions, the "anti-cutback" rule of the Employee Retirement Income Security Act of 1974 (ERISA) prohibits any amendment of a pension plan that would reduce a participant's "accrued benefit." 88 Stat. 858, 29 U. S. C. § 1054(g). The question is whether the rule prohibits an amendment expanding the categories of postretirement employment that trigger suspension of payment of early retirement benefits already accrued. We hold such an amendment prohibited.

I

Respondents Thomas Heinz and Richard Schmitt (collectively, Heinz) are retired participants in a multiemployer pension plan (hereinafter Plan) administered by petitioner Central Laborers' Pension Fund. Like most other participants in the Plan, Heinz worked in the construction industry in central Illinois before retiring, and by 1996, he had accrued enough pension credits to qualify for early retirement payments under a defined benefit "service only" pension. This scheme pays him the same monthly retirement benefit

*Briefs of *amici curiae* urging reversal were filed for the Central States, Southeast and Southwest Areas Pension Fund by *Thomas C. Nyhan, James P. Condon,* and *John J. Franczyk, Jr.;* and for the National Coordinating Committee for Multiemployer Plans et al. by *Donald J. Capuano, Sally M. Tedrow,* and *John M. McIntire.*

Mary Ellen Signorille and *Melvin Radowitz* filed a brief for AARP as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the National Employment Lawyers Association by *Stephen R. Bruce* and *Jeffrey Lewis;* and for the Society for Human Resource Management by *Peter M. Kelly* and *Stanley R. Strauss.*

he would have received if he had retired at the usual age, and is thus a form of subsidized benefit, since monthly payments are not discounted even though they start earlier and are likely to continue longer than the average period.

Heinz's entitlement is subject to a condition on which this case focuses: the Plan prohibits beneficiaries of service only pensions from certain "disqualifying employment" after they retire. The Plan provides that if beneficiaries accept such employment their monthly payments will be suspended until they stop the forbidden work.[1] When Heinz retired in 1996, the Plan defined "disqualifying employment" as any job as "a union or non-union construction worker." Brief for Respondents 6. This condition did not cover employment in a supervisory capacity, however, and when Heinz took a job in central Illinois as a construction supervisor after retiring, the Plan continued to pay out his monthly benefit.

In 1998, the Plan's definition of disqualifying employment was expanded by amendment to include any job "'in any capacity in the construction industry (either as a union or non-union construction worker).'" *Ibid.* The Plan took the amended definition to cover supervisory work and warned Heinz that if he continued on as a supervisor, his monthly pension payments would be suspended. Heinz kept working, and the Plan stopped paying.

Heinz sued to recover the suspended benefits on the ground that applying the amended definition of disqualifying

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[1] This suspension provision was adopted on the authority of ERISA § 203(a)(3)(B), 29 U. S. C. § 1053(a)(3)(B). In authorizing such suspensions, Congress seems to have been motivated at least in part by a desire "to protect participants against their pension plan being used, in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of employees covered by the plan." 120 Cong. Rec. 29930 (1974) (statement of Sen. Williams regarding § 203(a)(3)(B)). That explains why ERISA permits multiemployer plans to suspend a retiree's benefits only if he accepts work "in the same industry, in the same trade or craft, and the same geographic area covered by the plan." 29 U. S. C. § 1053(a)(3)(B)(ii).

employment so as to suspend payment of his accrued benefits violated ERISA's anti-cutback rule. On cross-motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), the District Court granted judgment for the Plan, only to be reversed by a divided panel of the Seventh Circuit, which held that imposing new conditions on rights to benefits already accrued was a violation of the anti-cutback rule. 303 F. 3d 802 (CA7 2002). We granted certiorari, 540 U. S. 1045 (2003), in order to resolve the resulting Circuit split, see *Spacek* v. *Maritime Assn.*, 134 F. 3d 283 (CA5 1998), and now affirm.

II

A

There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them.

> "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan. ERISA does, however, seek to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits. . . . [W]hen Congress enacted ERISA, it 'wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'" *Lockheed Corp.* v. *Spink*, 517 U. S. 882, 887 (1996) (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 375 (1980); citations omitted).

See also J. Langbein & B. Wolk, Pension and Employee Benefit Law 121 (3d ed. 2000) (hereinafter Langbein & Wolk) ("The central problem to which ERISA is addressed is the loss of pension benefits previously promised").

ERISA's anti-cutback rule is crucial to this object, and (with two exceptions of no concern here[2]) provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . ." 29 U. S. C. § 1054(g)(1). After some initial question about whether the provision addressed early retirement benefits, see Langbein & Wolk 164, a 1984 amendment made it clear that it does. Retirement Equity Act of 1984, § 301(a)(2), 98 Stat. 1451. Now § 204(g) provides that "a plan amendment which has the effect of . . . eliminating or reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." 29 U. S. C. § 1054(g)(2).

Hence the question here: did the 1998 amendment to the Plan have the effect of "eliminating or reducing an early retirement benefit" that was earned by service before the amendment was passed? The statute, admittedly, is not as helpful as it might be in answering this question; it does not explicitly define "early retirement benefit," and it rather circularly defines "accrued benefit" as "the individual's accrued benefit determined under the plan . . . ." § 1002(23)(A). Still, it certainly looks as though a benefit has suffered under the amendment here, for we agree with the Seventh Circuit that, as a matter of common sense, "[a] participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." 303 F. 3d, at 805. Heinz worked and accrued retirement benefits under a plan with terms allowing him to supplement retirement income by certain employment, and he was being reasonable if he relied on those terms in planning his retire-

[2] ERISA § 204(g) allows the reduction of accrued benefits by amendment in cases where a plan faces "substantial business hardship," 29 U. S. C. § 1082(c)(8), and in cases involving terminated multiemployer plans, § 1441.

ment. The 1998 amendment undercut any such reliance, paying retirement income only if he accepted a substantial curtailment of his opportunity to do the kind of work he knew. We simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits.

B

The Plan's responses are technical ones, beginning with the suggestion that the "benefit" that may not be devalued is actually nothing more than a "defined periodic benefit the plan is legally obliged to pay," Brief for Petitioner 28, so that § 204(g) applies only to amendments directly altering the nominal dollar amount of a retiree's monthly pension payment. A retiree's benefit of $100 a month, say, is not reduced by a postaccrual plan amendment that suspends payments, so long as nothing affects the figure of $100 defining what he would be paid, if paid at all. Under the Plan's reading, § 204(g) would have nothing to say about an amendment that resulted even in a permanent suspension of payments. But for us to give the anti-cutback rule a reading that constricted would take textual *force majeure*, and certainly something closer to irresistible than the provision quoted in the Plan's observation that accrued benefits are ordinarily "expressed in the form of an annual benefit commencing at normal retirement age," 29 U. S. C. § 1002(23)(A).

The Plan also contends that, because § 204(g) only prohibits amendments that "eliminat[e] or reduc[e] an early retirement benefit," the anti-cutback rule must not apply to mere suspensions of an early retirement benefit. This argument seems to rest on a distinction between "eliminat[e] or reduc[e]" on the one hand, and "suspend" on the other, but it just misses the point. No one denies that some conditions enforceable by suspending benefit payments are permissible under ERISA: conditions set before a benefit accrues can survive the anti-cutback rule, even though their sanction is

a suspension of benefits. Because such conditions are elements of the benefit itself and are considered in valuing it at the moment it accrues, a later suspension of benefit payments according to the Plan's terms does not eliminate the benefit or reduce its value. The real question is whether a new condition may be imposed after a benefit has accrued; may the right to receive certain money on a certain date be limited by a new condition narrowing that right? In a given case, the new condition may or may not be invoked to justify an actual suspension of benefits, but at the moment the new condition is imposed, the accrued benefit becomes less valuable, irrespective of any actual suspension.

C

Our conclusion is confirmed by a regulation of the Internal Revenue Service (IRS) that adopts just this reading of § 204(g). When Title I of ERISA was enacted to impose substantive legal requirements on employee pension plans (including the anti-cutback rule), Title II of ERISA amended the Internal Revenue Code to condition the eligibility of pension plans for preferential tax treatment on compliance with many of the Title I requirements. Employee Benefits Law 47, 171–173 (S. Sacher et al. eds., 2d ed. 2000). The result was a "curious duplicate structure" with nearly verbatim replication in the Internal Revenue Code of whole sections of text from Title I of ERISA. Langbein & Wolk 91, ¶ 6. The anti-cutback rule of ERISA § 204(g) is one such section, showing up in substantially identical form as 26 U. S. C. § 411(d)(6).[3] This duplication explains the provision of the Reorganization Plan No. 4 of 1978, § 101, 43 Fed. Reg. 47713 (1978), 92 Stat. 3790, giving the Secretary of the Treasury

[3] "A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8) [of this Code], or [29 U. S. C. § 1441]." 26 U. S. C. § 411(d)(6)(A); see also § 411(d)(6)(B) (clarifying that the anti-cutback rule applies to early retirement benefits). Cf. n. 2, *supra,* and accompanying text (detailing ERISA § 204(g)).

the ultimate authority to interpret these overlapping anti-cutback provisions. See also Langbein & Wolk 92, ¶ 7 ("The IRS has [regulatory] jurisdiction over . . . benefit accrua[l] and vesting"). Although the pertinent regulations refer only to the Internal Revenue Code version of the anti-cutback rule, they apply with equal force to ERISA § 204(g). See 53 Fed. Reg. 26050, 26053 (1988) ("The regulations under section 411 are also applicable to provisions of [ERISA] Title I").

The IRS has formally taken the position that the anti-cutback rule does not keep employers from specifying in advance of accrual that "[t]he availability of a section 411(d)(6) protected benefit [is] limited to employees who satisfy certain objective conditions . . . ." 26 CFR § 1.411(d)–4, A–6(a)(1) (2003). Without running afoul of the rule, for example, plans may say from the outset that a single sum distribution of benefits is conditioned on the execution of a covenant not to compete. § 1.411(d)–4, A–6(a)(2). And employers are perfectly free to modify the deal they are offering their employees, as long as the change goes to the terms of compensation for continued, future employment: a plan "may be amended to eliminate or reduce section 411(d)(6) protected benefits with respect to benefits not yet accrued . . . ." § 1.411(d)–4, A–2(a)(1). The IRS regulations treat such conditions very differently, however, when they turn up as part of an amendment adding new conditions to the receipt of benefits already accrued. The rule in that case is categorical: "[t]he addition of . . . objective conditions with respect to a section 411(d)(6) protected benefit that has already accrued violates section 411(d)(6). Also, the addition of conditions (whether or not objective) or any change to existing conditions with respect to section 411(d)(6) protected benefits that results in any further restriction violates section 411(d)(6)." § 1.411(d)–4, A–7. So far as the IRS regulations are concerned, then, the anti-cutback provision flatly prohibits plans from attaching new conditions to benefits that an employee has already earned.

The IRS has, however, told two stories. The Plan points to a provision of the Internal Revenue Manual that supports its position: "[a]n amendment that reduces IRC 411(d)(6) protected benefits on account of [a plan's disqualifying employment provision] does not violate IRC 411(d)(6)." Internal Revenue Manual 4.72.14.3.5.3(7) (May 4, 2001), available at http://www.irs.gov/irm/part4/ch50s19.html. And the United States as *amicus curiae* says that the IRS has routinely approved amendments to plan definitions of disqualifying employment, even when they apply retroactively to accrued benefits. But neither an unreasoned statement in the manual nor allegedly longstanding agency practice can trump a formal regulation with the procedural history necessary to take on the force of law. See generally Note, Omnibus Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political Placebo? 86 Mich. L. Rev. 1787, 1799–1801 (1988) (discussing legal status of the Internal Revenue Manual). Speaking in its most authoritative voice, the IRS has long since approved the interpretation of § 204(g) that we adopt today.[4]

III

In criticizing the Seventh Circuit's reading of § 204(g), the Plan and the United States rely heavily on an entirely separate section of ERISA § 203(a)(3)(B), 29 U. S. C. § 1053(a)(3)(B). Here they claim to find specific authoriza-

[4] Nothing we hold today requires the IRS to revisit the tax-exempt status in past years of plans that were amended in reliance on the agency's representations in its manual by expanding the categories of work that would trigger suspension of benefit payments as to already-accrued benefits. The Internal Revenue Code gives the Commissioner discretion to decline to apply decisions of this Court retroactively. 26 U. S. C. § 7805(b)(8) ("The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect"). This would doubtless be an appropriate occasion for exercise of that discretion.

tion to amend suspension provisions retroactively, in terms specific enough to trump any general prohibition imposed by § 204(g). Section 203(a)(3)(B) provides that

> "[a] right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as [beneficiaries like respondents are] employed . . . in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced." 29 U. S. C. § 1053(a)(3)(B).

The Plan's arguments notwithstanding, § 203(a)(3)(B) is irrelevant to the question before us, for at least two reasons.

First, as a technical matter, § 203(a) addresses the entirely different question of benefit forfeitures. This is a distinct concept: § 204(g) belongs to the section of ERISA that sets forth requirements for benefit accrual (the rate at which an employee earns benefits to put in his pension account), see 29 U. S. C. § 1054, whereas § 203(a)(3)(B) is in the section that regulates vesting (the process by which an employee's already-accrued pension account becomes irrevocably his property), see 29 U. S. C. § 1053. See generally *Nachman Corp.*, 446 U. S., at 366, n. 10 ("Section 203(a) is a central provision in ERISA. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of his having fulfilled age and length of service requirements no greater than those specified in § 203(a)(2), as not subject to forfeiture"). To be sure, the concepts overlap in practical effect, and a single act by a plan might raise both vesting and accrual concerns. But it would be a non sequitur to conclude that, because an amendment does not constitute a prohibited forfeiture under § 203, it must not be a prohibited reduction under § 204. Just because § 203(a)(3)(B) failed to forbid it would not mean that § 204(g) allowed it.

Second, read most simply and in context, § 203(a)(3)(B) is a statement about the terms that can be offered to plan participants up front and enforced without amounting to forfeiture, not as an authorization to adopt retroactive amendments. Section 203(a), 29 U. S. C. § 1053(a), reads that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." This is a global directive that regulates the substantive content of pension plans; it adds a mandatory term to all retirement packages that a company might offer. Section 203(a)(3)(B), in turn, is nothing more than an explanation of this substantive requirement. Congress wanted to allow employers to condition future benefits on a plan participant's agreement not to accept certain kinds of postretirement employment, see n. 1, *supra,* and it recognized that a plan provision to this effect might be seen as rendering vested benefits improperly forfeitable. Accordingly, adding § 203(a)(3)(B) made it clear that such suspension provisions were permissible in narrow circumstances. But critically for present purposes, § 203(a)(3)(B) speaks only to the permissible substantive scope of existing ERISA plans, not to the procedural permissibility of plan amendments. The fact that ERISA allows plans to include a suspension provision going to benefits not yet accrued has no logical bearing on the analysis of how ERISA treats the imposition of such a condition on (implicitly) bargained-for benefits that have accrued already.[5] Section 203(a)(3)(B) is no help to the Plan.[6]

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[5] This is not to say that § 203(a)(3)(B) does not authorize some amendments. Plans are free to add new suspension provisions under § 203(a)(3)(B), so long as the new provisions apply only to the benefits that will be associated with future employment. The point is that this section regulates the contents of the bargain that can be struck between employer and employees as part of the complete benefits package for future employment.

[6] For analogous reasons, the Plan's reliance on 26 CFR § 1.411(c)–1(f) (2003) is unavailing. That section provides that, for the purpose of allocating accrued benefits between employer and employee contributions,

* * *

The judgment of the Seventh Circuit is affirmed.

It is so ordered.

JUSTICE BREYER, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE GINSBURG join, concurring.

I join the opinion of the Court on the assumption that it does not foreclose a reading of the Employee Retirement Income Security Act of 1974 that allows the Secretary of Labor, or the Secretary of the Treasury, to issue *regulations* explicitly allowing plan amendments to enlarge the scope of disqualifying employment with respect to benefits attributable to already-performed services. Cf. *Christensen* v. *Harris County*, 529 U. S. 576, 589 (2000) (SOUTER, J., concurring).

"[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B)." We read this provision as simply establishing that the actual suspension of benefit payments pursuant to an existing suspension provision does not affect the actuarial value of a beneficiary's total benefits package for the purpose of allocation calculations, since the suspension provision has already been accounted for in the initial valuation. Cf. n. 3, *supra*. Far from helping the Plan, this regulation tends to support our larger proposition that it is the addition of a suspension condition, not the actual suspension of a benefit, that reduces an employee's accrued benefit.

Syllabus

DEPARTMENT OF TRANSPORTATION ET AL. *v.* PUBLIC CITIZEN ET AL.

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

No. 03–358. Argued April 21, 2004—Decided June 7, 2004

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to analyze the environmental impact of their proposals and actions in an Environmental Impact Statement (EIS), but Council of Environmental Quality (CEQ) regulations allow an agency to prepare a more limited Environmental Assessment (EA) if the agency's proposed action neither is categorically excluded from the EIS production requirement nor would clearly require production of an EIS. An agency that decides, pursuant to an EA, that no EIS is required must issue a "finding of no significant impact" (FONSI). The Clean Air Act (CAA or Act) leaves States to develop "implementation plan[s]" to comply with national air quality standards mandated by the Act, and requires federal agencies' actions to "conform" to those state plans, 42 U. S. C. § 7506(c)(1). In 1982, Congress enacted a moratorium, prohibiting, *inter alia*, Mexican motor carriers from obtaining operating authority within the United States and authorizing the President to lift the moratorium. In 2001, the President announced his intention to lift the moratorium once new regulations were prepared to grant operating authority to Mexican motor carriers. The Federal Motor Carrier Safety Administration (FMCSA) published one proposed rule addressing the application form for such carriers and another addressing the establishment of a safety-inspection regime for carriers receiving operating authority. Congress subsequently provided, in § 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002, that no funds appropriated could be obligated or expended to review or process any Mexican motor carrier's applications until FMCSA implemented specific application and safety-monitoring requirements. Acting pursuant to NEPA, FMCSA issued an EA for its proposed rules. The EA did not consider the environmental impact that might be caused by the increased presence of Mexican trucks in the United States, concluding that any such impact would be an effect of the moratorium's modification, not the regulations' implementation. Concluding that the regulations' issuance would have no significant environmental impact, FMCSA issued a FONSI. In subsequent interim rules, FMCSA relied on the EA and FONSI to demonstrate compliance with NEPA, and determined

that any emissions increase from the regulations would fall below the Environmental Protection Agency's (EPA) threshold levels needed to trigger a conformity review under the CAA. Before the moratorium was lifted, respondents sought judicial review of the proposed rules, arguing that their promulgation violated NEPA and the CAA. The Court of Appeals agreed, finding the EA deficient because it did not consider the environmental impact of lifting the moratorium, when that action was reasonably foreseeable at the time FMCSA prepared the EA and directing FMCSA to prepare an EIS and a full CAA conformity determination for the regulations.

Held: Because FMCSA lacks discretion to prevent cross-border operations of Mexican motor carriers, neither NEPA nor the CAA requires FMCSA to evaluate the environmental effects of such operations. Pp. 763–773.

(a) FMCSA did not violate NEPA or the relevant CEQ regulations. Pp. 763–770.

(1) An agency's decision not to prepare an EIS can be set aside only if it is arbitrary and capricious, see 5 U. S. C. § 706(2)(A). Respondents argue that the issuance of a FONSI was arbitrary and capricious because the EA did not take into account the environmental effects of an increase in cross-border operations of Mexican motor carriers. The relevant question, under NEPA, is whether that increase, and the correlative release of emissions, is an "effect," 40 CFR § 1508.8, of FMCSA's rules; if not, FMCSA's failure to address these effects in the EA did not violate NEPA, and the FONSI's issuance cannot be arbitrary and capricious. Pp. 763–764.

(2) Respondents have forfeited any objection to the EA on the ground that it did not adequately discuss potential alternatives to the proposed action because respondents never identified in their comments to the rules any alternatives beyond those the EA evaluated. Pp. 764–765.

(3) Respondents argue that the EA must take the increased cross-border operations' environmental effects into account because § 350's expenditure bar makes it impossible for any Mexican truck to operate in the United States until the regulations are issued, and hence the trucks' entry is a "reasonably foreseeable" indirect effect of the issuance of the regulations. 40 CFR § 1508.8. Critically, that argument overlooks FMCSA's inability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican trucks from operating in the United States. While § 350 restricted FMCSA's ability to authorize such operations, FMCSA remains subject to 49 U. S. C. § 13902(a)(1)'s mandate that it register any motor carrier willing and

able to comply with various safety and financial responsibility rules. Only the moratorium prevented it from doing so for Mexican trucks before 2001. Respondents must rest on "but for" causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect. However, "but for" causation is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. NEPA requires a "reasonably close causal relationship" akin to proximate cause in tort law. *Metropolitan Edison Co.* v. *People Against Nuclear Energy,* 460 U. S. 766, 774. Also, inherent in NEPA and its implementing regulations is a "rule of reason," which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process. The underlying policies behind NEPA and Congress' intent, as informed by the "rule of reason," make clear that the causal connection between the proposed regulations and the entry of Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of entry. Neither of the purposes of NEPA's EIS requirement—to ensure both that an agency has information to make its decision and that the public receives information so it might also play a role in the decisionmaking process—will be fulfilled by requiring FMCSA to consider the environmental impact at issue. Since FMCSA has no ability to prevent such cross-border operations, it lacks the power to act on whatever information might be contained in an EIS and could not act on whatever input the public could provide. This analysis is not changed by the CEQ regulation requiring an agency to evaluate the "cumulative impact" of its action, 40 CFR § 1508.7, since that rule does not require FMCSA to treat the lifting of the moratorium itself or the consequences from that lifting as an effect of its rules promulgation. Pp. 765–770.

(b) FMCSA did not act improperly by not performing a full conformity analysis pursuant to the CAA and relevant regulations. To ensure that its actions are consistent with 42 U. S. C. § 7506, a federal agency must undertake "a conformity determination . . . where the total of direct and indirect emissions in a nonattainment or maintenance area caused by [the] action would equal or exceed" certain threshold levels established by the EPA. 40 CFR § 93.153(b). "Direct emissions" "are caused or initiated by the Federal action and occur at the same time and place as the action," § 93.152; and "indirect emissions" are "caused by the Federal action" but may occur later in time, and may be practicably controlled or maintained by the federal agency, *ibid.* Some sort of "but for" causation is sufficient for evaluating causation in the conformity review process. See *ibid.* Because it excluded emissions attribut-

Syllabus

able to the increased presence of Mexican trucks within the United States, FMCSA concluded that its regulations would not exceed EPA thresholds. Although arguably FMCSA's proposed regulations would be "but for" causes of the entry of Mexican trucks into the United States, such trucks' emissions are not "direct" because they will not occur at the same time or place as the promulgation of the regulations. And they are not "indirect" because FMCSA cannot practicably control or maintain control over the emissions: FMCSA has no ability to countermand the President's decision to lift the moratorium or to act categorically to prevent Mexican carriers from registering and Mexican trucks from entering the country; and once the regulations are promulgated, FMCSA will not be able to regulate any aspect of vehicle exhaust from those trucks. Pp. 771–773.

316 F. 3d 1002, reversed and remanded.

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

Deputy Solicitor General Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Olson*, *Assistant Attorney General Sansonetti*, *Deputy Solicitor General Hungar*, *Deputy Assistant Attorney General Clark*, *Austin C. Schlick*, *John L. Smeltzer*, *David C. Shilton*, *Jeffrey A. Rosen*, and *Peter J. Plocki*.

Jonathan Weissglass argued the cause for respondents. With him on the brief were *Stephen P. Berzon*, *Gail Ruderman Feuer*, *Julie Masters*, *Adrianna Quintero Somaini*, *Melissa Lin Perrella*, *David C. Vladeck*, *Patrick J. Szymanski*, *David Rosenfeld*, *William S. Lerach*, *Patrick J. Coughlin*, *Albert H. Meyerhoff*, and *Thomas O. McGarity*.*

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*Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Susan L. Durbin* and *Gordon B. Burns*, Deputy Attorneys General, *Manuel M. Medeiros*, Solicitor General, *Tom Greene*, Chief Assistant Attorney General, *Theodora Berger*, Senior Assistant Attorney General, and *Craig C. Thompson*, Supervising Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Lisa Madigan* of Illinois, *Thomas F. Reilly* of Massachusetts, *Patricia A. Madrid* of New Mexico, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Christine O. Gregoire* of Washington, and *Peggy A. Lautenschlager* of Wisconsin; for the American Public Health Associa-

JUSTICE THOMAS delivered the opinion of the Court.

In this case, we confront the question whether the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 (codified, as amended, at 42 U. S. C. §§ 4321–4370f), and the Clean Air Act (CAA), 42 U. S. C. §§ 7401–7671q, require the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the environmental effects of cross-border operations of Mexican-domiciled motor carriers, where FMCSA's promulgation of certain regulations would allow such cross-border operations to occur. Because FMCSA lacks discretion to prevent these cross-border operations, we conclude that these statutes impose no such requirement on FMCSA.

I

Due to the complex statutory and regulatory provisions implicated in this case, we begin with a brief overview of the relevant statutes. We then turn to the factual and procedural background.

A

1

Signed into law on January 1, 1970, NEPA establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment," and was intended to reduce or eliminate environmental damage and to promote "the understanding of the ecological systems and natural resources important to" the United States. 42 U. S. C. § 4321. "NEPA itself does not mandate particular results" in order to accomplish these ends. *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 350 (1989). Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake anal-

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tion et al. by *Hope M. Babcock;* for Defenders of Wildlife et al. by *Pamela S. Karlan* and *Sanjay Narayan;* for the Eagle Forum Education & Legal Defense Fund by *Karen B. Tripp;* and for South Coast Air Quality Management District et al. by *Barbara Baird* and *Patricia V. Tubert.*

yses of the environmental impact of their proposals and actions. See *id.*, at 349–350. At the heart of NEPA is a requirement that federal agencies

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> "(iii) alternatives to the proposed action,
>
> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U. S. C. § 4332(2)(C).

This detailed statement is called an Environmental Impact Statement (EIS). The Council of Environmental Quality (CEQ), established by NEPA with authority to issue regulations interpreting it, has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement. See 40 CFR § 1500.3 (2003). The CEQ regulations allow an agency to prepare a more limited document, an Environmental Assessment (EA), if the agency's proposed action neither is categorically excluded from the requirement to produce an EIS nor would clearly require the production of an EIS. See §§ 1501.4(a)–(b). The EA is to be a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." § 1508.9(a). If, pursuant to the EA, an agency determines that an EIS is not required under applicable CEQ regulations, it must issue a "finding of no significant impact" (FONSI), which briefly presents

the reasons why the proposed agency action will not have a significant impact on the human environment. See §§ 1501.4(e), 1508.13.

2

What is known as the CAA became law in 1963, 77 Stat. 392. In 1970, Congress substantially amended the CAA into roughly its current form. 84 Stat. 1713. The 1970 amendments mandated national air quality standards and deadlines for their attainment, while leaving to the States the development of "implementation plan[s]" to comply with the federal standards. *Ibid.*

In 1977, Congress again amended the CAA, 91 Stat. 749, to prohibit the Federal Government and its agencies from "engag[ing] in, support[ing] in any way or provid[ing] financial assistance for, licens[ing] or permit[ting], or approv[ing], any activity which does not conform to [a state] implementation plan." 42 U. S. C. § 7506(c)(1). The definition of "conformity" includes restrictions on, for instance, "increas[ing] the frequency or severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard . . . in any area." § 7506(c)(1)(B). These safeguards prevent the Federal Government from interfering with the States' abilities to comply with the CAA's requirements.

3

FMCSA, an agency within the Department of Transportation (DOT), is responsible for motor carrier safety and registration. See 49 U. S. C. § 113(f). FMCSA has a variety of statutory mandates, including "ensur[ing]" safety, § 31136, establishing minimum levels of financial responsibility for motor carriers, § 31139, and prescribing federal standards for safety inspections of commercial motor vehicles, § 31142. Importantly, FMCSA has only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers

that are "willing and able to comply with" the applicable safety, fitness, and financial-responsibility requirements. § 13902(a)(1). FMCSA has no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety.

B

We now turn to the factual and procedural background of this case. Before 1982, motor carriers domiciled in Canada and Mexico could obtain certification to operate within the United States from the Interstate Commerce Commission (ICC).[1] In 1982, Congress, concerned about discriminatory treatment of United States motor carriers in Mexico and Canada, enacted a 2-year moratorium on new grants of operating authority. Congress authorized the President to extend the moratorium beyond the 2-year period if Canada or Mexico continued to interfere with United States motor carriers, and also authorized the President to lift or modify the moratorium if he determined that doing so was in the national interest. 49 U. S. C. § 10922(*l*) (1982 ed.). Although the moratorium on Canadian motor carriers was quickly lifted, the moratorium on Mexican motor carriers remained, and was extended by the President.

In December 1992, the leaders of Mexico, Canada, and the United States signed the North American Free Trade Agreement (NAFTA), 32 I. L. M. 605 (1993). As part of NAFTA, the United States agreed to phase out the moratorium and permit Mexican motor carriers to obtain operating authority within the United States' interior by January 2000. On NAFTA's effective date (January 1, 1994), the President began to lift the trade moratorium by allowing the licensing

[1] In 1995, Congress abolished the ICC and transferred most of its responsibilities to the Secretary of Transportation. See ICC Termination Act of 1995, § 101, 109 Stat. 803. In 1999, Congress transferred responsibility for motor carrier safety within DOT to the newly created FMCSA. See Motor Carrier Safety Improvement Act of 1999, 113 Stat. 1748.

of Mexican carriers to provide some bus services in the United States. The President, however, did not continue to ease the moratorium on the timetable specified by NAFTA, as concerns about the adequacy of Mexico's regulation of motor carrier safety remained.

The Government of Mexico challenged the United States' implementation of NAFTA's motor carrier provisions under NAFTA's dispute-resolution process, and in February 2001, an international arbitration panel determined that the United States' "blanket refusal" of Mexican motor carrier applications breached the United States' obligations under NAFTA. App. 279, ¶ 295. Shortly thereafter, the President made clear his intention to lift the moratorium on Mexican motor carrier certification following the preparation of new regulations governing grants of operating authority to Mexican motor carriers.

In May 2001, FMCSA published for comment proposed rules concerning safety regulation of Mexican motor carriers. One rule (the Application Rule) addressed the establishment of a new application form for Mexican motor carriers that seek authorization to operate within the United States. Another rule (the Safety Monitoring Rule) addressed the establishment of a safety-inspection regime for all Mexican motor carriers that would receive operating authority under the Application Rule.

In December 2001, Congress enacted the Department of Transportation and Related Agencies Appropriations Act, 2002, 115 Stat. 833. Section 350 of this Act, *id.*, at 864, provided that no funds appropriated under the Act could be obligated or expended to review or to process any application by a Mexican motor carrier for authority to operate in the interior of the United States until FMCSA implemented specific application and safety-monitoring requirements for Mexican carriers. Some of these requirements went beyond those proposed by FMCSA in the Application and Safety

Monitoring Rules. Congress extended the § 350 conditions to appropriations for Fiscal Years 2003 and 2004.

In January 2002, acting pursuant to NEPA's mandates, FMCSA issued a programmatic EA for the proposed Application and Safety Monitoring Rules. FMCSA's EA evaluated the environmental impact associated with three separate scenarios: where the President did not lift the moratorium; where the President did but where (contrary to what was legally possible) FMCSA did not issue any new regulations; and the Proposed Action Alternative, where the President would modify the moratorium and where FMCSA would adopt the proposed regulations. The EA considered the environmental impact in the categories of traffic and congestion, public safety and health, air quality, noise, socioeconomic factors, and environmental justice. Vital to the EA's analysis, however, was the assumption that there would be no change in trade volume between the United States and Mexico due to the issuance of the regulations. FMCSA did note that § 350's restrictions made it impossible for Mexican motor carriers to operate in the interior of the United States before FMCSA's issuance of the regulations. But, FMCSA determined that "this and any other associated effects in trade characteristics would be the result of the modification of the moratorium" by the President, not a result of FMCSA's implementation of the proposed safety regulations. App. 60. Because FMCSA concluded that the entry of the Mexican trucks was not an "effect" of its regulations, it did not consider any environmental impact that might be caused by the increased presence of Mexican trucks within the United States.

The particular environmental effects on which the EA focused, then, were those likely to arise from the increase in the number of roadside inspections of Mexican trucks and buses due to the proposed regulations. The EA concluded that these effects (such as a slight increase in emissions, noise from the trucks, and possible danger to passing motor-

ists) were minor and could be addressed and avoided in the inspections process itself. The EA also noted that the increase of inspection-related emissions would be at least partially offset by the fact that the safety requirements would reduce the number of Mexican trucks operating in the United States. Due to these calculations, the EA concluded that the issuance of the proposed regulations would have no significant impact on the environment, and hence FMCSA, on the same day as it released the EA, issued a FONSI.

On March 19, 2002, FMCSA issued the two interim rules, delaying their effective date until May 3, 2002, to allow public comment on provisions that FMCSA added to satisfy the requirements of § 350. In the regulatory preambles, FMCSA relied on its EA and its FONSI to demonstrate compliance with NEPA. FMCSA also addressed the CAA in the preambles, determining that it did not need to perform a "conformity review" of the proposed regulations under 42 U. S. C. § 7506(c)(1) because the increase in emissions from these regulations would fall below the Environmental Protection Agency's (EPA) threshold levels needed to trigger such a review.

In November 2002, the President lifted the moratorium on qualified Mexican motor carriers. Before this action, however, respondents filed petitions for judicial review of the Application and Safety Monitoring Rules, arguing that the rules were promulgated in violation of NEPA and the CAA. The Court of Appeals agreed with respondents, granted the petitions, and set aside the rules. 316 F. 3d 1002 (CA9 2003).

The Court of Appeals concluded that the EA was deficient because it failed to give adequate consideration to the overall environmental impact of lifting the moratorium on the cross-border operation of Mexican motor carriers. According to the Court of Appeals, FMCSA was required to consider the environmental effects of the entry of Mexican trucks because "the President's rescission of the moratorium was 'reasonably foreseeable' at the time the EA was pre-

pared and the decision not to prepare an EIS was made." *Id.*, at 1022 (quoting 40 CFR §§1508.7, 1508.8(b) (2003)). Due to this perceived deficiency, the Court of Appeals remanded the case for preparation of a full EIS.

The Court of Appeals also directed FMCSA to prepare a full CAA conformity determination for the challenged regulations. It concluded that FMCSA's determination that emissions attributable to the challenged rules would be below the threshold levels was not reliable because the agency's CAA determination reflected the "illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry." 316 F. 3d, at 1030.

We granted certiorari, 540 U. S. 1088 (2003), and now reverse.

II

An agency's decision not to prepare an EIS can be set aside only upon a showing that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. §706(2)(A). See also *Marsh* v. *Oregon Natural Resources Council*, 490 U. S. 360, 375–376 (1989); *Kleppe* v. *Sierra Club*, 427 U. S. 390, 412 (1976). Here, FMCSA based its FONSI upon the analysis contained within its EA; respondents argue that the issuance of the FONSI was arbitrary and capricious because the EA's analysis was flawed. In particular, respondents criticize the EA's failure to take into account the various environmental effects caused by the increase in cross-border operations of Mexican motor carriers.

Under NEPA, an agency is required to provide an EIS only if it will be undertaking a "major Federal actio[n]," which "significantly affect[s] the quality of the human environment." 42 U. S. C. §4332(2)(C). Under applicable CEQ regulations, "[m]ajor Federal action" is defined to "includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40

CFR § 1508.18 (2003). "Effects" is defined to "include: (a) Direct effects, which are caused by the action and occur at the same time and place," and "(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." § 1508.8. Thus, the relevant question is whether the increase in cross-border operations of Mexican motor carriers, with the correlative release of emissions by Mexican trucks, is an "effect" of FMCSA's issuance of the Application and Safety Monitoring Rules; if not, FMCSA's failure to address these effects in its EA did not violate NEPA, and so FMCSA's issuance of a FONSI cannot be arbitrary and capricious.

A

To answer this question, we begin by explaining what this case does *not* involve. What is not properly before us, despite respondents' argument to the contrary, see Brief for Respondents 38–41, is any challenge to the EA due to its failure properly to consider possible alternatives to the proposed action (*i. e.*, the issuance of the challenged rules) that would mitigate the environmental impact of the authorization of cross-border operations by Mexican motor carriers. Persons challenging an agency's compliance with NEPA must "structure their participation so that it . . . alerts the agency to the [parties'] position and contentions," in order to allow the agency to give the issue meaningful consideration. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 553 (1978). None of the respondents identified in their comments any rulemaking alternatives beyond those evaluated in the EA, and none urged FMCSA to consider alternatives. Because respondents did not raise these particular objections to the EA, FMCSA was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objec-

tion to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action.

Admittedly, the agency bears the primary responsibility to ensure that it complies with NEPA, see *ibid.*, and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action. But that situation is not before us. With respect to FMCSA's ability to mitigate, respondents can argue only that FMCSA could regulate emissions from Mexican trucks indirectly, through making the safety-registration process more onerous or by removing older, more polluting trucks through more effective enforcement of motor carrier safety standards. But respondents fail to identify any evidence that shows that any effect from these possible actions would be significant, or even noticeable, for air-quality purposes. The connection between enforcement of motor carrier safety and the environmental harms alleged in this case is also tenuous at best. Nor is it clear that FMCSA could, consistent with its limited statutory mandates, reasonably impose on Mexican carriers standards beyond those already required in its proposed regulations.

B

With this point aside, respondents have only one complaint with respect to the EA: It did not take into account the environmental effects of increased cross-border operations of Mexican motor carriers. Respondents' argument that FMCSA was required to consider these effects is simple. Under § 350, FMCSA is barred from expending any funds to process or review any applications by Mexican motor carriers until FMCSA implemented a variety of specific application and safety-monitoring requirements for Mexican carriers. This expenditure bar makes it impossible for any Mexican motor carrier to receive authorization to operate within the United States until FMCSA issued the regulations challenged here. The promulgation of the regulations,

the argument goes, would "caus[e]" the entry of Mexican trucks (and hence also cause any emissions such trucks would produce), and the entry of the trucks is "reasonably foreseeable." 40 CFR § 1508.8 (2003). Thus, the argument concludes, under the relevant CEQ regulations, FMCSA must take these emissions into account in its EA when evaluating whether to produce an EIS.

Respondents' argument, however, overlooks a critical feature of this case: FMCSA has no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States. To be sure, § 350 did restrict the ability of FMCSA to authorize cross-border operations of Mexican motor carriers, but Congress did not otherwise modify FMCSA's statutory mandates. In particular, FMCSA remains subject to the mandate of 49 U. S. C. § 13902(a)(1), that FMCSA "*shall* register a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with" the safety and financial responsibility requirements established by DOT. (Emphasis added.) Under FMCSA's entirely reasonable reading of this provision, it must certify *any* motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial responsibility contained in DOT regulations; only the moratorium prevented it from doing so for Mexican motor carriers before 2001. App. 51–55. Thus, upon the lifting of the moratorium, if FMCSA refused to authorize a Mexican motor carrier for cross-border services, where the Mexican motor carrier was willing and able to comply with the various substantive safety and financial responsibilities rules, it would violate § 13902(a)(1).

If it were truly impossible for FMCSA to comply with both § 350 and § 13902(a)(1), then we would be presented with an irreconcilable conflict of laws. As the later enacted provision, § 350 would quite possibly win out. See *Posadas* v. *Na-*

tional City Bank, 296 U. S. 497, 503 (1936). But FMCSA can easily satisfy both mandates: It can issue the application and safety inspection rules required by § 350, and start processing applications by Mexican motor carriers and authorize those that satisfy § 13902(a)(1)'s conditions. Without a conflict, then, FMCSA must comply with all of its statutory mandates.

Respondents must rest, then, on a particularly unyielding variation of "but for" causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect. However, a "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. As this Court held in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U. S. 766, 774 (1983), NEPA requires "a reasonably close causal relationship" between the environmental effect and the alleged cause. The Court analogized this requirement to the "familiar doctrine of proximate cause from tort law." *Ibid.* In particular, "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.*, at 774, n. 7. See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 264, 274–275 (5th ed. 1984) (proximate cause analysis turns on policy considerations and considerations of the "legal responsibility" of actors).

Also, inherent in NEPA and its implementing regulations is a "'rule of reason,'" which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process. See *Marsh*, 490 U. S., at 373–374. Where the preparation of an EIS would serve "no purpose" in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS. See *Aberdeen & Rockfish R. Co.* v. *Students*

Challenging Regulatory Agency Procedures (SCRAP), 422 U. S. 289, 325 (1975); see also 40 CFR §§ 1500.1(b)–(c) (2003).

In these circumstances, the underlying policies behind NEPA and Congress' intent, as informed by the "rule of reason," make clear that the causal connection between FMCSA's issuance of the proposed regulations and the entry of the Mexican trucks is insufficient to make FMCSA responsible under NEPA to consider the environmental effects of the entry. The NEPA EIS requirement serves two purposes. First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson*, 490 U. S., at 349. Second, it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Ibid.* Requiring FMCSA to consider the environmental effects of the entry of Mexican trucks would fulfill neither of these statutory purposes. Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the EIS.

Similarly, the informational purpose is not served. The "informational role" of an EIS is to "giv[e] the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process,' *Baltimore Gas & Electric Co.* [v. *Natural Resources Defense Council, Inc.*, 462 U. S. 87, 97 (1983)], and, perhaps more significantly, provid[e] a springboard for public comment" in the agency decisionmaking process itself, *ibid.* The purpose here is to ensure that the "larger audience," *ibid.*, can provide input as necessary to the agency making the relevant decisions. See 40 CFR § 1500.1(c) (2003) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster ex-

cellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment"); § 1502.1 ("The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government"). But here, the "larger audience" can have no impact on FMCSA's decisionmaking, since, as just noted, FMCSA simply could not act on whatever input this "larger audience" could provide.[2]

It would not, therefore, satisfy NEPA's "rule of reason" to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform. Put another way, the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion.

Consideration of the CEQ's "cumulative impact" regulation does not change this analysis. An agency is required to evaluate the "[c]umulative impact" of its action, which is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." § 1508.7. The "cumulative impact" regulation required FMCSA to consider the "incremental impact" of the safety rules themselves, in the context of the President's lifting of the moratorium

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[2] Respondents are left with arguing that an EIS would be useful for informational purposes entirely outside FMCSA's decisionmaking process. See Brief for Respondents 42. But such an argument overlooks NEPA's core focus on improving agency decisionmaking. See 40 CFR §§ 1500.1, 1500.2, 1502.1 (2003).

and other relevant circumstances. But this is exactly what FMCSA did in its EA. FMCSA appropriately and reasonably examined the incremental impact of its safety rules assuming the President's modification of the moratorium (and, hence, assuming the increase in cross-border operations of Mexican motor carriers). The "cumulative impact" regulation does not require FMCSA to treat the lifting of the moratorium itself, or consequences from the lifting of the moratorium, as an effect of its promulgation of its Application and Safety Monitoring Rules.[3]

C

We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a "major Federal action." Because the President, not FMCSA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental effects arising from the entry.[4]

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[3] The Court of Appeals and respondents contend that the EA contained numerous other errors, but their contentions are premised on the conclusion that FMCSA was required to take into account the increased cross-border operations of Mexican motor carriers.

[4] Respondents argue that Congress ratified the Court of Appeals' decision when it, after the lower court's opinion, reenacted § 350 in two appropriations bills. The doctrine of ratification states that "Congress is presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons,* 434 U. S. 575, 580 (1978). But this case involves the interpretation of NEPA and the CAA, not § 350. Indeed, the precise requirements of § 350 were not below, and are not here, in dispute. Hence, congressional reenactment of § 350 tells us nothing about Congress' view

III

Under the CAA, a federal "department, agency, or instrumentality" may not, generally, "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity" that violates an applicable state air-quality implementation plan. 42 U. S. C. § 7506(c)(1); 40 CFR § 93.150(a) (2003). Federal agencies must, in many circumstances, undertake a conformity determination with respect to a proposed action, to ensure that the action is consistent with § 7506(c)(1). See 40 CFR §§ 93.150(b), 93.153(a)–(b). However, an agency is exempt from the general conformity determination under the CAA if its action would not cause new emissions to exceed certain threshold emission rates set forth in § 93.153(b). FMCSA determined that its proposed regulations would not cause emissions to exceed the relevant threshold amounts and therefore concluded that the issuance of its regulations would comply with the CAA. App. to Pet. for Cert. 65a–66a, 155a. Critical to its calculations was its consideration of only those emissions that would occur from the increased roadside inspections of Mexican trucks; like its NEPA analysis, FMCSA's CAA analysis did not consider any emissions attributable to the increased presence of Mexican trucks within the United States.

The EPA's rules provide that "a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed" the threshold levels established by the EPA. 40 CFR § 93.153(b) (2003). "Direct emissions" are defined as those covered emissions "that are caused or initiated by the Federal action and occur at the same time and place as the

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as to the requirements of NEPA and the CAA, and so, on the legal issues involved in this case, Congress has been entirely silent.

action." § 93.152. The term "[i]ndirect emissions" means covered emissions that

> "(1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and
>
> "(2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency." *Ibid.*

Unlike the regulations implementing NEPA, the EPA's CAA regulations have defined the term "[c]aused by." *Ibid.* In particular, emissions are "[c]aused by" a federal action if the "emissions . . . would not . . . occur in the absence of the Federal action." *Ibid.* Thus, the EPA has made clear that for purposes of evaluating causation in the conformity review process, some sort of "but for" causation is sufficient.

Although arguably FMCSA's proposed regulations would be "but for" causes of the entry of Mexican trucks into the United States, the emissions from these trucks are neither "direct" nor "indirect" emissions. First, the emissions from the Mexican trucks are not "direct" because they will not occur at the same time or at the same place as the promulgation of the regulations.

Second, FMCSA cannot practicably control, nor will it maintain control, over these emissions. As discussed above, FMCSA does not have the ability to countermand the President's decision to lift the moratorium, nor could it act categorically to prevent Mexican carriers from being registered or Mexican trucks from entering the United States. Once the regulations are promulgated, FMCSA would have no ability to regulate any aspect of vehicle exhaust from these Mexican trucks. FMCSA could not refuse to register Mexican motor carriers simply on the ground that their trucks would pollute excessively. FMCSA cannot determine

whether registered carriers actually will bring trucks into the United States, cannot control the routes the carriers take, and cannot determine what the trucks will emit. Any reduction in emissions that would occur at the hands of FMCSA would be mere happenstance. It cannot be said that FMCSA "practicably control[s]" or "will maintain control" over the vehicle emissions from the Mexican trucks, and it follows that the emissions from the Mexican trucks are not "indirect emissions." *Ibid.;* see also Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63214, 63221 (1993) ("The EPA does not believe that Congress intended to extend the prohibitions and responsibilities to cases where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity").

The emissions from the Mexican trucks are neither "direct" nor "indirect" emissions caused by the issuance of FMCSA's proposed regulations. Thus, FMCSA did not violate the CAA or the applicable regulations by failing to consider them when it evaluated whether it needed to perform a full "conformity determination."

IV

FMCSA did not violate NEPA or the relevant CEQ regulations when it did not consider the environmental effect of the increase in cross-border operations of Mexican motor carriers in its EA. Nor did FMCSA act improperly by not performing, pursuant to the CAA and relevant regulations, a full conformity review analysis for its proposed regulations. We therefore reject respondents' challenge to the procedures used in promulgating these regulations. Accordingly, 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.

Syllabus

CITY OF LITTLETON, COLORADO *v.* Z. J. GIFTS D–4, L. L. C., DBA CHRISTAL'S

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

No. 02–1609. Argued March 24, 2004—Decided June 7, 2004

Under petitioner city's "adult business license" ordinance, the city's decision to deny a license may be appealed to the state district court pursuant to Colorado Rules of Civil Procedure. Respondent Z. J. Gifts D–4, L. L. C. (hereinafter ZJ), opened an adult bookstore in a place not zoned for adult businesses. Instead of applying for a license, ZJ filed suit attacking the ordinance as facially unconstitutional. The Federal District Court rejected ZJ's claims, but the Tenth Circuit held, as relevant here, that state law does not assure the constitutionally required "prompt final judicial *decision*."

Held: The ordinance meets the First Amendment's requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license. Pp. 778–784.

(a) The Court rejects the city's claim that its licensing scheme need only provide prompt access to judicial review, but not a "prompt judicial determination," of an applicant's legal claim. The city concedes that *Freedman* v. *Maryland*, 380 U. S. 51, 59, in listing constitutionally necessary "safeguards" applicable to a motion picture censorship statute, spoke of the need to assure a "prompt final judicial decision," but adds that JUSTICE O'CONNOR's controlling plurality opinion in *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, which addressed an adult business licensing scheme, did not use the word "decision," instead speaking only of the "*possibility of prompt judicial review*," *id.*, at 228 (emphasis added). JUSTICE O'CONNOR's *FW/PBS* opinion, however, points out that *Freedman*'s "judicial review" safeguard is meant to prevent "undue delay," 493 U. S., at 228, which includes *judicial*, as well as *administrative*, delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary. Pp. 778–781.

(b) However, the Court accepts the city's claim that Colorado law satisfies any "prompt judicial determination" requirement, agreeing that the Court should modify *FW/PBS*, withdrawing its implication that *Freedman*'s special judicial review rules—*e. g.*, strict time limits—apply in this case. Colorado's ordinary "judicial review" rules suffice to as-

Syllabus

sure a prompt judicial *decision*, as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. Four considerations support this conclusion. First, ordinary court procedural rules and practices give reviewing courts judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, courts may arrange their schedules to "accelerate" proceedings, and higher courts may grant expedited review. Second, there is no reason to doubt state judges' willingness to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. And federal remedies would provide an additional safety valve in the event of any such problem. Third, the typical First Amendment harm at issue here differs from that at issue in *Freedman*, diminishing the need in the typical case for procedural rules imposing special decisionmaking time limits. Unlike in *Freedman*, this ordinance does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. These criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally any specific item of adult material in the community. And the criteria's simple objective nature means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Finally, nothing in *FW/PBS* or *Freedman* requires a city or State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme. Pp. 781–784.

311 F. 3d 1220, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, THOMAS, and GINSBURG, JJ., joined, in which STEVENS, J., joined as to Parts I and II–B, and in which SOUTER and KENNEDY, JJ., joined except as to Part II–B. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 784. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY, J., joined, *post*, p. 786. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 787.

J. Andrew Nathan argued the cause for petitioner. With him on the briefs were *Heidi J. Hugdahl*, *Scott D. Bergthold*, *Larry W. Berkowitz*, and *Brad D. Bailey*.

Douglas R. Cole, State Solicitor of Ohio, argued the cause and filed a brief for the State of Ohio et al. as *amici curiae*

in support of petitioner under this Court's Rule 12.6. With him on the brief were *Jim Petro*, Attorney General of Ohio, *Rebecca L. Thomas*, Assistant Solicitor, and *Dan Schweitzer*, and the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Mark J. Bennett* of Hawaii, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *William H. Sorrell* of Vermont.

Michael W. Gross argued the cause for respondent. With him on the brief were *Arthur M. Schwartz* and *Cindy D. Schwartz.**

JUSTICE BREYER delivered the opinion of the Court.

In this case we examine a city's "adult business" licensing ordinance to determine whether it meets the First Amendment's requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license. See *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215 (1990); cf. *Freedman* v. *Maryland*, 380 U. S. 51 (1965). We conclude that the ordinance before us, considered on its face, is consistent with the First Amendment's demands.

I

Littleton, Colorado, has enacted an "adult business" ordinance that requires an "adult bookstore, adult novelty store

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*Briefs of *amici curiae* urging reversal were filed for the Community Defense Counsel by *David R. Langdon* and *Benjamin W. Bull;* and for the National League of Cities et al. by *Richard Ruda* and *Charles A. Rothfeld.*

Briefs of *amici curiae* urging affirmance were filed for the American Booksellers Foundation for Free Expression et al. by *Michael A. Bamberger;* and for the First Amendment Lawyers Association by *H. Louis Sirkin.*

or adult video store" to have an "adult business license." Littleton City Code §§ 3–14–2, 3–14–4 (2003), App. to Brief for Petitioner 13a–20a, 23a. The ordinance defines "adult business"; it requires an applicant to provide certain basic information about the business; it insists upon compliance with local "adult business" (and other) zoning rules; it lists eight specific circumstances the presence of which requires the city to deny a license; and it sets forth time limits (typically amounting to about 40 days) within which city officials must reach a final licensing decision. §§ 3–14–2, 3–14–3, 3–14–5, 3–14–7, 3–14–8, *id.*, at 13a–30a. The ordinance adds that the final decision may be "appealed to the [state] district court pursuant to Colorado rules of civil procedure 106(a)(4)." § 3–14–8(B)(3), *id.*, at 30a.

In 1999, the respondent, a company called Z. J. Gifts D–4, L. L. C. (hereinafter ZJ), opened a store that sells "adult books" in a place not zoned for adult businesses. Compare Tr. of Oral Arg. 13 (store "within 500 feet of a church and day care center") with § 3–14–3(B), App. to Brief for Petitioner 21a (forbidding adult businesses at such locations). Instead of applying for an adult business license, ZJ brought this lawsuit attacking Littleton's ordinance as unconstitutional on its face. The Federal District Court rejected ZJ's claims; but on appeal the Court of Appeals for the Tenth Circuit accepted two of them, 311 F. 3d 1220, 1224 (2002). The court held that Colorado law "does not assure that [the city's] license decisions will be given expedited [judicial] review"; hence it does not assure the "prompt final judicial *decision*" that the Constitution demands. *Id.*, at 1238. It also held unconstitutional another ordinance provision (not now before us) on the ground that it threatened lengthy administrative delay—a problem that the city believes it has cured by amending the ordinance. Compare *id.*, at 1233–1234, with § 3–14–7, App. to Brief for Petitioner 27a–28a, and Brief for Petitioner 3. Throughout these proceedings, ZJ's store has continued to operate.

The city has asked this Court to review the Tenth Circuit's "judicial review" determination, and we granted certiorari in light of lower court uncertainty on this issue. Compare, *e. g.*, 311 F. 3d, at 1238 (First Amendment requires prompt judicial *determination* of license denial); *Nightclubs, Inc.* v. *Paducah*, 202 F. 3d 884, 892–893 (CA6 2000) (same); *Baby Tam & Co.* v. *Las Vegas*, 154 F. 3d 1097, 1101–1102 (CA9 1998) (same); *11126 Baltimore Blvd., Inc.* v. *Prince George's County*, 58 F. 3d 988, 998–1001 (CA4 1995) (en banc) (same), with *Boss Capital, Inc.* v. *Casselberry*, 187 F. 3d 1251, 1256–1257 (CA11 1999) (Constitution requires only prompt *access* to courts); *TK's Video, Inc.* v. *Denton County*, 24 F. 3d 705, 709 (CA5 1994) (same); see also *Thomas* v. *Chicago Park Dist.*, 534 U. S. 316, 325–326 (2002) (noting a Circuit split); *City News & Novelty, Inc.* v. *Waukesha*, 531 U. S. 278, 281 (2001) (same).

II

The city of Littleton's claims rest essentially upon two arguments. First, this Court, in applying the First Amendment's procedural requirements to an "adult business" licensing scheme in *FW/PBS*, found that the First Amendment required such a scheme to provide an applicant with "*prompt access*" to judicial review of an administrative denial of the license, but that the First Amendment did not require assurance of a "prompt judicial *determination*" of the applicant's legal claim. Second, in any event, Colorado law satisfies any "prompt judicial determination" requirement. We reject the first argument, but we accept the second.

A

The city's claim that its licensing scheme need not provide a "prompt judicial determination" of an applicant's legal claim rests upon its reading of two of this Court's cases, *Freedman* and *FW/PBS*. In *Freedman*, the Court considered the First Amendment's application to a "motion picture

censorship statute"—a statute that required an "'owner or lessee'" of a film, prior to exhibiting a film, to submit the film to the Maryland State Board of Censors and obtain its approval. 380 U. S., at 52, and n. 1 (quoting Maryland statute). It said, "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.*, at 58. The Court added that those safeguards must include (1) strict time limits leading to a speedy administrative decision and minimizing any "prior restraint"-type effects, (2) burden of proof rules favoring speech, and (3) (using language relevant here) a "procedure" that will "*assure a prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.*, at 58–59 (emphasis added).

In *FW/PBS*, the Court considered the First Amendment's application to a city ordinance that "regulates sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections." 493 U. S., at 220–221. A Court majority held that the ordinance violated the First Amendment because it did not impose strict administrative time limits of the kind described in *Freedman*. In doing so, three Members of the Court wrote that "the full procedural protections set forth in *Freedman* are not required," but that nonetheless such a licensing scheme must comply with *Freedman*'s "core policy"—including (1) strict administrative time limits and (2) (using language somewhat different from *Freedman*'s) "*the possibility of prompt judicial review in the event that the license is erroneously denied.*" 493 U. S., at 228 (opinion of O'Connor, J.) (emphasis added). Three other Members of the Court wrote that all *Freedman*'s safeguards should apply, including *Freedman*'s requirement that "a prompt judicial determination must be available." 493 U. S., at 239 (Brennan, J., concurring in judgment). Three Members of the Court wrote in dissent that *Freedman*'s re-

quirements did not apply at all. See 493 U. S., at 244–245 (White, J., joined by REHNQUIST, C. J., concurring in part and dissenting in part); *id.*, at 250 (SCALIA, J., concurring in part and dissenting in part).

The city points to the differing linguistic descriptions of the "judicial review" requirement set forth in these opinions. It concedes that *Freedman*, in listing constitutionally necessary "safeguards," spoke of the need to assure a "prompt final judicial decision." 380 U. S., at 59. But it adds that JUSTICE O'CONNOR's controlling plurality opinion in *FW/PBS* did not use the word "decision," instead speaking only of the "*possibility of prompt judicial review.*" 493 U. S., at 228 (emphasis added); see also *id.*, at 229 ("an avenue for prompt judicial review"); *id.*, at 230 ("availability of prompt judicial review"). This difference in language between *Freedman* and *FW/PBS*, says the city, makes a major difference: The First Amendment, as applied to an "adult business" licensing scheme, demands only an assurance of speedy access to the courts, not an assurance of a speedy court decision.

In our view, however, the city's argument makes too much of too little. While JUSTICE O'CONNOR's *FW/PBS* plurality opinion makes clear that only *Freedman*'s "core" requirements apply in the context of "adult business" licensing schemes, it does not purport radically to alter the nature of those "core" requirements. To the contrary, the opinion, immediately prior to its reference to the "judicial review" safeguard, says:

> "The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two *[Freedman]* safeguards are essential . . . ." 493 U. S., at 228.

These words, pointing out that *Freedman*'s "judicial review" safeguard is meant to prevent "undue delay," 493 U. S., at 228, include *judicial*, as well as *administrative*, delay. A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." *Ibid.* Nothing in the opinion suggests the contrary. Thus we read that opinion's reference to "prompt judicial review," together with the similar reference in Justice Brennan's separate opinion (joined by two other Justices), see *id.*, at 239, as encompassing a prompt judicial decision. And we reject the city's arguments to the contrary.

B

We find the second argument more convincing. In effect that argument concedes the constitutional importance of assuring a "prompt" judicial decision. It concedes as well that the Court, illustrating what it meant by "prompt" in *Freedman*, there set forth a "model" that involved a "hearing one day after joinder of issue" and a "decision within two days after termination of the hearing." 380 U. S., at 60. But the city says that here the First Amendment nonetheless does not require it to impose 2- or 3-day time limits; the First Amendment does not require special "adult business" judicial review rules; and the First Amendment does not insist that Littleton write detailed judicial review rules into the ordinance itself. In sum, Colorado's ordinary "judicial review" rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming.

Littleton, in effect, argues that we should modify *FW/PBS*, withdrawing its implication that *Freedman*'s special judicial review rules apply in this case. And we accept that argument. In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer

those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. We reach this conclusion for several reasons.

First, ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, where necessary, courts may arrange their schedules to "accelerate" proceedings. Colo. Rule Civ. Proc. 106(a)(4)(VIII) (2003). And higher courts may quickly review adverse lower court decisions. See, *e. g.*, *Goebel* v. *Colorado Dept. of Institutions*, 764 P. 2d 785, 792 (Colo. 1988) (en banc) (granting "expedited review").

Second, we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. We presume that courts are aware of the constitutional need to avoid "undue delay result[ing] in the unconstitutional suppression of protected speech." *FW/PBS*, *supra*, at 228; see also, *e. g.*, *Schlesinger* v. *Councilman*, 420 U. S. 738, 756 (1975). There is no evidence before us of any special Colorado court-related problem in this respect. And were there some such problems, federal remedies would provide an additional safety valve. See Rev. Stat. § 1979, 42 U. S. C. § 1983.

Third, the typical First Amendment harm at issue here differs from that at issue in *Freedman*, diminishing the need in the typical case for special procedural rules imposing special 2- or 3-day decisionmaking time limits. *Freedman* considered a Maryland statute that created a Board of Censors, which had to decide whether a film was "'pornographic,'" tended to "'debase or corrupt morals,'" and lacked "'whatever other merits.'" 380 U. S., at 52–53, n. 2 (quoting Maryland statute). If so, it denied the permit and the film could not be shown. Thus, in *Freedman*, the Court considered a scheme with rather subjective standards and where a denial likely meant complete censorship.

In contrast, the ordinance at issue here does not seek to *censor* material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. The ordinance says that an adult business license "*shall*" be denied if the applicant (1) is underage; (2) provides false information; (3) has within the prior year had an adult business license revoked or suspended; (4) has operated an adult business determined to be a state law "public nuisance" within the prior year; (5) (if a corporation) is not authorized to do business in the State; (6) has not timely paid taxes, fees, fines, or penalties; (7) has not obtained a sales tax license (for which zoning compliance is required, see Tr. of Oral Arg. 16–17); or (8) has been convicted of certain crimes within the prior five years. § 3–14–8(A), App. to Brief for Petitioner 28a–29a (emphasis added).

These objective criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally the presence of any specific item of adult material in the Littleton community. Some license applicants will satisfy the criteria even if others do not; hence the community will likely contain outlets that sell protected adult material. A supplier of that material should be able to find outlets; a potential buyer should be able to find a seller. Nor should zoning requirements suppress that material, for a constitutional zoning system seeks to determine *where*, not *whether*, protected adult material can be sold. See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 46 (1986). The upshot is that Littleton's "adult business" licensing scheme does "not present the grave 'dangers of a censorship system.' " *FW/PBS*, 493 U. S., at 228 (opinion of O'Connor, J.) (quoting *Freedman*, *supra*, at 58). And the simple objective nature of the licensing criteria means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Where that is not so—where, for example, censorship of material, as well as delay

in opening an additional outlet, is improperly threatened—the courts are able to act to prevent that harm.

Fourth, nothing in *FW/PBS* or in *Freedman* requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme. *Freedman* itself said: "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." 380 U. S., at 60. This statement is not surprising given the fact that many cities and towns lack the state-law legal authority to impose deadlines on state courts.

These four sets of considerations, taken together, indicate that Colorado's ordinary rules of judicial review are adequate—at least for purposes of this facial challenge to the ordinance. Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria, cf. *post*, at 785 (STEVENS, J., concurring in part and concurring in judgment), and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type. Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require. Of course, those denied licenses in the future remain free to raise special problems of undue delay in individual cases as the ordinance is applied.

For these reasons, the judgment of the Tenth Circuit is

Reversed.

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

There is an important difference between an ordinance conditioning the operation of a business on compliance with certain neutral criteria, on the one hand, and an ordinance

conditioning the exhibition of a motion picture on the consent of a censor. The former is an aspect of the routine operation of a municipal government. The latter is a species of content-based prior restraint. Cf. *Graff* v. *Chicago*, 9 F. 3d 1309, 1330–1333 (CA7 1993) (Flaum, J., concurring).

The First Amendment is, of course, implicated whenever a city requires a bookstore, a newsstand, a theater, or an adult business to obtain a license before it can begin to operate. For that reason, as JUSTICE O'CONNOR explained in her plurality opinion in *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 226 (1990), a licensing scheme for businesses that engage in First Amendment activity must be accompanied by adequate procedural safeguards to avert "the possibility that constitutionally protected speech will be suppressed." But JUSTICE O'CONNOR's opinion also recognized that the full complement of safeguards that are necessary in cases that "present the grave 'dangers of a censorship system'" are "not required" in the ordinary adult-business licensing scheme. *Id.*, at 228 (quoting *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965)). In both contexts, "undue delay results in the unconstitutional suppression of protected speech," 493 U. S., at 228, and *FW/PBS* therefore requires both that the licensing decision be made promptly and that there be "the possibility of prompt judicial review in the event that the license is erroneously denied," *ibid.* But application of neutral licensing criteria is a "ministerial action" that regulates speech, rather than an exercise of discretionary judgment that prohibits speech. *Id.*, at 229. The decision to deny a license for failure to comply with these neutral criteria is therefore not subject to the presumption of invalidity that attaches to the "direct censorship of particular expressive material." *Ibid.* JUSTICE O'CONNOR's opinion accordingly declined to require that the licensor, like the censor, either bear the burden of going to court to effect the denial of a license or otherwise assume responsibility for ensuring

a prompt judicial determination of the validity of its decision. *Ibid.*

The Court today reinterprets *FW/PBS*'s references to "'*the possibility of prompt judicial review*'" as the equivalent of *Freedman*'s "'prompt' judicial decision" requirement. *Ante*, at 780–781. I fear that this misinterpretation of *FW/PBS* may invite other, more serious misinterpretations with respect to the content of that requirement. As the Court applies it in this case, assurance of a "'prompt' judicial decision" means little more than assurance of the *possibility* of a prompt decision—the same possibility of promptness that is available whenever a person files suit subject to "ordinary court procedural rules and practices." *Ante*, at 781–782. That possibility will generally be sufficient to guard against the risk of undue delay in obtaining a remedy for the erroneous application of neutral licensing criteria. But the mere possibility of promptness is emphatically insufficient to guard against the dangers of unjustified suppression of speech presented by a censorship system of the type at issue in *Freedman*, and is certainly not what *Freedman* meant by "'prompt' judicial decision."

JUSTICE O'CONNOR's opinion in *FW/PBS* recognized that differences between ordinary licensing schemes and censorship systems warrant imposition of different procedural protections, including different requirements with respect to which party must assume the burden of taking the case to court, as well as the risk of judicial delay. I would adhere to the views there expressed, and thus do not join Part II–A of the Court's opinion. I do, however, join the Court's judgment and Parts I and II–B of its opinion.

JUSTICE SOUTER, with whom JUSTICE KENNEDY joins, concurring in part and concurring in the judgment.

I join the Court's opinion, except for Part II–B. I agree that this scheme is unlike full-blown censorship, *ante*, at 782–784, so that the ordinance does not need a strict timetable of

the kind required by *Freedman* v. *Maryland*, 380 U. S. 51 (1965), to survive a facial challenge. I write separately to emphasize that the state procedures that make a prompt judicial determination possible need to align with a state judicial practice that provides a prompt disposition in the state courts. The emphasis matters, because although Littleton's ordinance is not as suspect as censorship, neither is it as innocuous as common zoning. It is a licensing scheme triggered by the content of expressive materials to be sold. See *Los Angeles* v. *Alameda Books, Inc.*, 535 U. S. 425, 448 (2002) (KENNEDY, J., concurring in judgment) ("These ordinances are content based, and we should call them so"); *id.*, at 455–457 (SOUTER, J., dissenting). Because the sellers may be unpopular with local authorities, there is a risk of delay in the licensing and review process. If there is evidence of foot dragging, immediate judicial intervention will be required, and judicial oversight or review at any stage of the proceedings must be expeditious.

JUSTICE SCALIA, concurring in the judgment.

Were the respondent engaged in activity protected by the First Amendment, I would agree with the Court's disposition of the question presented by the facts of this case (though not with all of the Court's reasoning). Such activity, when subjected to a general permit requirement unrelated to censorship of content, has no special claim to priority in the judicial process. The notion that media corporations have constitutional entitlement to accelerated judicial review of the denial of zoning variances is absurd.

I do not believe, however, that Z. J. Gifts is engaged in activity protected by the First Amendment. I adhere to the view I expressed in *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 250 (1990) (opinion concurring in part and dissenting in part): the pandering of sex is not protected by the First Amendment. "The Constitution does not require a State or municipality to permit a business that intentionally specializes in,

and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity." *Id.*, at 258. This represents the Nation's long understanding of the First Amendment, recognized and adopted by this Court's opinion in *Ginzburg* v. *United States*, 383 U. S. 463, 470–471 (1966). Littleton's ordinance targets sex-pandering businesses, see Littleton City Code § 3–14–2 (2003); to the extent it could apply to constitutionally protected expression its excess is not so great as to render it substantially overbroad and thus subject to facial invalidation, see *FW/PBS*, 493 U. S., at 261–262. Since the city of Littleton "could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with First Amendment standards." *Id.*, at 253.

Reporter's Note

The next page is purposely numbered 901. The numbers between 788 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 8 THROUGH JUNE 8, 2004

MARCH 8, 2004

Miscellaneous Orders

No. 03M49. UNDER SEAL *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Motion of Billy Wayne Andrews, Jr., for leave to intervene denied. [For earlier order herein, see, *e. g.*, 540 U. S. 1216.]

No. 02–572. INTEL CORP. *v.* ADVANCED MICRO DEVICES, INC. C. A. 9th Cir. [Certiorari granted, 540 U. S. 1003.] Motion of the Commission of the European Communities for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 02–1609. CITY OF LITTLETON, COLORADO *v.* Z. J. GIFTS D–4, L. L. C., DBA CHRISTAL'S. C. A. 10th Cir. [Certiorari granted, 540 U. S. 944.] Motion of petitioner for divided argument denied. Motion of Ohio et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted.

No. 03–932. DURA PHARMACEUTICALS, INC. *v.* BROUDO ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 03–8150. BIELENBERG ET UX. *v.* GRIFFITHS ET AL. C. A. 7th Cir.; and

No. 03–8253. BITTERMAN *v.* HOFFMAN ET AL. Sup. Ct. Fla. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 29, 2004, 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. 03–8903. REYNA *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 03–974. IN RE KEMP;
No. 03–977. IN RE BROWN;
No. 03–1062. IN RE NORMAN; and
No. 03–8200. IN RE LONE WOLF, AKA HORTON. Petitions for writs of mandamus denied.

Certiorari Denied

No. 02–11099. ALSTON *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–596. GOODINE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 326 F. 3d 26.

No. 03–816. SUWANNEE SWIFTY STORES, INC. *v.* GEORGIA LOTTERY CORP. C. A. 11th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 583.

No. 03–824. NAETHING *v.* COVINGTON, DIRECTOR, AMERICAN GENERAL LIFE & ACCIDENT INSURANCE CO., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 825.

No. 03–933. CALDERON, GOVERNOR OF PUERTO RICO, ET AL. *v.* NAVARRO-AYALA ET AL. C. A. 1st Cir. Certiorari denied.

No. 03–939. DIAZ ET AL. *v.* J. RAY MCDERMOTT, S. A., ET AL. Ct. App. La., 4th Cir. Certiorari denied.

No. 03–941. DAVIS, FKA BEVERIDGE *v.* JONES ET UX. Ct. App. Mich. Certiorari denied.

No. 03–943. SECURED ENVIRONMENTAL MANAGEMENT, INC. *v.* TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ET AL. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 97 S. W. 3d 246.

No. 03–944. AMERICAN GEM SEAFOODS, INC., ET AL. *v.* WEI ZHANG. C. A. 9th Cir. Certiorari denied. Reported below: 339 F. 3d 1020.

No. 03–952. BRAZAUSKAS *v.* FORT WAYNE-SOUTH BEND DIOCESE, INC., ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 796 N. E. 2d 286.

No. 03–953. USX Corp. et al. *v.* Adriatic Insurance Co. et al. C. A. 3d Cir. Certiorari denied. Reported below: 345 F. 3d 190.

No. 03–954. Tierney et al. *v.* John Hancock Financial Services, Inc., et al. App. Ct. Mass. Certiorari denied. Reported below: 58 Mass. App. 571, 791 N. E. 2d 925.

No. 03–956. Boy Scouts of America et al. *v.* Wyman, in Her Capacity as Comptroller of the State of Connecticut and as a Member of the Connecticut State Employee Campaign Committee, et al. C. A. 2d Cir. Certiorari denied. Reported below: 335 F. 3d 80.

No. 03–957. Williams *v.* Warner, Governor of Virginia, et al. C. A. 4th Cir. Certiorari denied. Reported below: 63 Fed. Appx. 168.

No. 03–964. Oakley *v.* Webster Bank et al. Sup. Ct. Conn. Certiorari denied. Reported below: 265 Conn. 539, 830 A. 2d 139.

No. 03–967. Kang *v.* Board of Supervisors of Louisiana State University et al. C. A. 5th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 974.

No. 03–970. Schmitz *v.* M&M/Mars, a Division of Mars, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 238.

No. 03–971. Rodriguez *v.* HFP, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 663.

No. 03–983. Jones *v.* Norfolk Southern Railway Co. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 03–991. Guilbeaux *v.* Grasso Production Management, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 17.

No. 03–994. Brown, in Her Capacity as Special Representative for Reeves, Deceased, et al. *v.* Stumpf et al., Cotrustees of S & S Land Trust, et al. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 337 Ill. App. 3d 1193, 843 N. E. 2d 527.

No. 03–1006. GALLAGHER *v.* MICHIGAN. Cir. Ct. Macomb County, Mich. Certiorari denied.

No. 03–1013. EXXON MOBIL CORP. ET AL. *v.* NORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 346 F. 3d 1244.

No. 03–1019. TERRY *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 340 F. 3d 1378.

No. 03–1026. RAMIREZ ET AL. *v.* TEXAS ET AL. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 03–1103. PARKER *v.* DEPARTMENT OF DEFENSE. C. A. Fed. Cir. Certiorari denied. Reported below: 71 Fed. Appx. 54.

No. 03–1110. JOHNSON *v.* MCCUSKEY, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 475.

No. 03–1117. GUPTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 256.

No. 03–1126. CHASE *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 73 Fed. Appx. 445.

No. 03–1128. PORRO ET VIR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–1130. COLLADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 348 F. 3d 323.

No. 03–6462. BENITEZ-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 78.

No. 03–6724. SANTANA *v.* UNITED STATES;
No. 03–6798. STEVENSON *v.* UNITED STATES;
No. 03–6831. GARVIN *v.* UNITED STATES;
No. 03–6958. HERNANDEZ ET AL. *v.* UNITED STATES; and
No. 03–7305. DIAZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 330 F. 3d 964.

No. 03–7044. GUNN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 657.

No. 03–7399. KAMAE *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 03–7506. ROCKWELL *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 341 F. 3d 507.

No. 03–7604. CLIFFORD *v.* CHANDLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 333 F. 3d 724.

No. 03–7695. NASIRUN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 282.

No. 03–7782. BLACKWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 294.

No. 03–7793. KELLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–7797. TATE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 851 So. 2d 921.

No. 03–7883. TAYLOR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 855 So. 2d 1.

No. 03–7892. ROUSE *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 339 F. 3d 238.

No. 03–8111. RICHMAN *v.* FABIANI. C. A. 3d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 285.

No. 03–8124. ROBERTSON *v.* CASUAL CORNER GROUP, INC. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 873.

No. 03–8131. DI NARDO ET AL. *v.* CIRCUIT COURT OF FLORIDA, PALM BEACH COUNTY, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 727.

No. 03–8138. COAR *v.* MACFARLAND, ADMINISTRATOR, SOUTH WOODS STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8139. PELLEGRINO *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA. C. A. 8th Cir. Certiorari denied.

No. 03–8140. MCGOWAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 333 Ill. App. 3d 1210, 836 N. E. 2d 230.

No. 03–8141. BARTON *v.* BREWER ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–8145. SIMMONS *v.* CASPARI, ASSISTANT DIRECTOR, MISSOURI BOARD OF PROBATION AND PAROLE. C. A. 8th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 901.

No. 03–8147. SEALEY *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8152. ROSS *v.* CIRCUIT COURT OF WEST VIRGINIA, KANAWAH COUNTY. Sup. Ct. App. W. Va. Certiorari denied.

No. 03–8153. RUDDOCK *v.* MOTE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–8154. STRAUSS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 836 So. 2d 1096.

No. 03–8155. REID *v.* OKLAHOMA PARDON AND PAROLE BOARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 515.

No. 03–8156. SPUCK *v.* MEYERS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8165. FARRELL *v.* FLANAGAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8168. DELVAL *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8176. MCMAHAN *v.* BRAVO, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–8180. BROCK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 328 Ill. App. 3d 1085, 817 N. E. 2d 218.

No. 03–8187. MCGRAW *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–8189. SELLS *v.* WOLFE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 299.

No. 03–8191. REED *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 991.

No. 03–8194. WALLACE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 817 A. 2d 485.

No. 03–8195. MUSGROVE *v.* DeTELLA, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 641.

No. 03–8196. COOLEY *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8198. COOMBS *v.* KELCHNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 285.

No. 03–8199. METOYER *v.* ADDISON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 524.

No. 03–8205. WILLIAMS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 03–8207. JOHNSON *v.* McCONDICHIE, SUPERINTENDENT, SOUTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–8208. LANN *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 03–8209. FLORES ARGUMANIZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8211. BELL *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8212. A. L. *v.* A. J. Super. Ct. N. J., App. Div. Certiorari denied.

No. 03–8214. MARTIN *v.* BOBBY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8215. ASMUSSEN *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 668 N. W. 2d 725.

No. 03–8221. EALOMS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8227. YOUNG *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8231. VOITS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 186 Ore. App. 643, 64 P. 3d 1156.

No. 03–8232. BARTON *v.* AIRGOOD. C. A. 9th Cir. Certiorari denied.

No. 03–8238. CALHOUN *v.* HARGROVE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 371.

No. 03–8240. DONER *v.* CITY OF ROCKFORD, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 898.

No. 03–8242. CAMPBELL *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8243. COBBS *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 58 Fed. Appx. 353.

No. 03–8244. CROMPTON *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 855 So. 2d 59.

No. 03–8245. CAMPFIELD *v.* STICKMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8251. WILSON *v.* MOTE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–8256. REYNOLDS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 264 Conn. 1, 836 A. 2d 224.

No. 03–8259. BALDASARO *v.* CALIFORNIA; and
No. 03–8262. BAUGH *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–8273. CRUZ *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8290. DUNYAN *v.* COLLERAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT WAYMART, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8295. CHATMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 326 Ill. App. 3d 1149, 811 N. E. 2d 785.

No. 03–8300. STEVENS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 03–8303. HARRIS *v.* HAMLET, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 252.

No. 03–8316. WELDON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–8329. SANDERS *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8332. ROBERSON *v.* LOPEZ, SHERIFF, BEXAR COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied.

No. 03–8351. POWELL *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 343 F. 3d 1215.

No. 03–8355. BURNETT *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 485.

No. 03–8396. SHEGOG *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 302 App. Div. 2d 1020, 753 N. Y. S. 2d 417.

No. 03–8406. SULLIVAN *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 677.

No. 03–8408. WOLFE *v.* NORFOLK SOUTHERN RAILWAY CO. C. A. 6th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 532.

No. 03–8423. SMITH *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 150 Wash. 2d 135, 75 P. 3d 934.

No. 03–8431. TAYLOR *v.* MORGAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8448. VON BROCK *v.* WILSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 03–8473. SHIPPS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 440 Mass. 1018, 797 N. E. 2d 1202.

No. 03–8475. ROBERTS *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8498. LORD *v.* STERNES, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–8509. WIGGINS, AKA CARRUTH *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 159 N. C. App. 252, 584 S. E. 2d 303.

No. 03–8519. SMITH *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 307.

No. 03–8520. ROZENBLAT *v.* SANDIA CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 904.

No. 03–8521. BRYANT *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 03–8528. SANTIAGO *v.* MCADORY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–8533. HEARD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 4th 946, 75 P. 3d 53.

No. 03–8543. HURBENCA *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 266 Neb. 853, 669 N. W. 2d 668.

No. 03–8568. KIMBROUGH *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 03–8571. PORTER *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 276 Kan. ix, 78 P. 3d 473.

No. 03–8618. BIAS *v.* WEST VIRGINIA. Cir. Ct. Cabell County, W. Va. Certiorari denied.

No. 03–8619. BRIGHTWELL *v.* HUTCHINSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 699.

No. 03–8628. HODGE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 116 S. W. 3d 463.

No. 03–8631. HICKMAN *v.* DELAWARE DIVISION OF FAMILY SERVICES. Sup. Ct. Del. Certiorari denied. Reported below: 836 A. 2d 498.

No. 03–8692. HATTON *v.* RANEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8731. WARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 945.

No. 03–8734. NEAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 83 Fed. Appx. 405.

No. 03–8742. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 480.

No. 03–8743. SEALED PETITIONER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 03–8750. RAMOS-SANTIAGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 284.

No. 03–8758. PONCE CASTELLON, AKA CASTELLON PONCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 562.

No. 03–8760. LEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 722.

No. 03–8761. MANJARREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 348 F. 3d 881.

No. 03–8762. MENDOZA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 883.

No. 03–8765. MCDADE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 03–8766. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 156.

No. 03–8767. MCKENZIE *v.* CASTERLINE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 361.

No. 03–8768. LEVINE *v.* ELLIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8769. ANDERSON *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–8777. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 675.

No. 03–972. PAPPAS ET AL. *v.* CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY ET AL. Sup. Ct. Nev. Motions of Paul and Laurel A. Molden, Arizona Property Owners Saied Afkary et al., and Pacific Legal Foundation et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 119 Nev. 429, 76 P. 3d 1.

No. 03–7751. VELTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 331 F. 3d 673.

No. 03–8629. HAYES *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 80 Fed. Appx. 561.

Rehearing Denied

No. 03–6850. METZENBAUM *v.* NUGENT, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, 540 U. S. 1060;

No. 03–6960. HAMBRICK *v.* HOFFMAN, 540 U. S. 1114;

No. 03–7088. WILLIAMS *v.* MARYLAND STATE BOARD OF EDUCATION, 540 U. S. 1118;

No. 03–7128. RICHARDSON *v.* FIRST AMERICAN TITLE INSURANCE CO. ET AL., 540 U. S. 1118;

No. 03–7283. JOHNSON *v.* PEP BOYS-MANNY, MOE & JACK, ET AL., 540 U. S. 1123;

No. 03–7407. PARKER *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL., 540 U. S. 1151;

No. 03–7527. KELCH *v.* STARKS ET UX., 540 U. S. 1127;

No. 03–7660. MELTON *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL., 540 U. S. 1135;

No. 03–7689. THOMAS *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 540 U. S. 1136; and

No. 03–7779. PATTERSON *v.* UNITED STATES, 540 U. S. 1139. Petitions for rehearing denied.

MARCH 9, 2004

Certiorari Denied

No. 03–9271 (03A773). BROWN *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

MARCH 17, 2004

Dismissals Under Rule 46

No. 03–1166. NATWEST BANK NATIONAL ASSN. *v.* AFFILIATED FM INSURANCE CO. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 343 F. 3d 120.

No. 03–1244. CHASE MANHATTAN BANK *v.* AFFILIATED FM INSURANCE CO. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 343 F. 3d 120.

MARCH 18, 2004

Dismissal Under Rule 46

No. 02–11309. SMITH *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. [Certiorari granted, 539 U. S. 986.] Writ of certiorari dismissed under this Court's Rule 46.1. Reported below: 311 F. 3d 661.

Miscellaneous Order

No. 03–475. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. [Certiorari granted, 540 U. S. 1088.] Motion to recuse, referred to JUSTICE SCALIA [540 U. S. 1217], and by him denied.

Memorandum of JUSTICE SCALIA.

I have before me a motion to recuse in these cases consolidated below. The motion is filed on behalf of respondent Sierra Club.

The other private respondent, Judicial Watch, Inc., does not join the motion and has publicly stated that it "does not believe the presently-known facts about the hunting trip satisfy the legal standards requiring recusal." Judicial Watch Statement 2 (Feb. 13, 2004) (available in Clerk of Court's case file). (The District Court, a nominal party in this mandamus action, has of course made no appearance.) Since the cases have been consolidated, however, recusal in the one would entail recusal in the other.

I

The decision whether a judge's impartiality can "'reasonably be questioned'" is to be made in light of the facts as they existed, and not as they were surmised or reported. See *Microsoft Corp.* v. *United States*, 530 U. S. 1301, 1302 (2000) (REHNQUIST, C. J., respecting recusal). The facts here were as follows:

For five years or so, I have been going to Louisiana during the Court's long December-January recess, to the duck-hunting camp of a friend whom I met through two hunting companions from Baton Rouge, one a dentist and the other a worker in the field of handicapped rehabilitation. The last three years, I have been accompanied on this trip by a son-in-law who lives near me. Our friend and host, Wallace Carline, has never, as far as I know, had business before this Court. He is not, as some reports have described him, an "energy industry executive" in the sense that summons up boardrooms of ExxonMobil or Con Edison. He runs his own company that provides services and equipment rental to oil rigs in the Gulf of Mexico.

During my December 2002 visit, I learned that Mr. Carline was an admirer of Vice President Cheney. Knowing that the Vice President, with whom I am well acquainted (from our years serving together in the Ford administration), is an enthusiastic duck hunter, I asked whether Mr. Carline would like to invite him to our next year's hunt. The answer was yes; I conveyed the invitation (with my own warm recommendation) in the spring of 2003 and received an acceptance (subject, of course, to any superseding demands on the Vice President's time) in the summer. The Vice President said that if he did go, I would be welcome to fly down to Louisiana with him. (Because of national security requirements, of course, he must fly in a Government plane.) That invitation was later extended—if space was available—to my son-in-law and to a son who was joining the hunt for the first time;

they accepted. The trip was set long before the Court granted certiorari in the present case, and indeed before the petition for certiorari had even been filed.

We departed from Andrews Air Force Base at about 10 a.m. on Monday, January 5, flying in a Gulfstream jet owned by the Government. We landed in Patterson, Louisiana, and went by car to a dock where Mr. Carline met us, to take us on the 20-minute boat trip to his hunting camp. We arrived at about 2 p.m., the 5 of us joining about 8 other hunters, making about 13 hunters in all; also present during our time there were about 3 members of Mr. Carline's staff, and, of course, the Vice President's staff and security detail. It was not an intimate setting. The group hunted that afternoon and Tuesday and Wednesday mornings; it fished (in two boats) Tuesday afternoon. All meals were in common. Sleeping was in rooms of two or three, except for the Vice President, who had his own quarters. Hunting was in two- or three-man blinds. As it turned out, I never hunted in the same blind with the Vice President. Nor was I alone with him at any time during the trip, except, perhaps, for instances so brief and unintentional that I would not recall them—walking to or from a boat, perhaps, or going to or from dinner. Of course we said not a word about the present case. The Vice President left the camp Wednesday afternoon, about two days after our arrival. I stayed on to hunt (with my son and son-in-law) until late Friday morning, when the three of us returned to Washington on a commercial flight from New Orleans.

II

Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." Motion to Recuse 8. That might be sound advice if I were sitting on a Court of Appeals. But see *In re Aguinda*, 241 F. 3d 194, 201 (CA2 2001). There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. Thus, as Justices stated in their 1993 Statement of Recusal Policy: "We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a rela-

tive is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court." (Available in Clerk of Court's case file.) Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.

Even so, recusal is the course I must take—and will take—when, on the basis of established principles and practices, I have said or done something which requires that course. I have recused for such a reason this very Term. See *Elk Grove Unified School Dist.* v. *Newdow*, 540 U. S. 945 (cert. granted, Oct. 14, 2003). I believe, however, that established principles and practices do not require (and thus do not permit) recusal in the present case.

A

My recusal is required if, by reason of the actions described above, my "impartiality might reasonably be questioned." 28 U. S. C. § 455(a). Why would that result follow from my being in a sizable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same blind or had other opportunity for private conversation? The only possibility is that it would suggest I am a friend of his. But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.

A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials—and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive. John Quincy Adams hosted dinner parties featuring such luminaries as Chief Justice Marshall, Justices Johnson, Story, and Todd, Attorney General Wirt, and Daniel Webster. 5 Memoirs of John

Quincy Adams 322–323 (C. Adams ed. 1875, reprint 1969) (Diary Entry of Mar. 8, 1821). Justice Harlan and his wife often "'stopped in'" at the White House to see the Hayes family and pass a Sunday evening in a small group, visiting and singing hymns. M. Harlan, Some Memories of a Long Life, 1854–1911, p. 99 (2001). Justice Stone tossed around a medicine ball with members of the Hoover administration mornings outside the White House. 2 Memoirs of Herbert Hoover 327 (1952). Justice Douglas was a regular at President Franklin Roosevelt's poker parties; Chief Justice Vinson played poker with President Truman. J. Simon, Independent Journey: The Life of William O. Douglas 220–221 (1980); D. McCullough, Truman 511 (1992). A no-friends rule would have disqualified much of the Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), the case that challenged President Truman's seizure of the steel mills. Most of the Justices knew Truman well, and four had been appointed by him. A no-friends rule would surely have required Justice Holmes's recusal in *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904), the case that challenged President Theodore Roosevelt's trust-busting initiative. See S. Novick, Honorable Justice: The Life of Oliver Wendell Holmes 264 (1989) ("Holmes and Fanny dined at the White House every week or two . . .").

It is said, however, that this case is different because the federal officer (Vice President Cheney) is actually a *named party.* That is by no means a rarity. At the beginning of the current Term, there were before the Court (excluding habeas actions) no fewer than 83 cases in which high-level federal Executive officers were named in their official capacity—more than 1 in every 10 federal civil cases then pending. That an officer is named has traditionally made no difference to the proposition that friendship is not considered to affect impartiality in official-action suits. Regardless of whom they name, such suits, when the officer is the plaintiff, seek relief not for him personally but for the Government; and, when the officer is the defendant, seek relief not against him personally, but against the Government. That is why federal law provides for *automatic substitution* of the new officer when the originally named officer has been replaced. See Fed. Rule Civ. Proc. 25(d)(1); Fed. Rule App. Proc. 43(c)(2); this Court's Rule 35.3. The caption of Sierra Club's complaint in this action designates as a defendant "Vice President Richard Cheney, *in his*

official capacity as Vice President of the United States and Chairman of the National Energy Policy Development Group." App. 139 (emphasis added). The body of the complaint repeats (in paragraph 6) that "Defendant Richard Cheney is sued *in his official capacity* as the Vice President of the United States and Chairman of the Cheney Energy Task Force." *Id.*, at 143 (emphasis added). Sierra Club has *relied* upon the fact that this is an official-action rather than a personal suit as a basis for denying the petition. It asserted in its brief in opposition that if there was no Presidential immunity from discovery in *Clinton* v. *Jones*, 520 U. S. 681 (1997), which was a private suit, "[s]urely . . . the Vice President and subordinate White House officials have no greater immunity claim here, especially when the lawsuit relates to their official actions while in office and the primary relief sought is a declaratory judgment." Brief in Opposition 13.

Richard Cheney's name appears in this suit only because he was the head of a Government committee that allegedly did not comply with the Federal Advisory Committee Act (FACA), 5 U. S. C. App. § 2, p. 1, and because he may, by reason of his office, have custody of some or all of the Government documents that the plaintiffs seek. If some other person were to become head of that committee or to obtain custody of those documents, the plaintiffs would name that person and Cheney would be dismissed. Unlike the defendant in *United States* v. *Nixon*, 418 U. S. 683 (1974), or *Clinton* v. *Jones*, *supra*, Cheney is represented here, not by his personal attorney, but by the United States Department of Justice in the person of the Solicitor General. And the courts at all levels have referred to his arguments as (what they are) the arguments of "the government." See *In re Cheney*, 334 F. 3d 1096, 1100 (CADC 2003); *Judicial Watch, Inc.* v. *National Energy Policy Development Group*, 219 F. Supp. 2d 20, 25 (DC 2002).

The recusal motion, however, asserts the following:

> "Critical to the issue of Justice Scalia's recusal is understanding that this is not a run-of-the-mill legal dispute about an administrative decision. . . . Because his own conduct is central to this case, the Vice President's 'reputation and his integrity are on the line.' (Chicago Tribune.)" Motion to Recuse 9.

I think not. Certainly as far as the legal issues immediately presented to me are concerned, this *is* "a run-of-the-mill legal

dispute about an administrative decision." I am asked to determine what powers the District Court possessed under FACA, and whether the Court of Appeals should have asserted mandamus or appellate jurisdiction over the District Court.[1] Nothing this Court says on those subjects will have any bearing upon the reputation and integrity of Richard Cheney. Moreover, even if this Court affirms the decision below and allows discovery to proceed in the District Court, the issue that would ultimately present itself *still* would have no bearing upon the reputation and integrity of Richard Cheney. That issue would be, quite simply, whether some private individuals were *de facto* members of the National Energy Policy Development Group (NEPDG). It matters not whether they were caused to be so by Cheney or someone else, or whether Cheney was even aware of their *de facto* status; if they *were de facto* members, then (according to D. C. Circuit law) the records and minutes of NEPDG must be made public.

The recusal motion asserts, however, that Richard Cheney's "'reputation and his integrity are on the line'" because

> "respondents have alleged, *inter alia*, that the Vice President, as the head of the Task Force and its sub-groups, was responsible for the involvement of energy industry executives in the operations of the Task Force, as a result of which the Task Force and its sub-groups became subject to FACA." *Ibid.*

As far as Sierra Club's *complaint* is concerned, it simply is not true that Vice President Cheney is singled out as having caused the involvement of energy executives. But even if the allegation had been made, it would be irrelevant to the case. FACA assertedly requires disclosure if there were private members of the task

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[1] The questions presented in the petition, and accepted for review, are as follows:

"1. Whether the Federal Advisory Committee Act (FACA), 5 U. S. C. App. 1, §1 *et seq.*, can be construed . . . to authorize broad discovery of the process by which the Vice President and other senior advisors gathered information to advise the President on important national policy matters, based solely on an unsupported allegation in a complaint that the advisory group was not constituted as the President expressly directed and the advisory group itself reported.

"2. Whether the court of appeals had mandamus or appellate jurisdiction to review the district court's unprecedented discovery orders in this litigation." Pet. for Cert. (I).

force, *no matter who* they were—"energy industry executives" or Ralph Nader; and *no matter who* was responsible for their membership—the Vice President or no one in particular. I do not see how the Vice President's "'reputation and . . . integrity are on the line'" any more than the agency head's reputation and integrity are on the line in virtually all official-action suits, which accuse his agency of acting (to quote the Administrative Procedure Act) "arbitrar[ily], capricious[ly], [with] an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706(2)(A). Beyond that always-present accusation, there is nothing illegal or immoral about making "energy industry executives" members of a task force on energy; some people probably think it would be a good idea. If, in doing so, or in allowing it to happen, the Vice President went beyond his assigned powers, that is no worse than what every agency head has done when his action is judicially set aside.

To be sure, there could be political consequences from disclosure of the fact (if it be so) that the Vice President favored business interests, and especially a sector of business with which he was formerly connected. But political consequences are not my concern, and the possibility of them does not convert an official suit into a private one. That possibility exists to a greater or lesser degree in virtually all suits involving agency action. To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do. It seems to me quite wrong (and quite impossible) to make recusal depend upon what degree of political damage a particular case can be expected to inflict.

In sum, I see nothing about this case which takes it out of the category of normal official-action litigation, where my friendship, or the appearance of my friendship, with one of the named officers does not require recusal.

B

The recusal motion claims that "the fact that Justice Scalia and his daughter *[sic]* were the Vice President's guest on Air Force Two on the flight down to Louisiana" means that I "accepted a sizable gift from a party in a pending case," a gift "measured in the thousands of dollars." Motion to Recuse 6 (footnote omitted).

Let me speak first to the value, though that is not the principal point. Our flight down cost the Government nothing, since

space-available was the condition of our invitation. And, though our flight down on the Vice President's plane was indeed free, since we were not returning with him we purchased (because they were least expensive) round-trip tickets that cost precisely what we would have paid if we had gone both down and back on commercial flights. In other words, none of us saved a cent by flying on the Vice President's plane. The purpose of going with him was not saving money, but avoiding some inconvenience to ourselves (being taken by car from New Orleans to Morgan City) and considerable inconvenience to our friends, who would have had to meet our plane in New Orleans, and schedule separate boat trips to the hunting camp, for us and for the Vice President's party. (To be sure, flying on the Vice President's jet was more comfortable and more convenient than flying commercially; that accommodation is a matter I address in the next paragraph.)[2]

The principal point, however, is that social courtesies, provided at Government expense by officials whose only business before the Court is business in their official capacity, have not hitherto been thought prohibited. Members of Congress and others are frequently invited to accompany Executive Branch officials on Government planes, where space is available. That this is not the sort of gift thought likely to affect a judge's impartiality is suggested by the fact that the Ethics in Government Act of 1978, 5 U. S. C. App. § 101 *et seq.*, p. 38, which requires annual reporting of transportation provided or reimbursed, excludes from this requirement transportation provided by the United States. See § 109(5)(C); Committee on Financial Disclosure, Administrative Office of the U. S. Courts, Financial Disclosure Report: Filing Instructions for Judicial Officers and Employees 25 (Jan. 2003). I daresay that, at a hypothetical charity auction, much more would be bid for dinner for two at the White House than for a one-way flight to Louisiana on the Vice President's jet. Justices accept the former with regularity. While this matter was pending, Justices and their spouses were invited (*all* of them, I believe)

[2] As my statement of the facts indicated, by the way, my daughter did not accompany me. My married son and son-in-law were given a ride—not because they were relatives and as a favor to me; but because they were other hunters leaving from Washington, and as a favor to them (and to those who would have had to go to New Orleans to meet them). Had they been unrelated invitees to the hunt, the same would undoubtedly have occurred. Financially, the flight was worth as little to them as it was to me.

to a December 11, 2003, Christmas reception at the residence of the Vice President—which included an opportunity for a photograph with the Vice President and Mrs. Cheney. Several of the Justices attended, and in doing so they were fully in accord with the proprieties.

III

When I learned that Sierra Club had filed a recusal motion in this case, I assumed that the motion would be replete with citations of legal authority, and would provide some instances of cases in which, because of activity similar to what occurred here, Justices have recused themselves or at least have been asked to do so. In fact, however, the motion cites only two Supreme Court cases assertedly relevant to the issue here discussed,[3] and nine Court of Appeals cases. Not a single one of these even involves an official-action suit.[4] And the motion gives not a single instance in which, under even remotely similar circumstances, a Justice has recused or been asked to recuse. Instead, the argument section of the motion consists almost entirely of references to, and quotations from, newspaper editorials.

The core of Sierra Club's argument is as follows:

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[3] The motion cites a third Supreme Court case, *Public Citizen* v. *Department of Justice*, 491 U. S. 440 (1989), as a case involving FACA in which I recused myself. It speculates (1) that the reason for recusal was that as Assistant Attorney General for the Office of Legal Counsel I had provided an opinion which concluded that applying FACA to presidential advisory committees was unconstitutional; and asserts (2) that this would also be grounds for my recusal here. My opinion as Assistant Attorney General addressed the precise question presented in *Public Citizen:* whether the American Bar Association's Standing Committee on Federal Judiciary, which provided advice to the President concerning judicial nominees, could be regulated as an "advisory committee" under FACA. I concluded that my withdrawal from the case was required by 28 U. S. C. § 455(b)(3), which mandates recusal where the judge "has served in governmental employment and in such capacity . . . expressed an opinion concerning the merits of the particular case in controversy." I have never expressed an opinion concerning the merits of the present case.

[4] *United States* v. *Murphy*, 768 F. 2d 1518 (CA7 1985), at least involved a judge's going on vacation—but not with the named defendant in an official-action suit. The judge had departed for a vacation with the prosecutor of Murphy's case, immediately after sentencing Murphy. Obviously, the prosecutor is personally involved in the outcome of the case in a way that the nominal defendant in an official-action suit is not.

> "Sierra Club makes this motion because . . . damage [to the integrity of the system] is being done right now. As of today, 8 of the 10 newspapers with the largest circulation in the United States, 14 of the largest 20, and 20 of the 30 largest have called on Justice Scalia to step aside . . . . Of equal import, there is no counterbalance or controversy: not a single newspaper has argued against recusal. Because the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned. These facts more than satisfy Section 455(a), which mandates recusal merely when a Justice's impartiality 'might reasonably be questioned.'" Motion to Recuse 3–4.

The implications of this argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it.

The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right. The length of our hunting trip together was said to be several days (San Francisco Chronicle), four days (Boston Globe), or nine days (San Antonio Express-News). We spent about 48 hours together at the hunting camp. It was asserted that the Vice President and I "spent time alone in the rushes," "huddled together in a Louisiana marsh," where we had "plenty of time . . . to talk privately" (Los Angeles Times); that we "spent . . . quality time bonding [together] in a duck blind" (Atlanta Journal-Constitution); and that "[t]here is simply no reason to think these two did not discuss the pending case" (Buffalo News). As I have described, the Vice President and I were never in the same blind, and never discussed the case. (Washington officials know the rules, and know that discussing with judges pending cases—their own or anyone else's—is forbidden.) The Palm Beach Post stated that our "transportation [was] provided, appropriately, by an oil services company," and Newsday that a "private jet . . . whisked Scalia to Louisiana." The Vice President and I flew in a Government plane. The Cincinnati Enquirer said that "Scalia was Cheney's guest at a private duck-hunting camp in Louisiana." Cheney and I were Wallace Carline's guests. Various newspapers described Mr. Carline as "an energy company official" (Atlanta

Journal-Constitution), an "oil industrialist" (Cincinnati Enquirer), an "oil company executive" (Contra Costa Times), an "oilman" (Minneapolis Star Tribune), and an "energy industry executive" (Washington Post). All of these descriptions are misleading.

And these are just the inaccuracies pertaining to the *facts*. With regard to the *law*, the vast majority of the editorials display no recognition of the central proposition that a federal officer is not ordinarily regarded to be a personal party in interest in an official-action suit. And those that do display such recognition facilely assume, contrary to all precedent, that in such suits mere political damage (which they characterize as a destruction of Cheney's reputation and integrity) is ground for recusal. Such a blast of largely inaccurate and uninformed opinion cannot determine the recusal question. It is well established that the recusal inquiry must be "made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances*." *Microsoft Corp.* v. *United States*, 530 U. S., at 1302 (REHNQUIST, C. J., respecting recusal) (emphases added) (citing *Liteky* v. *United States*, 510 U. S. 540, 548 (1994)).

IV

While Sierra Club was apparently unable to summon forth a single example of a Justice's recusal (or even motion for a Justice's recusal) under circumstances similar to those here, I have been able to accomplish the seemingly more difficult task of finding a couple of examples establishing the negative: that recusal or motion for recusal did *not* occur under circumstances similar to those here.

Justice White and Robert Kennedy

The first example pertains to a Justice with whom I have sat, and who retired from the Court only 11 years ago, Byron R. White. Justice White was close friends with Attorney General Robert Kennedy from the days when White had served as Kennedy's Deputy Attorney General. In January 1963, the Justice went on a skiing vacation in Colorado with Robert Kennedy and his family, Secretary of Defense Robert McNamara and his family, and other members of the Kennedy family. Skiing Not The Best; McNamara Leaves Colorado, Terms Vacation "Marvelous," Denver Post, Jan. 2, 1963, p. 22; D. Hutchinson, The Man Who Once Was Whizzer White 342 (1998). (The skiing in Colorado, like my

hunting in Louisiana, was not particularly successful.) At the time of this skiing vacation there were pending before the Court at least two cases in which Robert Kennedy, in his official capacity as Attorney General, was a party. See *Gastelum-Quinones* v. *Kennedy*, 374 U. S. 469 (1963); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963). In the first of these, moreover, the press might have said, as plausibly as it has said here, that the reputation and integrity of the Attorney General were at issue. There the Department of Justice had decreed deportation of a resident alien on grounds that he had been a member of the Communist Party. (The Court found that the evidence adduced by the Department was inadequate.)

Besides these cases naming Kennedy, another case pending at the time of the skiing vacation was argued to the Court *by Kennedy* about two weeks later. See *Gray* v. *Sanders*, 372 U. S. 368 (1963). That case was important to the Kennedy administration, because by the time of its argument everybody knew that the apportionment cases were not far behind, and *Gray* was a significant step in the march toward *Reynolds* v. *Sims*, 377 U. S. 533 (1964). When the decision was announced, it was front-page news. See High Court Voids County Unit Vote, N. Y. Times, Mar. 19, 1963, p. 1, col. 2; Georgia's Unit Voting Voided, Washington Post, Mar. 19, 1963, p. A1, col. 5. Attorney General Kennedy argued for affirmance of a three-judge District Court's ruling that the Georgia Democratic Party's county-unit voting system violated the one-person, one-vote principle. This was Kennedy's only argument before the Court, and it certainly put "on the line" his reputation as a lawyer, as well as an important policy of his brother's administration.

Justice Jackson and Franklin Roosevelt

The second example pertains to a Justice who was one of the most distinguished occupants of the seat to which I was appointed, Robert Jackson. Justice Jackson took the recusal obligation particularly seriously. See, *e. g.*, *Jewell Ridge Coal Corp.* v. *United Mine Workers*, 325 U. S. 897 (1945) (Jackson, J., concurring in denial of rehearing) (oblique criticism of Justice Black's decision not to recuse himself from a case argued by his former law partner). Nonetheless, he saw nothing wrong with maintaining a close personal relationship, and engaging in "'quite frequen[t]'" socializing with the President whose administration's acts came

before him regularly. R. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt 74 (J. Barrett ed. 2003) (footnote omitted).

In April 1942, the two "spent a weekend on a very delightful house party down at General Watson's in Charlottesville, Virginia. I had been invited to ride down with the President and to ride back with him." *Id.*, at 106 (footnote omitted). Pending at the time, and argued the next month, was one of the most important cases concerning the scope of permissible federal action under the Commerce Clause, *Wickard* v. *Filburn*, 317 U. S. 111 (1942). Justice Jackson wrote the opinion for the Court. Roosevelt's Secretary of Agriculture, rather than Roosevelt himself, was the named federal officer in the case, but there is no doubt that it was important to the President.

I see nothing wrong about Justice White's and Justice Jackson's socializing—including vacationing and accepting rides—with their friends. Nor, seemingly, did anyone else at the time. (The Denver Post, which has been critical of me, reported the White-Kennedy-McNamara skiing vacation with nothing but enthusiasm.) If friendship is basis for recusal (as it assuredly is when friends are sued personally) then activity which suggests close friendship must be avoided. But if friendship is *no* basis for recusal (as it is not in official-capacity suits) social contacts that do no more than evidence that friendship suggest no impropriety whatever.

Of course it can be claimed (as some editorials have claimed) that "times have changed," and what was once considered proper—even as recently as Byron White's day—is no longer so. That may be true with regard to the earlier rare phenomenon of a Supreme Court Justice's serving as advisor and confidant to the President—though that activity, so incompatible with the separation of powers, was not widely known when it was occurring, and can hardly be said to have been generally approved before it was properly abandoned. But the well-known and constant practice of Justices' enjoying friendship and social intercourse with Members of Congress and officers of the Executive Branch has *not* been abandoned, and ought not to be.

V

Since I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse. See

Microsoft, 530 U. S., at 1302. That alone is conclusive; but another consideration moves me in the same direction: Recusal would in my judgment harm the Court. If I were to withdraw from this case, it would be because some of the press has argued that the Vice President would suffer political damage *if* he should lose this appeal, and *if,* on remand, discovery should establish that energy industry representatives were *de facto* members of NEPDG—and because some of the press has elevated that possible political damage to the status of an impending stain on the reputation and integrity of the Vice President. But since political damage often comes from the Government's losing official-action suits; and since political damage can readily be characterized as a stain on reputation and integrity; recusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.

My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons. The Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean whose school I had visited several weeks before—visited not at his invitation, but at his predecessor's. See New Trip Trouble for Scalia, Feb. 28, 2004, p. B22. The same paper has asserted that it was improper for me to speak at a dinner honoring Cardinal Bevilacqua given by the Urban Family Council of Philadelphia because (according to the Times's false report)[5] that organization was engaged in litiga-

[5] The Times's reporter had interviewed the former president of the Urban Family Council, who told him categorically that the council was neither a party to, nor had provided financial support for, the civil-union litigation. The filed papers in the case, publicly available, *showed* that the council was not a party. The Los Angeles Times nonetheless devoted a lengthy front-page article to the point that (in the words of the lead sentence) "Justice Antonin Scalia gave a keynote dinner speech in Philadelphia for an advocacy group waging a legal battle against gay rights." Serrano & Savage, Scalia Addressed Advocacy Group Before Key Decision, Mar. 8, 2004, at A1. Five days later, in a weekend edition, the paper printed (at the insistence of the council) a few-line retraction acknowledging that this asserted fact was wrong—as though it was merely one incidental fact in a long piece, rather than the central fact upon which the long piece was based, and without which *there was no story.* See For the Record, Mar. 13, 2004, at A2. Other inaccurate facts and insinuations in the article, brought to the paper's atten-

tion seeking to prevent same-sex civil unions, and I had before me a case presenting the question (whether same-sex civil unions were lawful?—no) whether homosexual sodomy could constitutionally be *criminalized*. See *Lawrence* v. *Texas*, 539 U. S. 558 (2003). While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

* * *

As I noted at the outset, one of the private respondents in this case has not called for my recusal, and has expressed confidence that I will rule impartially, as indeed I will. Counsel for the other private respondent seek to impose, it seems to me, a standard regarding friendship, the appearance of friendship, and the acceptance of social favors, that is more stringent than what they themselves observe. Two days before the brief in opposition to the petition in this case was filed, lead counsel for Sierra Club, a friend, wrote me a warm note inviting me to come to Stanford Law School to speak to one of his classes. (Available in Clerk of Court's case file.) (Judges teaching classes at law schools normally have their transportation and expenses paid.) I saw nothing amiss in that friendly letter and invitation. I surely would have thought otherwise if I had applied the standards urged in the present motion.

There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the Government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the Vice President might cause me to favor the Government in cases in which *he* is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here. The question, simply put, is whether someone who thought I could decide this case impartially despite my

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tion by the council, were not corrected. See e-mail from Betty Jean Wolfe, President, Urban Family Council, to Richard Serrano, Los Angeles Times (Mar. 8, 2004) (available in Clerk of Court's case file).

friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.

As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here—even to the point of becoming (as the motion cruelly but accurately states) "fodder for late-night comedians." Motion to Recuse 6. If I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case. Since I believe there is no basis for recusal, I cannot. The motion is

Denied.

March 19, 2004

Miscellaneous Orders

No. 03A797. Ozmint, Director, South Carolina Department of Corrections, et al. *v.* Hill. Application to vacate the preliminary injunction of execution of sentence of death entered by the United States District Court for the District of South Carolina on March 4, 2004, presented to The Chief Justice, and by him referred to the Court, granted. Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer would deny the application to vacate the preliminary injunction of execution.

No. 02–1624. Elk Grove Unified School District et al. *v.* Newdow et al. C. A. 9th Cir. [Certiorari granted, 540 U. S. 945.] Motion of Institute in Basic Life Principles, Faith and Action, et al. for reconsideration of order denying motion for leave to participate in oral argument as *amici curiae* and for divided argument [540 U. S. 1174] denied. Justice Scalia took no part in the consideration or decision of this motion.

No. 03–95. Pennsylvania State Police *v.* Suders. C. A. 3d Cir. [Certiorari granted, 540 U. S. 1046.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondent and *amicus curiae* Lawyers' Committee for Civil Rights Under

Law for leave to allow Lawyers' Committee for Civil Rights Under Law to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 03–339. SOSA *v.* ALVAREZ-MACHAIN ET AL.; and

No. 03–485. UNITED STATES *v.* ALVAREZ-MACHAIN ET AL. C. A. 9th Cir. [Certiorari granted, 540 U. S. 1045.] Motion of the Solicitor General for enlargement of time for oral argument and for divided argument granted.

MARCH 22, 2004

Certiorari Granted—Vacated and Remanded

No. 03–7276. SHIELDS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washington*, *ante*, p. 36. Reported below: 108 Cal. App. 4th 469, 133 Cal. Rptr. 2d 489.

No. 03–7626. CORONA *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washington*, *ante*, p. 36. Reported below: 853 So. 2d 430.

Certiorari Dismissed

No. 03–8376. NABELEK *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 03–8381. NABELEK *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule

38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Miscellaneous Orders

No. 03A616. MOSS *v.* HOFBAUER, WARDEN. Application for certificate of appealability, addressed to JUSTICE GINSBURG and referred to the Court, denied.

No. D–2358. IN RE DISBARMENT OF BLACKWELL. Disbarment entered. [For earlier order herein, see 540 U. S. 1101.]

No. D–2359. IN RE DISCIPLINE OF HACKMAN. Gordon Hackman, of Boutte, 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. D–2360. IN RE DISCIPLINE OF FAUNTLEROY. John D. Fauntleroy, Jr., 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–2361. IN RE DISCIPLINE OF CORIZZI. Anthony Joseph Corizzi, of Manassas, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2362. IN RE DISCIPLINE OF CACCHIOTTI. Paul R. Cacchiotti, of Manchester, 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–2363. IN RE DISCIPLINE OF VAILLANCOURT. Donald Charles Vaillancourt, of Fort Lee, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2364. IN RE DISCIPLINE OF KLINGENBERG. Ronald L. Klingenberg, 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–2365. IN RE DISCIPLINE OF CUELLER. Albert Cueller III, of Chicago, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2366. IN RE DISCIPLINE OF GARSIDE. Gary Alston Garside, of Columbus, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2367. IN RE DISCIPLINE OF CARTELLONE. John Joseph Cartellone, of Cleveland, Ohio, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2368. IN RE DISCIPLINE OF WARREN. Randall Benjamin Warren, of Beverly, 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–2369. IN RE DISCIPLINE OF ABBELL. Michael Abbell, of Bethesda, 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–2370. IN RE DISCIPLINE OF FABER. Mark Andrew Faber, of Baltimore, 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–2371. IN RE DISCIPLINE OF GALLAGHER. Edward Patrick Gallagher, of Frederick, 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–2372. IN RE DISCIPLINE OF SPERY. Robert Moore Spery, of Salisbury, 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–2373. IN RE DISCIPLINE OF WALK. Timothy James Mathew Walk, of Melbourne, 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–2374. IN RE DISCIPLINE OF AYENI. Shola Rannie Ayeni, of Stafford, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 03M51. CALHOUN *v.* FRISCO RAILROAD ET AL.; and

No. 03M52. HOWARD *v.* SEAWAY FOOD TOWN, INC., ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 02–891. CENTRAL LABORERS' PENSION FUND *v.* HEINZ ET AL. C. A. 7th Cir. [Certiorari granted, 540 U. S. 1045.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–1684. YARBOROUGH, WARDEN *v.* ALVARADO. C. A. 9th Cir. [Certiorari granted, 539 U. S. 986.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 03–343. AL ODAH ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. [Certiorari granted, 540 U. S. 1003.] Motion of Military Attorneys Assigned to Defense in Office of Military Commissions for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 03–7117. NABELEK *v.* COURT OF CRIMINAL APPEALS OF TEXAS. Ct. Crim. App. Tex. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [540 U. S. 1100] denied.

No. 03–526. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* SUMMERLIN. [Certiorari granted, 540 U. S.

1045.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–8622. HARRINGTON *v.* NORTHWEST AIRLINES, INC. Ct. App. Minn. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 12, 2004, 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. 03–8963. IN RE MEADOR; and
No. 03–9073. IN RE RODRIGUEZ. Petitions for writs of habeas corpus denied.

No. 03–1021. IN RE KAIMOWITZ;
No. 03–8292. IN RE COLE;
No. 03–8298. IN RE SISSON;
No. 03–8514. IN RE PRICE; and
No. 03–8979. IN RE WALLACE. Petitions for writs of mandamus denied.

No. 03–8476. IN RE SHERRILLS. 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. 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. 03–8492. IN RE SIMMONS. Petition for writ of prohibition denied.

Certiorari Granted

No. 02–1472. CHEROKEE NATION OF OKLAHOMA ET AL. *v.* THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 10th Cir.; and
No. 03–853. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* CHEROKEE NATION OF OKLAHOMA. C. A. Fed. Cir. Certiorari granted, cases consolidated, and a total of one hour

alloted for oral argument. Reported below: No. 02–1472, 311 F. 3d 1054; No. 03–853, 334 F. 3d 1075.

No. 03–287. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. *v.* DOTSON ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 329 F. 3d 463.

Certiorari Denied

No. 02–11311. REID *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–732. JOHNSON *v.* DALEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 339 F. 3d 582.

No. 03–737. CROSS ET AL. *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 333 F. 3d 611.

No. 03–738. BIVINGS *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 65 Fed. Appx. 731.

No. 03–739. LABERGE *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 66 Fed. Appx. 204.

No. 03–838. THOMPSON, ADMINISTRATOR OF THE ESTATE OF ANDRADE, ET AL. *v.* CHOJNACKI ET AL.; and

No. 03–849. BROWN ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 338 F. 3d 448.

No. 03–841. DALRYMPLE ET AL. *v.* RENO ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 334 F. 3d 991.

No. 03–847. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* AMERICAN EAGLE AIRLINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 343 F. 3d 401.

No. 03–850. AVILA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–870. VICORY ET AL. *v.* VERMILLION COUNTY, INDIANA, ET AL. Ct. App. Ind. Certiorari denied. Reported below: 790 N. E. 2d 180.

No. 03–883. WOLGAST CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 349 F. 3d 250.

No. 03–887. VASQUEZ *v.* SNOW, SECRETARY OF THE TREASURY. C. A. 5th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 275.

No. 03–888. MACKBY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 339 F. 3d 1013.

No. 03–891. GILL, CHAPTER 7 TRUSTEE *v.* STERN; and
No. 03–1055. STERN *v.* GILL, CHAPTER 7 TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 345 F. 3d 1036.

No. 03–895. ROSALES ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 913.

No. 03–903. WELCH ET AL. *v.* DAVIS ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 114 S. W. 3d 285.

No. 03–911. S. D. MYERS, INC. *v.* CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 336 F. 3d 1174.

No. 03–982. WALZ, GUARDIAN AD LITEM, ON BEHALF OF WALZ *v.* EGG HARBOR TOWNSHIP BOARD OF EDUCATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 342 F. 3d 271.

No. 03–986. BLOOMBERG, MAYOR OF THE CITY OF NEW YORK, ET AL. *v.* HENRIETTA D. ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED. C. A. 2d Cir. Certiorari denied. Reported below: 331 F. 3d 261.

No. 03–995. WORDS, INC. *v.* SINGER ET AL. Ct. App. D. C. Certiorari denied. Reported below: 810 A. 2d 910.

No. 03–997. GORDON *v.* MEANS ET AL. Sup. Ct. Va. Certiorari denied.

No. 03–1001. SCOTT *v.* PRISON HEALTH SERVICES, INC. C. A. 8th Cir. Certiorari denied.

No. 03–1002. DESOUZA *v.* UNIVERSITY OF CALIFORNIA, DAVIS MEDICAL CENTER, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 03–1003. CIGNA PROPERTY AND CASUALTY *v.* VILLAR RUIZ ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 726.

No. 03–1009. ESTATE OF HOGARTH ET AL. *v.* EDGAR RICE BURROUGHS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 342 F. 3d 149.

No. 03–1018. STATE CONCERN TURKMENNEFT *v.* BRIDAS S. A. P. I. C. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 345 F. 3d 347.

No. 03–1020. MARKS *v.* UNION COUNTY DEMOCRATIC COMMITTEE ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 03–1022. QUANG DIHN NGUYEN *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 803.

No. 03–1023. HOWARD ET AL. *v.* FAIR POLITICAL PRACTICES COMMISSION. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 109 Cal. App. 4th 269, 134 Cal. Rptr. 2d 659.

No. 03–1029. MCFADDEN ET AL. *v.* GILBERT, COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 756.

No. 03–1032. HUMBOLDT COUNTY, CALIFORNIA, ET AL. *v.* HEADWATERS FOREST DEFENSE ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–1033. TIDWELL *v.* BELLSOUTH TELECOMMUNICATIONS, INC. Ct. Civ. App. Ala. Certiorari denied. Reported below: 876 So. 2d 533.

No. 03–1036. LAKE *v.* STEWART, SUPERINTENDENT, WASHINGTON CORRECTIONS CENTER FOR WOMEN. C. A. 9th Cir. Certiorari denied.

No. 03–1038. FERMIN *v.* DIRECT MERCHANTS CREDIT CARD BANK, N. A. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 932.

No. 03–1041. UNITED STATES BANCORP ET AL. *v.* FRASER. C. A. 9th Cir. Certiorari denied. Reported below: 342 F. 3d 1032.

No. 03–1047. ADAIR ET AL. *v.* ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 214.

No. 03–1048. IGARTUA DE LA ROSA *v.* OFFICE OF GOVERNMENTAL ETHICS OF PUERTO RICO. Sup. Ct. P. R. Certiorari denied.

No. 03–1054. PRYOR ET AL. *v.* CITY OF LANSING, MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 810.

No. 03–1078. BROWN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 122 S. W. 3d 794.

No. 03–1087. SABATER *v.* BIAS. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 951.

No. 03–1090. PORTER ET UX. *v.* BANKNORTH, N. A., ET AL. App. Ct. Mass. Certiorari denied. Reported below: 59 Mass. App. 1102, 795 N. E. 2d 614.

No. 03–1091. NAPOLI *v.* FIRST UNUM LIFE INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 78 Fed. Appx. 787.

No. 03–1099. KINDER *v.* LOSHONKOHL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 109 Cal. App. 4th 510, 135 Cal. Rptr. 2d 114.

No. 03–1102. ON THE HOUSE SYNDICATION, INC., ET AL. *v.* FEDERAL EXPRESS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 247.

No. 03–1104. FINANDER *v.* BURRELLE'S INFORMATION SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 953.

No. 03–1119. MORRIS *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 215.

No. 03–1139. VAN VOORHIS, JUDGE, SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY *v.* CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE. Sup. Ct. Cal. Certiorari denied.

No. 03–1145. MCMULLEN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 71 Fed. Appx. 848.

No. 03–1150. MISEK-FALKOFF ET VIR *v.* AMERICAN LAWYER MEDIA, INC., ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 300 App. Div. 2d 215, 752 N. Y. S. 2d 647.

No. 03–1151. MONTEFUSCO *v.* DEPARTMENT OF THE ARMY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 71 Fed. Appx. 907.

No. 03–1157. NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH *v.* TERRA INDUSTRIES, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 346 F. 3d 1160.

No. 03–1167. RAMOS CALUYA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 688.

No. 03–1176. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 501.

No. 03–1179. SHOBANDE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 349 F. 3d 964.

No. 03–1190. MCCLURE *v.* WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–1191. STRUBE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 65 Fed. Appx. 865.

No. 03–1201. GALLUZZI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–6028. CARPENTER *v.* JOHNSON, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 2.

No. 03–6030. SHERER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 113 Wash. App. 1014.

No. 03–6480. QUINONES-MONDRAGON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 253.

No. 03–7132. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 322 F. 3d 1209 and 59 Fed. Appx. 960.

No. 03–7380. KEITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 35.

No. 03–7502. LAMAR *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 205 Ariz. 431, 72 P. 3d 831.

No. 03–7510. SANCHEZ-MEDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 395.

No. 03–7586. GREEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 832 A. 2d 754.

No. 03–7591. ALLRIDGE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 60.

No. 03–7682. CORTEZ-CRUZ, AKA CORTEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 330 F. 3d 1288.

No. 03–7894. JENNINGS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 857 So. 2d 196.

No. 03–7997. MURPHY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 112 S. W. 3d 592.

No. 03–8023. MORAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 398.

No. 03–8049. PERKINS *v.* LEE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 4.

No. 03–8051. MENDEZ-CARISOSA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 193.

No. 03–8065. ANDERSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 863 So. 2d 169.

No. 03–8096. MORRISON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 276 Ga. 829, 583 S. E. 2d 873.

No. 03–8188. RAMOS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 573 Pa. 605, 827 A. 2d 1195.

No. 03–8246. EVANS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8266. CHAVEZ *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8267. CRAWLEY *v.* BRAXTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 63 Fed. Appx. 725.

No. 03–8268. ELLIOT, AKA MUHAMMAD *v.* JOHNSON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–8269. DELAPAZ *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–8270. CASDIA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 830 A. 2d 1043.

No. 03–8274. CHANDLER *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 03–8275. DODDS *v.* CALBONE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–8280. COTTON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 880 So. 2d 507.

No. 03–8282. DILWORTH *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8285. CRIOLLO *v.* WILSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 576.

No. 03–8288. DAWSON *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 735.

No. 03–8289. COUTURIER *v.* NEW HAMPSHIRE ET AL. C. A. 1st Cir. Certiorari denied.

No. 03–8291. CARTER *v.* VANDERCOOK, SHERIFF, SUMNER COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 59 Fed. Appx. 52.

No. 03–8293. CLAYTON *v.* MECHLING, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8296. RODLAND *v.* COURT OF COMMON PLEAS OF PENNSYLVANIA, BLAIR COUNTY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8299. SARAH *v.* DESHAMBO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 346.

No. 03–8301. SPENCER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–8302. HETTLER *v.* KAHN. C. A. 8th Cir. Certiorari denied.

No. 03–8304. HALE *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 335 Ore. 612, 75 P. 3d 448.

No. 03–8309. HARVELL *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Stanly County, N. C. Certiorari denied.

No. 03–8313. BUMPHUS *v.* HAZELTREE APARTMENTS, AKA PHOENIX HAZELTREE LLC, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 63 Fed. Appx. 382.

No. 03–8314. WATKINS *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 876.

No. 03–8317. AYER *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 150 N. H. 14, 834 A. 2d 277.

No. 03–8318. GREEN *v.* KNOWLES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–8323. WHITE *v.* MICHIGAN CENTER FOR FORENSIC PSYCHIATRY. C. A. 6th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 626.

No. 03–8331. STULL *v.* ROLLINS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8335. PORTERFIELD *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 03–8337. SMITH *v.* HENDRICKSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–8338. SACCO *v.* NEW YORK. County Ct., Orange County, N. Y. Certiorari denied.

No. 03–8339. RINALDO *v.* BROWARD COUNTY JAIL. C. A. 11th Cir. Certiorari denied. Reported below: 52 Fed. Appx. 491.

No. 03–8348. WILLIAMS *v.* KINGSTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 65 Fed. Appx. 875.

No. 03–8350. WEBB *v.* YLST. C. A. 9th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 716.

No. 03–8357. POTTS *v.* ROSE, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 100 Ohio St. 3d 119, 769 N. E. 2d 935.

No. 03–8363. MCPEAK *v.* MAYLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 599.

No. 03–8364. O'QUINN *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 339 Ill. App. 3d 347, 791 N. E. 2d 1066.

No. 03–8366. NEWMAN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 835.

No. 03–8367. CARTER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 357 N. C. 345, 584 S. E. 2d 792.

No. 03–8368. MING LI *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–8371. KAILEY *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 03–8372. MACHADO *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8377. DI NARDO ET AL. *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 727.

No. 03–8379. WYLEY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 03–8380. WIGGINS *v.* MOORE, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8382. SMITH *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 110 Cal. App. 4th 492, 1 Cal Rptr. 3d 779.

No. 03–8383. BROADES *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–8384. HOWARD *v.* ZEMMELMAN, JUDGE, COURT OF COMMON PLEAS OF OHIO, LUCAS COUNTY, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 99 Ohio St. 3d 1535, 795 N. E. 2d 676.

No. 03–8386. WATERS *v.* WESTBROOKS, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 03–8390. BAKER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 377 Md. 567, 833 A. 2d 1070.

No. 03–8391. JACKSON *v.* ANDREASEN ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–8393. WATTS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 357 N. C. 366, 584 S. E. 2d 740.

No. 03–8398. CANADA *v.* KNIGHT, SUPERINTENDENT, CORRECTIONAL INDUSTRIAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 03–8402. RIDDLESPRIGER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8412. PLATER *v.* DEMASS ET AL. C. A. 2d Cir. Certiorari denied.

No. 03–8415. WEST *v.* MILLEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 190.

No. 03–8417. TIBBS *v.* TEXAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 459.

No. 03–8418. McMahon *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 03–8421. Bell *v.* Smith, Sheriff, Levy County, Florida, et al. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 217.

No. 03–8428. Rason *v.* Elggren, Chapter 7 Trustee, et al. C. A. 9th Cir. Certiorari denied.

No. 03–8432. Dossey et ux. *v.* Texas Department of Protective and Regulatory Services. Sup. Ct. Tex. Certiorari denied. Reported below: 113 S. W. 3d 340.

No. 03–8433. Misko *v.* Alameida, Director, California Department of Corrections. C. A. 9th Cir. Certiorari denied.

No. 03–8436. Barnes *v.* West Virginia et al. Cir. Ct. Fayette County, W. Va. Certiorari denied.

No. 03–8443. McKnight *v.* Court of Common Pleas of Pennsylvania, Philadelphia County, et al. C. A. 3d Cir. Certiorari denied.

No. 03–8446. Mott *v.* Sistrunk, Superintendent, Cross City Correctional Institution, et al. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 213.

No. 03–8449. Dung Van Mai *v.* Prunty, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 586.

No. 03–8452. Soto *v.* Phillips, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 78 Fed. Appx. 760.

No. 03–8458. Banda *v.* Morgan et al. C. A. 3d Cir. Certiorari denied.

No. 03–8459. Munoz *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 03–8460. Eddington *v.* Hill, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 512.

No. 03–8461. BROOKS *v.* EARLY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 931.

No. 03–8462. CONNER *v.* HILL, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 03–8467. JOHNSTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 863 So. 2d 271.

No. 03–8470. MCMILLAN *v.* YELLOW CAB ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 315.

No. 03–8471. OSTRANDER *v.* LUEBBERS, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–8477. BARKCLAY *v.* MARICOPA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 701.

No. 03–8485. NASH *v.* MORGAN, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 509.

No. 03–8486. PENA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8489. BROWN *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8496. OBADELE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8499. JEMMERISON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8500. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–8502. JONES *v.* BIRKETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8505. LY *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–8508. BLACK *v.* PACIFIC MARITIME ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 122.

No. 03–8510. BYRAM *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 339 F. 3d 203.

No. 03–8511. XIONG *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 4th 613, 74 P. 3d 176.

No. 03–8517. SIMPSON *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 03–8522. SLAUGHTER *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 141.

No. 03–8525. TAYLOR *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 329 F. 3d 963.

No. 03–8534. GOODIN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 856 So. 2d 267.

No. 03–8540. MATHIS *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8542. PHILLIPS *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 03–8545. VERSER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–8552. RUSSELBURG *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 03–8566. NGONGO *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 604.

No. 03–8569. MARSHALL *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8581. VARELA *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–8588. MCKNIGHT *v.* MANN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SENIOR ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 65 Fed. Appx. 874.

No. 03–8591. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 337 Ill. App. 3d 1157, 843 N. E. 2d 512.

No. 03–8602. STOKES *v.* BOWLEN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8613. CORREA *v.* STERNES, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 03–8615. CLEMONS *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 526.

No. 03–8635. HALL *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 03–8636. RILEY-JAMES *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 70 Fed. Appx. 36.

No. 03–8639. FRANK *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 334 Ill. App. 3d 1122, 836 N. E. 2d 402.

No. 03–8642. ELMORE *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–8644. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 334 Ill. App. 3d 1120, 836 N. E. 2d 401.

No. 03–8650. TERRY *v.* HICKS. C. A. 11th Cir. Certiorari denied.

No. 03–8653. BROWN ET AL. *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 03–8670. BERGER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 03–8675. BEAVER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 03–8676. WILLIAMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 857 So. 2d 198.

No. 03–8682. BURNS *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 256.

No. 03–8700. SMITH *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 867.

No. 03–8701. MARTINEZ *v.* SOARES, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 03–8703. MILNES *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 80 Fed. Appx. 660.

No. 03–8708. CLOUGH *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 03–8711. WARE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–8712. THACHER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 861 So. 2d 51.

No. 03–8719. DE FORD *v.* THE KIVA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 779.

No. 03–8720. DONEVAN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 160 N. C. App. 252, 584 S. E. 2d 892.

No. 03–8722. DAUGHERTY *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 116 S. W. 3d 616.

No. 03–8723. SUTTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 348 F. 3d 789.

No. 03–8724. REYNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 665.

No. 03–8725. RICO-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 988.

No. 03–8726. SANTILLANA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 402.

No. 03–8729. FERNANDEZ *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 82 Fed. Appx. 48.

No. 03–8733. ESPINOZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 338 F. 3d 1140.

No. 03–8738. RUIZ-AHUMADA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 751.

No. 03–8739. LEKAS *v.* BATTLES, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 03–8746. ROUNTREE *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 03–8747. BEAVER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 03–8749. ESTEPP *v.* WEST VIRGINIA. Cir. Ct. Cabell County, W. Va. Certiorari denied.

No. 03–8753. MCFARLAND *v.* UNITED STATES; and
No. 03–8989. WILSON, AKA BLACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 232.

No. 03–8754. ABDELSAMED *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 90.

No. 03–8755. WINDHAM *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 519.

No. 03–8776. LA FRANK *v.* ROWLEY, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 340 F. 3d 685.

No. 03–8781. CREAMER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 70 Fed. Appx. 48.

No. 03–8783. DOYLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–8786. STRINGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–8789. BACKUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 349 F. 3d 1298.

No. 03–8791. BRYSON ET AL. *v.* JOHNSTON, JUDGE, SUPERIOR COURT OF NORTH CAROLINA, MECKLENBURG COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 223.

No. 03–8792. ROMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–8793. SEGUI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–8794. SIMMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–8797. SATIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 428.

No. 03–8801. DADI *v.* DAVIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 388.

No. 03–8802. DUSENBERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 443.

No. 03–8806. DAMMONS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 159 N. C. App. 284, 583 S. E. 2d 606.

No. 03–8810. LENTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 381.

No. 03–8814. POLK *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 378 Md. 1, 835 A. 2d 575.

No. 03–8815. PUGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 386.

No. 03–8817. SOLORIO-ACOSTA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 331.

No. 03–8819. PITTS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 875.

No. 03–8822. VASQUEZ-HERNANDEZ *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 335 Ore. 506, 73 P. 3d 291.

No. 03–8823. HORTMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 476.

No. 03–8826. HERZOG *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 606.

No. 03–8827. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 869.

No. 03–8829. FLORES, AKA FLORES-MELGAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 723.

No. 03–8830. FARESE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 821.

No. 03–8832. MATEO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 355.

No. 03–8835. PALUCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 740.

No. 03–8843. KOU YANG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 345 F. 3d 650.

No. 03–8844. VILLALOBOS, AKA FALICIANO GARCIAS, AKA DIAZ MORENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 230.

No. 03–8846. JENKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 515.

No. 03–8850. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 356 F. 3d 529.

No. 03–8852. BARRETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 486.

No. 03–8855. OROZCO-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 132.

No. 03–8856. NEWMEYER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 907.

No. 03–8857. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 714.

No. 03–8858. STOCKTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 349 F. 3d 755.

No. 03–8859. MCDONALD *v.* HARO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 83.

No. 03–8860. BOONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 227.

No. 03–8863. ANDREWS, AKA KAMANGENI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 353 F. 3d 1154.

No. 03–8864. ADENODI *v.* UNITED STATES; and
No. 03–8876. ADEOSHUN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 343.

No. 03–8869. MARKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–8870. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–8871. MELTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 344 F. 3d 1021.

No. 03–8882. SANTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–8890. MEUSE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–8894. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 354 F. 3d 390.

No. 03–8896. PERSINGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 55.

No. 03–8899. JANES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–8900. VINES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 80 Fed. Appx. 113.

No. 03–8904. PANNELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 188.

No. 03–8912. ERVIN *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 401.

No. 03–8913. DANTZLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–8915. RODRIGUEZ-CASTILLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 350 F. 3d 1.

No. 03–8917. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 182.

No. 03–8919. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 341.

No. 03–8920. ZACARIA-BARAJAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 990.

No. 03–8922. BROWN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 334 F. 3d 1161.

No. 03–8924. MARCHESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 87 Fed. Appx. 276.

No. 03–8925. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 45.

No. 03–8929. POINDEXTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 188.

No. 03–8931. WINGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 30.

No. 03–8932. VANHORN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 344 F. 3d 729.

No. 03–8933. VILLA-BOJORQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 807.

No. 03–8935. KUHNKE *v.* BERTRAND, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–8936. KING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–8938. PINELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 28.

No. 03–8939. PLUMLEE ET AL. *v.* DODRILL, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 873.

No. 03–8940. MENDOZA-GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 210.

No. 03–8941. MINER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 345 F. 3d 1004.

No. 03–8947. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 341 F. 3d 673.

No. 03–8948. CHAPMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 345 F. 3d 630.

No. 03–8950. DOWDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 941.

No. 03–8952. DODSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 196.

No. 03–8956. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 50 Fed. Appx. 970.

No. 03–8958. SCOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 629.

No. 03–8964. ARCEDIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 235.

No. 03–8967. TURINCIO *v.* UNITED STATES; and GOMEZ-GALICIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 344 (first judgment); 82 Fed. Appx. 868 (second judgment).

No. 03–8969. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–8972. BLANKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 388.

No. 03–8977. ALTMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–8978. PLEASANT, AKA PLEASANTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 653.

No. 03–8982. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–8993. COUNCIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 387.

No. 03–8995. BOLLING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 81 Fed. Appx. 373.

No. 03–8996. MACK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 78 Fed. Appx. 171.

No. 03–8997. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 345 F. 3d 59.

No. 03–9003. BRYE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 718.

No. 03–9004. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 82 Fed. Appx. 248.

No. 03–821. HOLLAND, WARDEN *v.* ADAMS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 330 F. 3d 398.

No. 03–862. EXCEL CORP. *v.* ESTATE OF KRIEFALL ET AL. Ct. App. Wis. Motions of American Meat Institute et al. and Product Liability Advisory Council, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 265 Wis. 2d 476, 665 N. W. 2d 417.

No. 03–1031. MOORE, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX *v.* SANDERS. C. A. 9th Cir. Motion of re-

spondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 342 F. 3d 991.

No. 03–1037. ANGLE, NEVADA STATE ASSEMBLY MEMBER, ET AL. *v.* GUINN, GOVERNOR OF NEVADA, ET AL. Sup. Ct. Nev. Motions of Initiative and Referendum Institute, Pacific Legal Foundation et al., and National Taxpayers Union et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 119 Nev. 277, 71 P. 3d 1269, and 119 Nev. 460, 76 P. 3d 22.

No. 03–1040. WASHINGTON STATE GRANGE ET AL. *v.* WASHINGTON STATE DEMOCRATIC PARTY ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 343 F. 3d 1198.

Rehearing Denied

No. 02–1841. ZIDELL *v.* UNITED STATES, 540 U. S. 824;

No. 03–177. ELLISON *v.* SANDIA NATIONAL LABORATORIES ET AL., 540 U. S. 880;

No. 03–344. ULLMAN *v.* UNITED STATES, 540 U. S. 950;

No. 03–715. GAIN ET AL. *v.* WASHINGTON ET AL. (two judgments), 540 U. S. 1149;

No. 03–728. DIVILLY *v.* PORT AUTHORITY OF ALLEGHENY COUNTY, PENNSYLVANIA, 540 U. S. 1111;

No. 03–6479. KENNEY *v.* MENDEZ, WARDEN, ET AL., 540 U. S. 1163;

No. 03–7087. YOUNG *v.* GARCIA, WARDEN, 540 U. S. 1118;

No. 03–7665. NEVITT *v.* FITCH, JUDGE, DISTRICT COURT OF NEW MEXICO, CATRON COUNTY, 540 U. S. 1135; and

No. 03–7808. JOSHUA *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 540 U. S. 1165. Petitions for rehearing denied.

No. 03–7531. IN RE BONTKOWSKI, 540 U. S. 1103. Petition for rehearing denied. JUSTICE STEVENS took no part in the consideration or decision of this petition.

MARCH 29, 2004

Certiorari Dismissed

No. 03–9110. RASHID *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied,

and certiorari dismissed. See this Court's Rule 39.8. Reported below: 85 Fed. Appx. 873.

Miscellaneous Orders

No. 03M53. MURRELL *v.* STATE FARM INSURANCE ET AL.;

No. 03M54. HOFMANN *v.* ILLINOIS HUMAN RIGHTS COMMISSION ET AL.;

No. 03M55. HOFMANN *v.* FERMILAB NAL/URA ET AL.; and

No. 03M57. K. E. *v.* FLORIDA BOARD OF BAR EXAMINERS. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 03M56. CLINTON *v.* CITY OF ATLANTA, GEORGIA. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. D–2357. IN RE DISBARMENT OF WIGHTMAN-CERVANTES. Disbarment entered. [For earlier order herein, see 540 U. S. 1100.]

No. 03–9197. IN RE BURKS. Petition for writ of habeas corpus denied.

No. 03–1219. IN RE VEY. Petition for writ of mandamus denied.

Certiorari Granted

No. 03–750. SMALL *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 333 F. 3d 425.

No. 03–892. COMMISSIONER OF INTERNAL REVENUE *v.* BANKS. C. A. 6th Cir.; and

No. 03–907. COMMISSIONER OF INTERNAL REVENUE *v.* BANAITIS. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 03–892, 345 F. 3d 373; No. 03–907, 340 F. 3d 1074.

No. 03–1160. SMITH ET AL. *v.* CITY OF JACKSON, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 351 F. 3d 183.

Certiorari Denied

No. 03–691. EGWAOJE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 335 F. 3d 579.

No. 03–774. ILLINOIS *v.* BUNCH. Sup. Ct. Ill. Certiorari denied. Reported below: 207 Ill. 2d 7, 796 N. E. 2d 1024.

No. 03–1051. HEFFINGTON ET UX. *v.* BOB COOK HOMES, L. L. C., ET AL. Ct. App. Kan. Certiorari denied. Reported below: 31 Kan. App. 2d xix, 72 P. 3d 582.

No. 03–1056. WALTON *v.* JOHNSON & JOHNSON SERVICES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 347 F. 3d 1272.

No. 03–1057. DENGEL *v.* BOLEN, UNITED STATES TRUSTEE, REGION 5, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 340 F. 3d 300.

No. 03–1058. CARTER, INDIVIDUALLY AND ON BEHALF OF THE WRONGFUL DEATH HEIRS AND BENEFICIARIES, ET AL. *v.* MISSISSIPPI DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 860 So. 2d 1187.

No. 03–1059. CASS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 307 App. Div. 2d 932, 762 N. Y. S. 2d 892.

No. 03–1060. WILLIAMS ET AL. *v.* GALVESTON INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 946.

No. 03–1064. NESBIT *v.* GEARS UNLIMITED, INC. C. A. 3d Cir. Certiorari denied. Reported below: 347 F. 3d 72.

No. 03–1065. STEINBRECHER *v.* STEINBRECHER. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 03–1067. MEDICAL INSTRUMENTATION & DIAGNOSTICS CORP. *v.* ELEKTA AB ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 344 F. 3d 1205.

No. 03–1069. PEIRCE ET AL. *v.* MELLON BANK CORP. ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–1072. BANK ONE, NA *v.* WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT. C. A. 7th Cir. Certiorari denied. Reported below: 345 F. 3d 454.

No. 03–1075. PIECZENIK *v.* DYAX CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 76 Fed. Appx. 293.

No. 03–1076. WILLIAMS *v.* MADDI ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 306 App. Div. 2d 852, 761 N. Y. S. 2d 890.

No. 03–1093. SHELTON *v.* SHELTON. Sup. Ct. Nev. Certiorari denied. Reported below: 119 Nev. 492, 78 P. 3d 507.

No. 03–1105. BROWN ET UX. *v.* TURNER ET UX. C. A. 3d Cir. Certiorari denied. Reported below: 76 Fed. Appx. 471.

No. 03–1106. FAIRFAX REALTY, INC., ET AL. *v.* SMITH ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 82 P. 3d 1064.

No. 03–1132. DUNLEAVY *v.* MAINE COMMITTEE ON JUDICIAL RESPONSIBILITY AND DISABILITY. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 838 A. 2d 338.

No. 03–1141. GISSLEN *v.* CITY OF CRYSTAL, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 345 F. 3d 624.

No. 03–1149. MISEK-FALKOFF ET VIR *v.* MCDONALD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 63 Fed. Appx. 551.

No. 03–1154. SEARS *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 349 F. 3d 1326.

No. 03–1155. GRACIA ET AL. *v.* PEREZ-GUZMAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 346 F. 3d 229.

No. 03–1232. VALLADARES-HELGUERA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 232.

No. 03–1233. WHEELER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 656.

No. 03–1241. HARRELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–7686. O'NEAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 461.

No. 03–7760. DALLIO *v.* SPITZER, ATTORNEY GENERAL OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 343 F. 3d 553.

No. 03–8046. BURGESS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 262 Wis. 2d 354, 665 N. W. 2d 124.

No. 03–8419. WRIGHT *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 857 So. 2d 861.

No. 03–8518. RIVERS *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 03–8527. REESE *v.* BUTLER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8544. TERRY *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 128.

No. 03–8547. ESTRADA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 705.

No. 03–8558. CHAUDHARY *v.* CLARKE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 952.

No. 03–8567. OFFORD *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–8570. REDDING *v.* WORKMAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–8574. PFINGSTEN *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–8577. AMICK *v.* DORMIRE, SUPERINTENDENT, MISSOURI STATE PENITENTIARY, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 554.

No. 03–8579. BURR *v.* STATE OF TEXAS COURT ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–8585. ALDER *v.* CORRECTIONAL MEDICAL SERVICES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 839.

No. 03–8587. OGUNJOBI-YOBO *v.* DEKALB COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 223.

No. 03–8589. PREYER *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8595. CALTABIANO *v.* TOWNSHIP OF GLOUCESTER, NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 03–8596. ERBY *v.* CARUSO, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied.

No. 03–8597. PARKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 331 Ill. App. 3d 1132, 835 N. E. 2d 467.

No. 03–8599. BENNETT *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 837 So. 2d 765.

No. 03–8607. OCHOA *v.* JAMROG, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8608. WELDY *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 794 N. E. 2d 1167.

No. 03–8609. VALLE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 859 So. 2d 516.

No. 03–8612. KATTICK *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–8617. DAVIS *v.* ATKINSON, SHERIFF, SEBASTIAN COUNTY, ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 903.

No. 03–8623. LENNON *v.* STONE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–8625. MCCOY *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–8627. GRAHAM *v.* GALAZA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 17.

No. 03–8640. THANH PHUONG NGUYEN *v.* PHILLIPS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 358.

No. 03–8641. ALLEY *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 307 F. 3d 380.

No. 03–8643. WEAVER *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 885.

No. 03–8646. PARKS *v.* CITY OF CHATTANOOGA, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 432.

No. 03–8651. WILSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8652. TAYLOR *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8665. WILLIAMS *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied. Reported below: 149 Ohio App. 3d 434, 777 N. E. 2d 892.

No. 03–8687. TILLER *v.* GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 03–8694. FITTEN *v.* CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY. C. A. 6th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 384.

No. 03–8756. JONES *v.* UNIVERSITY OF CENTRAL FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 727.

No. 03–8795. JACKSON *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 348 F. 3d 658.

No. 03–8800. KRAY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 114 Wash. App. 1052.

No. 03–8825. VORAVONGSA *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. Reported below: 349 F. 3d 1.

No. 03–8833. PALLADINO *v.* PERLMAN, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–8879. SCOTT *v.* LINDSEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8885. WILLIAMS *v.* AVIALL SERVICES INC. C. A. 5th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 534.

No. 03–8916. RHODES *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 03–8937. HORNE *v.* POTTER, POSTMASTER GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 282.

No. 03–8954. PHILLIPS *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied.

No. 03–8973. MURILLO-CONTRERAS, AKA MARTINEZ-BRAVO, AKA CONTRERAS MURILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 690.

No. 03–8986. BOYER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 508.

No. 03–8990. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–8994. CUEVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 546.

No. 03–8999. BENNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 314.

No. 03–9001. STERLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–9008. MAXWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 65 Fed. Appx. 911.

No. 03–9014. CHARLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 386.

No. 03–9015. CIANCAGLINI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 349 F. 3d 144.

No. 03–9019. GATES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 875.

No. 03–9022. HOLT *v.* FLEMING, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 966.

No. 03–9024. FLOWERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 877.

No. 03–9025. HOFFMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 202.

No. 03–9027. WALL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 349 F. 3d 18.

No. 03–9028. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 890.

No. 03–9035. GIL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–9040. OUTLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 348 F. 3d 476.

No. 03–9041. MCARTHUR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 391.

No. 03–9042. MORALES-MADERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 352 F. 3d 1.

No. 03–9044. VARGAS-DURAN *v.* UNITED STATES; MORALES-VEGA *v.* UNITED STATES; and LOZANO-SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 356 F. 3d 598 (first judgment); 81 Fed. Appx. 485 (second judgment); 82 Fed. Appx. 924 (third judgment).

No. 03–9047. STOKES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 655.

No. 03–9048. SHRYOCK ET AL. *v.* UNITED STATES; and
No. 03–9159. THERRIEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 342 F. 3d 948.

No. 03–9055. BECERRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 902.

No. 03–9056. GRANDISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 878.

No. 03–9058. GRESHAM *v.* MILES, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 396.

No. 03–9060. HUPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 142.

No. 03–9064. HALEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 271.

No. 03–9065. GADSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 292.

No. 03–9066. GAINES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 712.

No. 03–9068. FLEMING *v.* BROOKS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 177.

No. 03–9074. STOSSEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 348 F. 3d 1320.

No. 03–9079. WARDRICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 350 F. 3d 446.

No. 03–9080. ZEPEDA-OROZCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 189.

No. 03–9085. FIELDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9088. GIBSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–9089. GRAHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 214.

No. 03–9091. BURKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 345 F. 3d 416.

No. 03–9094. GRAHAM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–9099. LANG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 30.

No. 03–9101. ORRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 82.

No. 03–9102. MORA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 385.

No. 03–9107. BONSU *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 336 F. 3d 582.

No. 03–9108. RIVERA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–9109. ATKINSON *v.* DEWALT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 647.

No. 03–9112. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 895.

No. 03–9115. MASSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 832.

No. 03–9119. CURTIS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 200.

No. 03–9125. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 226.

No. 03–9129. ISAACS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 917.

No. 03–9132. GIDA *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 823 A. 2d 538.

No. 03–9136. CAMPA-FABELA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 339 F. 3d 993.

No. 03–9138. CAVE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–9144. GIBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9146. GORMLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 65 Fed. Appx. 502.

No. 03–9148. BERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 268.

No. 03–9153. GUERECA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 681.

No. 03–9155. GILLETTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 864.

No. 03–9156. GILLON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 348 F. 3d 755.

No. 03–9157. FULLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 371.

No. 03–9164. ZAUCEDA-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 613.

No. 03–9173. LEINENBACH, AKA NELSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–9179. MIRANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 499.

No. 03–9182. MANGAL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 841 A. 2d 8.

No. 03–9184. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 780.

No. 03–9185. ORTUNO *v.* GERLINSKI, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 65 Fed. Appx. 874.

No. 03–9196. ABRAHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–1014. ELI LILLY & CO. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF WASHINGTON. C. A. Fed. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 334 F. 3d 1264.

No. 03–1077. THOMAS *v.* WAL-MART STORES, INC.; and MONTAGUE *v.* ASPLUNDH TREE EXPERT CO. C. A. 11th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 85 Fed. Appx. 193 (second judgment); 87 Fed. Appx. 714 (first judgment).

No. 03–1173. MASON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 73 Fed. Appx. 967.

No. 03–9577 (03A812). WICKLINE *v.* MITCHELL, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 03–7024. HARRIS *v.* UNITED STATES, 540 U. S. 1062;

No. 03–7055. CLAIBORNE *v.* HENDERSON ET AL., 540 U. S. 1116;

No. 03–7075. GARNETT *v.* PAYNE ET AL., 540 U. S. 1117;

No. 03–7094. BROOKS *v.* NIX, CHAIRMAN, GEORGIA BOARD OF PARDONS AND PAROLES, ET AL., 540 U. S. 1118;

No. 03–7211. SMITH *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 540 U. S. 1120;

No. 03–7352. CHUA-ZULUETA *v.* ASHCROFT, ATTORNEY GENERAL, 540 U. S. 1124;

No. 03–7426. HENDROCK *v.* GILBERT, 540 U. S. 1152;

No. 03–7532. ATKINSON *v.* UNITED STATES, 540 U. S. 1127;

No. 03–7533. LUCZAK *v.* MOTE, WARDEN, 540 U. S. 1154;

No. 03–7847. WATSON *v.* OHIO, 540 U. S. 1165; and

No. 03–7898. SLATER *v.* UNITED STATES, 540 U. S. 1140. Petitions for rehearing denied.

MARCH 31, 2004

Miscellaneous Orders

No. 03A826. ORBE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. 03A827. ORBE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

Certiorari Denied

No. 03–9579 (03A815). ORBE *v.* TRUE, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 82 Fed. Appx. 802.

APRIL 5, 2004

Certiorari Granted—Vacated and Remanded

No. 02–1270. PERLMAN *v.* DEPARTMENT OF JUSTICE. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *National Archives and Records Admin.* v. *Favish*, *ante*, p. 157. Reported below: 312 F. 3d 100.

No. 02–5651. OGUAJU *v.* UNITED STATES MARSHALS SERVICE. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *National Archives and Records Admin.* v. *Favish*, *ante*, p. 157. Reported below: 288 F. 3d 448.

Certiorari Granted—Remanded

No. 02–599. ANTHONY ET AL. *v.* FAVISH ET AL. C. A. 9th Cir. The Court reversed the judgment below in *National Archives and Records Admin.* v. *Favish*, *ante*, p. 157. Therefore, certiorari granted, and case remanded to the Court of Appeals to enter appropriate orders as may be necessary. Reported below: 37 Fed. Appx. 863.

Certiorari Dismissed

No. 03–8716. SIEGEL *v.* ARLINGTON COUNTY DEPARTMENT OF COMMUNITY PLANNING HOUSING AND DEVELOPMENT 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: 79 Fed. Appx. 571.

No. 03–8771. COHEA *v.* CALIFORNIA. Sup. Ct. Cal. 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. 03–9057. HOOD *v.* DOTSON, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 69 Fed. Appx. 648.

Miscellaneous Orders

No. 03M58. BAUTISTA *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL.;

No. 03M59. SULLIVAN *v.* UNITED STATES; and

No. 03M61. JAMES *v.* ALLEN, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT CEDAR JUNCTION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 03M60. CREVELING *v.* MOHAVE COUNTY, ARIZONA, ET AL. Motion for leave to proceed *in forma pauperis* with the declaration of indigency under seal denied.

No. 03–475. CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. [Certiorari granted, 540 U. S. 1088.] Motion of respondent Judicial Watch, Inc., for divided argument granted.

No. 03–724. F. HOFFMANN-LA ROCHE LTD ET AL. *v.* EMPAGRAN S. A. ET AL. C. A. D. C. Cir. [Certiorari granted, 540 U. S. 1088.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 03–8748. RAAFLAUB *v.* GRIEVANCE ADMINISTRATOR, ATTORNEY GRIEVANCE COMMISSION OF MICHIGAN. Sup. Ct. Mich. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 26, 2004, 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. 03–9332. In re Kashoggi, fka Sterling, et al.;
No. 03–9383. In re Smith; and
No. 03–9415. In re Belser. Petitions for writs of habeas corpus denied.

No. 03–8959. In re Roberson. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 03–725. Pasquantino et al. *v.* United States. C. A. 4th Cir. Certiorari granted. Reported below: 336 F. 3d 321.

No. 03–923. Illinois *v.* Caballes. Sup. Ct. Ill. Certiorari granted. Reported below: 207 Ill. 2d 504, 802 N. E. 2d 202.

Certiorari Denied

No. 02–409. Favish *v.* National Archives and Records Administration et al. C. A. 9th Cir. Certiorari denied. Reported below: 37 Fed. Appx. 863.

No. 03–637. Newdunn Associates, LLP, et al. *v.* United States Army Corps of Engineers. C. A. 4th Cir. Certiorari denied. Reported below: 344 F. 3d 407.

No. 03–701. Deaton et ux. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 332 F. 3d 698.

No. 03–784. Hoots et al. *v.* K. B. et al. Sup. Ct. N. D. Certiorari denied. Reported below: 663 N. W. 2d 625.

No. 03–898. Ortiz Velez, Mayor of Sabana Grande, Puerto Rico, et al. *v.* Rivera-Torres et al. C. A. 1st Cir. Certiorari denied. Reported below: 341 F. 3d 86.

No. 03–929. Rapanos *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 339 F. 3d 447.

No. 03–934. Merle et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 351 F. 3d 92.

No. 03–938. Christian, Individually and on Behalf of All Others Similarly Situated *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 337 F. 3d 1338.

No. 03–948. SMITH *v.* JONES ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–949. ANHEUSER-BUSCH, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 338 F. 3d 267.

No. 03–1025. HALLIBURTON ENERGY SERVICES, INC. *v.* BJ SERVICES CO. C. A. Fed. Cir. Certiorari denied. Reported below: 338 F. 3d 1368.

No. 03–1044. OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC., ET AL. *v.* NEW PRIME, INC., DBA PRIME, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 339 F. 3d 1001.

No. 03–1083. ST. VINCENT MEDICAL CENTER ET AL. *v.* SERVICE EMPLOYEES INTERNATIONAL UNION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 344 F. 3d 977.

No. 03–1084. ROLE *v.* ATCO PRODUCTS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 873.

No. 03–1086. SHR LTD. PARTNERSHIP *v.* MERCURY EXPLORATION CO. ET AL. Ct. App. Mich. Certiorari denied.

No. 03–1094. GENERAL MILLS, INC., ET AL. *v.* COMMISSIONER OF REVENUE OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 440 Mass. 154, 795 N. E. 2d 552.

No. 03–1095. ANDREWS *v.* ANDREWS. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 03–1100. JONES, DBA MELDER PUBLISHING CO. *v.* HAWKINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 391.

No. 03–1101. CORY *v.* FAHLSTROM ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 656.

No. 03–1107. CENTER FOR FAIR PUBLIC POLICY ET AL. *v.* MARICOPA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 336 F. 3d 1153.

No. 03–1112. EDLUND *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 03–1113. COLWELL *v.* COLLINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 89.

No. 03–1115. MALLOY *v.* TELEPHONICS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 68 Fed. Appx. 270.

No. 03–1121. TWIN LAKES DEVELOPMENT CORP. *v.* TOWN OF MONROE, NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 1 N. Y. 3d 98, 801 N. E. 2d 821.

No. 03–1122. MERCER *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 03–1123. ARMENDARIZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 123 S. W. 3d 401.

No. 03–1124. TENNESSEE *v.* MORAN GARCIA. Sup. Ct. Tenn. Certiorari denied. Reported below: 123 S. W. 3d 335.

No. 03–1127. VAN POYCK *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 860 So. 2d 980.

No. 03–1134. HIGHWAY J CITIZENS GROUP, U. A. *v.* MINETA, SECRETARY OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 349 F. 3d 938.

No. 03–1142. GONZALEZ ET VIR *v.* METROPOLITAN TRANSPORTATION AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 986.

No. 03–1146. SKIPPY INC. *v.* LIPTON INVESTMENTS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 291.

No. 03–1148. MCCOWN *v.* ST. JOHN'S HEALTH SYSTEM, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 349 F. 3d 540.

No. 03–1156. CITIZENS FOR SAFER COMMUNITIES *v.* NORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 348 F. 3d 1020.

No. 03–1168. BATTLE *v.* POSTON, JUDGE, CIRCUIT COURT OF VIRGINIA, CITY OF NORFOLK, ET AL. Sup. Ct. Va. Certiorari denied.

No. 03–1169. KENNEDY ET AL. *v.* VENROCK ASSOCIATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 348 F. 3d 584.

No. 03–1225. J. H. ET AL., BY AND THROUGH THEIR FATHER, HIGGIN *v.* JOHNSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 346 F. 3d 788.

No. 03–1227. PO KEE WONG *v.* PATENT AND TRADEMARK OFFICE, BOARD OF PATENT APPEALS AND INTERFERENCES. C. A. Fed. Cir. Certiorari denied. Reported below: 80 Fed. Appx. 107.

No. 03–1236. DILLARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 505.

No. 03–1239. FACONTI *v.* POTTER, POSTMASTER GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 77 Fed. Appx. 68.

No. 03–7719. FLOM *v.* UNITED STATES; and
No. 03–7748. ALLEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 341 F. 3d 870.

No. 03–7726. BOOTHE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 335 F. 3d 522.

No. 03–7884. YOUNG *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 822 A. 2d 1113.

No. 03–7895. MORGAN *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–7949. HOGAN *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 209.

No. 03–7975. FENNIE *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 855 So. 2d 597.

No. 03–7995. JONES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 30 Cal. 4th 1084, 70 P. 3d 359.

No. 03–8055. BRYAN *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 335 F. 3d 1207.

No. 03–8601. SANFORD *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 03–8633. HARLOW *v.* BLAINE ET AL. C. A. 1st Cir. Certiorari denied.

No. 03–8645. HILL *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 114.

No. 03–8655. FLORES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 92.

No. 03–8657. HAMILTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 03–8658. HEUSS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 712.

No. 03–8669. COLBERT *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 674.

No. 03–8677. WALKER *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8681. NEALY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8683. CERNIGLIA *v.* DEMORALES, EXECUTIVE DIRECTOR, ATASCADERO STATE HOSPITAL, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–8685. HISTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–8686. HOBLEY *v.* BODDIE-NOELL ENTERPRISES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 482.

No. 03–8688. WILLIAMS *v.* ROWLEY, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–8689. WALKER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8690. Luczak *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–8691. Harvey *v.* Garcia, Warden. C. A. 9th Cir. Certiorari denied.

No. 03–8697. Remoi *v.* New Jersey et al. C. A. 3d Cir. Certiorari denied.

No. 03–8698. Riley *v.* Pappert, Attorney General of Pennsylvania, et al. C. A. 3d Cir. Certiorari denied.

No. 03–8704. Kalski *v.* California Association of Professional Employees et al. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 663.

No. 03–8706. Bahoda *v.* Michigan. Cir. Ct. Oakland County, Mich. Certiorari denied.

No. 03–8714. Moss *v.* McKune, Warden, et al. C. A. 10th Cir. Certiorari denied.

No. 03–8718. Curry *v.* Adam's Mark Hotel. C. A. 10th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 399.

No. 03–8737. Sanitate *v.* Gilhooley et al. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 874.

No. 03–8740. Lloyd et ux. *v.* Baker et al. C. A. 5th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 983.

No. 03–8741. Baptiste *v.* Hicks, Warden. C. A. 11th Cir. Certiorari denied.

No. 03–8744. Bey *v.* Trabosh, Judge, Municipal Court, Gloucester Township, New Jersey, et al. C. A. 3d Cir. Certiorari denied.

No. 03–8752. Blandon *v.* Runnels, Warden. C. A. 9th Cir. Certiorari denied.

No. 03–8757. Simon *v.* Mississippi. Sup. Ct. Miss. Certiorari denied. Reported below: 857 So. 2d 668.

No. 03–8759. Conde *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 860 So. 2d 930.

No. 03–8763. MOORE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 03–8764. ARVISO *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 03–8770. DORSEY *v.* NEVADA. C. A. 9th Cir. Certiorari denied.

No. 03–8772. DOVE *v.* DONNELLY, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–8812. JACKSON *v.* NEW JERSEY DEPARTMENT OF HUMAN SERVICES, DIVISION OF DEVELOPMENTAL DISABILITIES. Super. Ct. N. J., App. Div. Certiorari denied.

No. 03–8813. WOODS *v.* ROMANOWSKI, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8816. HARBISON *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8840. CROWLEY *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 03–8862. JONES *v.* LOWE ET AL. C. A. 4th Cir. Certiorari denied.

No. 03–8866. THOMAS *v.* HOLMES, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 77 Fed. Appx. 538.

No. 03–8868. BOGGS *v.* WEST VIRGINIA. Cir. Ct. Wood County, W. Va. Certiorari denied.

No. 03–8881. ALVES RODRIGUES *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 03–8905. RONDEAU *v.* RONDEAU. Sup. Ct. N. H. Certiorari denied.

No. 03–8921. WRIGHT *v.* SACCHET, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 659.

No. 03–8930. BANCROFT *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 03–8944. ROYSTER *v.* HARKLEROAD, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 822.

No. 03–8949. CYR *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–8951. CALDERON *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 621.

No. 03–8971. BRADFORD *v.* RUNNELS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 929.

No. 03–9000. KUNCO *v.* PAPPERT, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 819.

No. 03–9020. HAMILTON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 03–9030. HAYES *v.* GEMMA POWER SYSTEM, LLC, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 302.

No. 03–9031. HOLMES *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 80.

No. 03–9032. HOLMES *v.* CRAWFORD, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 297.

No. 03–9051. SZWEDO *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 03–9053. MINCER *v.* WHITMORE, ACTING ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION. C. A. D. C. Cir. Certiorari denied.

No. 03–9078. THIEFAULT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 389.

No. 03–9149. REDMOND *v.* CLARKE, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 8th Cir. Certiorari denied.

No. 03–9150. FRANCISCO GRANADOS, AKA GRANADOS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 03–9166. MILLER *v.* MCBRIDE, WARDEN. Cir. Ct. Raleigh County, W. Va. Certiorari denied.

No. 03–9175. PINET *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–9186. SOLANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 563.

No. 03–9188. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–9194. LENDMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–9195. COLEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 486.

No. 03–9199. SANDS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–9201. PERKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 352 F. 3d 198.

No. 03–9209. SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–9210. SIMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 218.

No. 03–9212. PRINCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–9213. BOLIVAR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 153.

No. 03–9214. BAUCUM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 820 A. 2d 551.

No. 03–9216. VENTURA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 353 F. 3d 84.

No. 03–9219. MCBARRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 341.

No. 03–9224. AGUILAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 610.

No. 03–9226. TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–9231. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–9232. SERNA-VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 352 F. 3d 225.

No. 03–9237. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 510.

No. 03–9238. KLECKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 348 F. 3d 69.

No. 03–9241. ADKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 701.

No. 03–9242. DELOSSANTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 398.

No. 03–9250. STANFIEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 27.

No. 03–9252. TUCKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–9253. MAGLALANG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 395.

No. 03–9263. MASSEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 Fed. Appx. 596.

No. 03–9264. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 622.

No. 03–9266. KNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–9269. WHITFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 713.

No. 03–9272. RODRIGUEZ *v.* UNITED STATES; GARCIA-GONZALEZ *v.* UNITED STATES; MADRID *v.* UNITED STATES; CARILLO-GALVAN *v.* UNITED STATES; VILLA-NEGRETE *v.* UNITED

STATES; and ACOSTA-ORELLANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 891 (first judgment) and 961 (sixth judgment); 86 Fed. Appx. 785 (third judgment); 87 Fed. Appx. 396 (fourth judgment), 418 (second judgment), and 951 (fifth judgment).

No. 03–9275. UNDER SEAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 341 F. 3d 331.

No. 03–9277. NELSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 636.

No. 03–9281. WEST *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–9288. CONTRERAS OJEDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 390.

No. 03–9289. MEZA-URTADO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 351 F. 3d 301.

No. 03–9290. PENA-REYES *v.* UNITED STATES (Reported below: 87 Fed. Appx. 930); SANCHEZ-LOPEZ *v.* UNITED STATES (85 Fed. Appx. 363); TREJO-SEGURA *v.* UNITED STATES (83 Fed. Appx. 620); MARTINEZ-CARRISALES *v.* UNITED STATES (85 Fed. Appx. 367); BELMARES-DELGADO *v.* UNITED STATES (82 Fed. Appx. 901); ANGULO *v.* UNITED STATES (83 Fed. Appx. 622); CORNEJO-ALCAREZ *v.* UNITED STATES (82 Fed. Appx. 902); DE LA GARZA-RODRIGUEZ *v.* UNITED STATES (83 Fed. Appx. 623); QUINTERO-GUEVARA, AKA ACOLTZI-GUEVARA *v.* UNITED STATES (82 Fed. Appx. 908); MALDONADO-GALLEGOS *v.* UNITED STATES (82 Fed. Appx. 904); MALDONADO-GALLEGOS *v.* UNITED STATES (83 Fed. Appx. 625); PEDROZA-SALINAS *v.* UNITED STATES (82 Fed. Appx. 923); MEJIA-CUELLAR *v.* UNITED STATES (82 Fed. Appx. 909); MARTINEZ-ESTRADA *v.* UNITED STATES (82 Fed. Appx. 925); ESPINOSA-HERNANDEZ, AKA ESPINOSA *v.* UNITED STATES (82 Fed. Appx. 953); RESENDEZ-HERNANDEZ, AKA FLORES *v.* UNITED STATES (83 Fed. Appx. 626); ROMERO-MARTINEZ *v.* UNITED STATES (82 Fed. Appx. 927); HERNANDEZ-VELASQUEZ *v.* UNITED STATES (82 Fed. Appx. 926); FRANCISCO-GOMEZ *v.* UNITED STATES (84 Fed. Appx. 383); DELGADO-HERNANDEZ *v.* UNITED STATES (87 Fed. Appx. 923); ARDON, AKA ORTIZ-GONZALEZ *v.* UNITED STATES (84 Fed. Appx. 384); JIMINEZ-MARTINEZ *v.* UNITED STATES (82 Fed. Appx. 913); VELA-

BECERRA, aka GARAY, aka GARAY-RAMIREZ *v.* UNITED STATES (87 Fed. Appx. 423); BARRAZA-PEREZ *v.* UNITED STATES (87 Fed. Appx. 967); and LOEZA-CASTANEDA *v.* UNITED STATES (82 Fed. Appx. 929). C. A. 5th Cir. Certiorari denied.

No. 03–9297. ERVIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 390.

No. 03–9298. EDMONDSON, aka MOORER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 390.

No. 03–9299. KIRBY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 380.

No. 03–9300. MARTINEZ-HERNANDEZ, aka CAMPOS-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 889.

No. 03–9319. ALTAMIRANO-VARGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 936.

No. 03–918. CHEVY CHASE BANK, F. S. B., ET AL. *v.* WELLS ET AL. Ct. App. Md. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 377 Md. 197, 832 A. 2d 812.

No. 03–8848. AVILES *v.* COLORADO. Ct. App. Colo. Motion of petitioner to consolidate case with No. 03–407, *Kowalski, Judge, 26th Judicial Circuit Court of Michigan, et al.* v. *Tesmer et al.* [certiorari granted, 540 U. S. 1148], denied. Certiorari denied.

Rehearing Denied

No. 03–839. IN RE GENTILUOMO, 540 U. S. 1176;

No. 03–6458. MODENA *v.* UNITED STATES, 540 U. S. 1185;

No. 03–7130. BUTLER *v.* MADISON COUNTY JAIL ET AL., 540 U. S. 1119;

No. 03–7375. ARDOIN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 540 U. S. 1151;

No. 03–7627. KENDRICK *v.* UNITED STATES, 540 U. S. 1133;

No. 03–7693. NEVITT *v.* CHAPEL ET UX. (two judgments), 540 U. S. 1187;

No. 03–7702. RIVAS *v.* UNITED STATES, 540 U. S. 1137;

No. 03–7890. RIDDICK *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 540 U. S. 1192;

No. 03–8052. PUCKETT *v.* IDAHO, 540 U. S. 1198;

No. 03–8283. DUNLAP *v.* MICHIGAN, 540 U. S. 1204; and

No. 03–8409. IN RE KORNAFEL, 540 U. S. 1176. Petitions for rehearing denied.

APRIL 14, 2004

Dismissal Under Rule 46

No. 03–9541. CARDENAS ASPRILLA *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 83 Fed. Appx. 86.

Certiorari Denied

No. 03–9686 (03A838). MCWEE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 357 S. C. 403, 593 S. E. 2d 456.

APRIL 16, 2004

Miscellaneous Orders

No. 03–221. PLILER, WARDEN *v.* FORD. C. A. 9th Cir. [Certiorari granted, 540 U. S. 1099.] Motion of Federal Defenders in the Ninth Circuit for leave to file a brief as *amicus curiae* granted. Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 03–1027. RUMSFELD, SECRETARY OF DEFENSE *v.* PADILLA ET AL. C. A. 2d Cir. [Certiorari granted, 540 U. S. 1173.] Motion of respondents for divided argument denied.

APRIL 19, 2004

Affirmed on Appeal

No. 03–756. BARRIENTOS ET AL. *v.* TEXAS ET AL. Affirmed on appeal from D. C. S. D. Tex. Reported below: 290 F. Supp. 2d 740.

Certiorari Dismissed

No. 03–9225. PHELPS *v.* ASHCROFT, ATTORNEY GENERAL, 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: 79 Fed. Appx. 606.

Miscellaneous Orders

No. 03A706. RUSS *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 03A742. HICKS *v.* SMITH, WARDEN. Application for certificate of appealability, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 03A799 (03–1324). HINKSON *v.* UNITED STATES. Application for release, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–2375. IN RE DISCIPLINE OF GATES. Daniel J. Gates, of Zelienople, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2376. IN RE DISCIPLINE OF GOMEZ. Mark Andrew Gomez, of Newnan, Ga., 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. 03M62. ENRIQUEZ *v.* CASTRO, WARDEN;

No. 03M63. DECORSO *v.* WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC., ET AL.; and

No. 03M64. TALIANO *v.* MITCHELL, WARDEN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 02–10038. TENNARD *v.* DRETKE, DIRECTOR, DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION.

C. A. 5th Cir. [Certiorari granted, 540 U. S. 945.] Motion of petitioner for appointment of counsel granted. Richard Burr, Esq., of Houston, Tex., is appointed to serve as counsel for petitioner in this case.

No. 03–878. CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* SUAREZ MARTINEZ. C. A. 9th Cir. [Certiorari granted, 540 U. S. 1217.] Motion of respondent for appointment of counsel granted. Christine S. Dahl, Esq., of Portland, Ore., is appointed to serve as counsel for respondent in this case.

No. 03–6539. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal. [Certiorari granted, 540 U. S. 1045.] Motion of petitioner to file supplemental brief after argument granted.

No. 03–8018. SIEGEL *v.* CRESCENT POTOMAC PROPERTIES, LLC, ET AL. Sup. Ct. Va. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [540 U. S. 1174] denied.

No. 03–8342. DARBY *v.* DEPARTMENT OF DEFENSE ET AL. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [540 U. S. 1217] denied.

No. 03–8788. MURPHY *v.* WASHINGTON. Ct. App. Wash.; and
No. 03–9011. CORBIN *v.* FLORIDA BAR. Sup. Ct. Fla. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 10, 2004, 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. 03–9472. IN RE MCQUIDDY;
No. 03–9474. IN RE SANDOVAL;
No. 03–9499. IN RE REYNOLDS; and
No. 03–9535. IN RE SETTS. Petitions for writs of habeas corpus denied.

No. 03–8346. IN RE COOPER;
No. 03–8796. IN RE TORRES;
No. 03–8962. IN RE BRADLEY;
No. 03–9180. IN RE BUTLER;
No. 03–9217. IN RE MENDEZ;

No. 03–9361. IN RE RILEY; and

No. 03–9438. IN RE SIMMONDS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 03–710. DEVENPECK ET AL. *v.* ALFORD. C. A. 9th Cir. Certiorari granted. Reported below: 333 F. 3d 972.

Certiorari Denied

No. 03–829. PENN *v.* BODIN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 335 F. 3d 786.

No. 03–831. RANGER CELLULAR ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 333 F. 3d 255.

No. 03–858. UAW-LABOR EMPLOYMENT & TRAINING CORP. ET AL. *v.* CHAO, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 325 F. 3d 360.

No. 03–872. VAUGHN ET AL. *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 336 F. 3d 1351.

No. 03–935. NORTH DAKOTA ET AL. *v.* UBBELOHDE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 330 F. 3d 1014.

No. 03–950. BANKRUPTCY RECEIVABLES MANAGEMENT *v.* LOPEZ ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 345 F. 3d 701.

No. 03–955. CARMICHAEL ET UX. *v.* PAYMENT CENTER, INC. C. A. 7th Cir. Certiorari denied. Reported below: 336 F. 3d 636.

No. 03–985. BREWER *v.* BOARD OF TRUSTEES OF UNIVERSITY OF ILLINOIS ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 339 Ill. App. 3d 1074, 791 N. E. 2d 657.

No. 03–1007. FREEDOM NY, INC. *v.* RUMSFELD, SECRETARY OF DEFENSE. C. A. Fed. Cir. Certiorari denied. Reported below: 329 F. 3d 1320.

No. 03–1008. PASTENE *v.* PIKKERT. C. A. 4th Cir. Certiorari denied. Reported below: 63 Fed. Appx. 166.

No. 03–1011. MANATEE COUNTY, FLORIDA *v.* PEEK-A-BOO LOUNGE OF BRADENTON, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 337 F. 3d 1251.

No. 03–1066. COLOSIMO *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 669 N. W. 2d 1.

No. 03–1089. ARTISTIC ENTERTAINMENT, INC., DBA TEASERS, ET AL. *v.* CITY OF WARNER ROBINS, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 331 F. 3d 1196.

No. 03–1129. SHOKETSU KINZOKU KOGYO KABUSHIKI CO., LTD., AKA SMC CORP., ET AL. *v.* FESTO CORP.; and

No. 03–1133. FESTO CORP. *v.* SHOKETSU KINZOKU KOGYO KABUSHIKI, CO., LTD., AKA SMC CORP., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 344 F. 3d 1359.

No. 03–1136. SLUSARCHUK ET AL. *v.* HOFF ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 346 F. 3d 1178.

No. 03–1137. NOVELLO, IN HER INDIVIDUAL AND OFFICIAL CAPACITY *v.* DIBLASIO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 344 F. 3d 292.

No. 03–1143. JEAN DEVELOPMENT CO., DBA GOLD STRIKE HOTEL AND GAMBLING HALL *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–1152. JAMES *v.* RICE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 907.

No. 03–1158. GREEN ET AL. *v.* SPRINT COMMUNICATIONS CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 340 F. 3d 1047.

No. 03–1161. NEWMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 74 Fed. Appx. 126.

No. 03–1163. WYETH HOLDINGS CORP. *v.* UNIVERSITY OF COLORADO FOUNDATION, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 342 F. 3d 1298.

No. 03–1171. OBER *v.* EVANKO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 196.

No. 03–1181. SELF COMMUNICATIONS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 349 F. 3d 667.

No. 03–1183. ENDRES *v.* INDIANA STATE POLICE. C. A. 7th Cir. Certiorari denied. Reported below: 349 F. 3d 922.

No. 03–1185. CASILLAS *v.* RAWERS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 551.

No. 03–1186. CARMONA, AKA KESTER *v.* CARMONA, AS SUCCESSOR REPRESENTATIVE OF CARMONA, DECEASED. Sup. Ct. Nev. Certiorari denied.

No. 03–1195. GILL *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 973.

No. 03–1209. PHELAN *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 347 F. 3d 679.

No. 03–1216. WITTNER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 442.

No. 03–1217. CONSOLE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 869.

No. 03–1221. SAFETY NATIONAL CASUALTY CORP. *v.* SHOOK & FLETCHER ASBESTOS SETTLEMENT TRUST. C. A. 8th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 238.

No. 03–1222. MOUNTAIN ENTERPRISES, INC. *v.* FITCH ET AL. Cir. Ct. Lincoln County, W. Va. Certiorari denied.

No. 03–1223. MOUNTAIN ENTERPRISES, INC. *v.* FITCH ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 03–1228. BHUTANI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–1246. GUANG CHYI LIU ET AL. *v.* DUNKIN' DONUTS INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 79 Fed. Appx. 543.

No. 03–1256. DAYTON NEWSPAPERS, INC. *v.* GENERAL TRUCK DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL No. 957. C. A. 6th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 712.

No. 03–1258. LUNDY ET AL. *v.* AMERICAN CYANAMID CO. C. A. 6th Cir. Certiorari denied. Reported below: 350 F. 3d 496.

No. 03–1263. NEINAST *v.* BOARD OF TRUSTEES OF THE COLUMBUS METROPOLITAN LIBRARY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 346 F. 3d 585.

No. 03–1271. LARA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 67 Fed. Appx. 72.

No. 03–1277. OPARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 139.

No. 03–1278. PERSIK *v.* COLORADO STATE UNIVERSITY. C. A. 10th Cir. Certiorari denied. Reported below: 60 Fed. Appx. 209.

No. 03–1295. STEINER *v.* POTTER, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 354 F. 3d 432.

No. 03–1296. BUCKLEY *v.* MEIS, REGIONAL CHIEF COUNSEL, OFFICE OF GENERAL COUNSEL, SEATTLE REGION X, SOCIAL SECURITY ADMINISTRATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 192.

No. 03–1312. PAYMAN *v.* ABDRABBO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 826.

No. 03–1324. HINKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–1337. KRAMER *v.* OLSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 347 F. 3d 214.

No. 03–7694. PACHECO-MEDINA *v.* OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 104.

No. 03–7728. THORELL ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 149 Wash. 2d 724, 72 P. 3d 708.

No. 03–7945. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 343 F. 3d 849.

No. 03–7992. COX *v.* HEMAR INSURANCE CORPORATION OF AMERICA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 338 F. 3d 1238.

No. 03–8029. ADAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 834 A. 2d 129.

No. 03–8098. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 226.

No. 03–8434. SULLIVAN *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 162.

No. 03–8447. AVALOS ALBA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–8468. MEZA-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 432.

No. 03–8616. CREW *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 4th 822, 74 P. 3d 820.

No. 03–8667. YEOMAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 4th 93, 72 P. 3d 1166.

No. 03–8774. COWAN *v.* MOORE, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8775. DUKES *v.* E. R. MANAGEMENT, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 223.

No. 03–8779. CRISWELL *v.* DRETKE, DIRECTOR, DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8780. CHANDLER *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8782. COOPER *v.* JOHNSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 82 Fed. Appx. 258.

No. 03–8784. PERRY *v.* BYRD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 873.

No. 03–8785. ORTEZ *v.* DRETKE, DIRECTOR, DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8787. AINSWORTH *v.* AINSWORTH ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 860 So. 2d 104.

No. 03–8798. SARAH *v.* BRADLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 562.

No. 03–8799. MARTIN *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 176 Vt. 653, 845 A. 2d 1027.

No. 03–8803. COMI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–8811. JOHNSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–8818. ROBERTSSON *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 742.

No. 03–8820. PICKETT *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 548.

No. 03–8821. HARRIS *v.* MCADORY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 334 F. 3d 665.

No. 03–8824. HOLLEN *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 87 S. W. 3d 151.

No. 03–8828. HUME *v.* BARTON PROTECTIVE SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 726.

No. 03–8831. MARKS *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8834. MORROW *v.* LINDSEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8836. BROWN-BEY *v.* EARLY, DISTRICT ATTORNEY, SECOND JUDICIAL DISTRICT, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 03–8837. PUGH *v.* WALKER, CLERK, SUPERIOR COURT OF GEORGIA, DODGE COUNTY. C. A. 11th Cir. Certiorari denied.

No. 03–8838. MILNER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8839. BARBER *v.* OHIO UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied.

No. 03–8841. DUEST *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 855 So. 2d 33.

No. 03–8842. CHAVIS *v.* HEWLETT PACKARD CO. C. A. 3d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 284.

No. 03–8845. LOSS *v.* LERLERC. C. A. 6th Cir. Certiorari denied.

No. 03–8847. KOCH *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 337 Ill. App. 3d 1178, 843 N. E. 2d 521.

No. 03–8849. BARA *v.* BUTLER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8851. BROWN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8853. MARIAN *v.* SUPERIOR COURT OF CALIFORNIA, VENTURA COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–8854. LOVETT *v.* GUNDY, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 03–8861. BURNETT *v.* THOMPSON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 781.

No. 03–8865. BUCKNER *v.* DORMIRE, SUPERINTENDENT, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied.

No. 03–8872. PINSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–8873. McPherson *v.* Goord, Commissioner, New York Department of Correctional Services, et al. C. A. 2d Cir. Certiorari denied.

No. 03–8875. Altamirano *v.* Washington. Sup. Ct. Wash. Certiorari denied.

No. 03–8877. Beeson *v.* Ada County Clerk et al. C. A. 9th Cir. Certiorari denied.

No. 03–8880. Ratzke *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 03–8883. Smith *v.* Wilson, Superintendent, Mississippi State Penitentiary. C. A. 5th Cir. Certiorari denied.

No. 03–8884. Bellah *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 03–8886. Torres *v.* Conway, Superintendent, Attica Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 03–8887. Young *v.* Flippo et al. C. A. 5th Cir. Certiorari denied.

No. 03–8888. Dais *v.* Conway, Superintendent, Attica Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 03–8889. D'Antuono *v.* New York. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 306 App. Div. 2d 890, 762 N. Y. S. 2d 198.

No. 03–8891. Norville *v.* Illinois Department of Human Rights et al. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 341 Ill. App. 3d 260, 792 N. E. 2d 825.

No. 03–8893. Almonte *v.* Goord, Commissioner, New York Department of Correctional Services. C. A. 2d Cir. Certiorari denied. Reported below: 56 Fed. Appx. 4.

No. 03–8895. Russell *v.* Vittands. C. A. 6th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 859.

No. 03–8897. Pepper *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 03–8898. BURRELL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–8901. TAYLOR *v.* LEE COUNTY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–8902. TAYLOR *v.* SPENCER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 991.

No. 03–8906. VON BROCK *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 03–8907. ROSA *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–8908. SOUSER *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 659.

No. 03–8909. ROBISON *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8911. SMITH *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8918. SMITH *v.* GRANT ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8926. LANE *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–8927. PEREZ *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–8928. PERRY *v.* CITY OF BIRMINGHAM, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 221.

No. 03–8934. MARTINEZ *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–8942. MARSH *v.* RICKS. C. A. 2d Cir. Certiorari denied.

No. 03–8943. KNOX *v.* CASON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 03–8945. THOMPSON *v.* HENRY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 213.

No. 03–8953. SHIELDS *v.* WHITE, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 72.

No. 03–8955. REVELS *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. C. A. 5th Cir. Certiorari denied.

No. 03–8957. HALL *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 341 F. 3d 706.

No. 03–8960. SMITH *v.* AMERICAN HOME PRODUCTS CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–8961. ABRON *v.* RAWERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8966. BISHOP *v.* BISHOP. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–8970. SIMMONS *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 100 S. W. 3d 484.

No. 03–8974. ABDUL-KHABIR, AKA DAVIS *v.* CHERRY, SUPERINTENDENT, HAMPTON ROADS REGIONAL JAIL, ET AL. C. A. 4th Cir. Certiorari denied.

No. 03–8975. KELLER *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 527.

No. 03–8976. ADAMSON *v.* MAZZUCA, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–8983. ANDERSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–8984. THOMPSON *v.* DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT. C. A. 11th Cir. Certiorari denied.

No. 03–9007. JETER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 809.

No. 03–9016. EVANS *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 775.

No. 03–9018. HELMS *v.* MARYLAND. Cir. Ct. Allegany County, Md. Certiorari denied.

No. 03–9037. LAUSHAW *v.* KELLY, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 03–9045. GALLOWAY *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 304.

No. 03–9050. LAYTON *v.* PAINTER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 771.

No. 03–9062. GRAHAM *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 260.

No. 03–9067. GARCIA *v.* TAYLOR, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9069. HEMINGWAY *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–9075. SAMPLE *v.* CHESNEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–9081. MILES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 03–9090. HARTEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 816 A. 2d 329.

No. 03–9092. TOLENTINO *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–9096. HOWARD *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 328 Ill. App. 3d 1100, 817 N. E. 2d 225.

No. 03–9097. HEARNS *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–9100. YOUNG *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 670 N. W. 2d 430.

No. 03–9105. GARRETT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 331 Ill. App. 3d 1129, 835 N. E. 2d 466.

No. 03–9111. WATKINS *v.* CURTIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9114. TRIGUEROZ-GONZALEZ *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 03–9122. HYNES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–9127. MITCHELL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 03–9135. DORENBOS *v.* GALVIN. C. A. 9th Cir. Certiorari denied.

No. 03–9137. CALDWELL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 864 So. 2d 402.

No. 03–9139. CARTER *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 511.

No. 03–9147. HOLLAND *v.* FRANK ET AL. C. A. 6th Cir. Certiorari denied.

No. 03–9154. GRIFFIN *v.* JOHNSON, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 350 F. 3d 956.

No. 03–9193. TOODLE *v.* BUSH, PRESIDENT OF THE UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–9233. SALYER *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 80 P. 3d 831.

No. 03–9235. SHIELDS *v.* POTTER, POSTMASTER GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 541.

No. 03–9248. SHAVER *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9265. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–9276. MORANT *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 600.

No. 03–9283. TUCKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–9285. RIOS-MARADIAGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 755.

No. 03–9291. MORELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–9292. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 913.

No. 03–9301. MATHISON ET UX. *v.* CORRECTIONS CORPORATION OF AMERICA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 720.

No. 03–9302. MANLEY *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied.

No. 03–9303. BACHMANN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 865 So. 2d 489.

No. 03–9304. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–9309. BREEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 03–9310. SOSA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 191.

No. 03–9312. WOODS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 827.

No. 03–9313. REED *v.* OHIO. Ct. App. Ohio, Clark County. Certiorari denied.

No. 03–9315. AINSWORTH *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 924.

No. 03–9316. JACKSON *v.* BROOKS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 898.

No. 03–9320. BERNARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 351 F. 3d 360.

No. 03–9321. SANCHEZ-GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 934.

No. 03–9327. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 343 F. 3d 927.

No. 03–9328. VAN POYCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–9329. SARFF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–9330. JOHNSON *v.* UNITED STATES; and
No. 03–9470. PHILLIPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 349 F. 3d 138.

No. 03–9335. SOMSAMOUTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 352 F. 3d 1271.

No. 03–9336. MEADOWS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 77 Fed. Appx. 575.

No. 03–9340. BARNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9342. MARSHALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 338 F. 3d 990.

No. 03–9346. MILTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–9347. HERRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 872.

No. 03–9354. FLEMING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 916.

No. 03–9355. GRAYDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 711.

No. 03–9356. HESS, AKA HEB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 389.

No. 03–9364. BOWENS, AKA MCCURDY, AKA JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 726.

No. 03–9365. BEMIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 1.

No. 03–9366. MONDRAGON-SOTO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 894.

No. 03–9367. LOPEZ-CASTANEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 961.

No. 03–9369. TOPETE-PLASCENCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 351 F. 3d 454.

No. 03–9371. HOPKINS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 688.

No. 03–9374. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 171.

No. 03–9377. GREY, AKA GRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 87 Fed. Appx. 254.

No. 03–9379. HUNDLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 875.

No. 03–9381. MOLINA-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 18.

No. 03–9382. MEDINA-SALINAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 968.

No. 03–9384. CERA-GONZALEZ *v.* UNITED STATES (Reported below: 82 Fed. Appx. 914); FEGURACION-MARTINEZ *v.* UNITED

STATES (82 Fed. Appx. 920); HERNANDEZ-REYES *v.* UNITED STATES (82 Fed. Appx. 881); LAVARIEGA-LAVARIEGA *v.* UNITED STATES (84 Fed. Appx. 388); MORALES-ESCALERA *v.* UNITED STATES (82 Fed. Appx. 955); MORALES-MARTINEZ, AKA SANCHEZ FLORES, AKA SANCHEZ, AKA SILVA, AKA LANDEROS, AKA FLORES SANCHEZ *v.* UNITED STATES (82 Fed. Appx. 903); OSORTO-LAGOS *v.* UNITED STATES (82 Fed. Appx. 954); QUINTERO-CRUZ *v.* UNITED STATES (82 Fed. Appx. 930); SAUCEDO-FLORES, AKA VALDEZ, AKA NAVA *v.* UNITED STATES (83 Fed. Appx. 606); URIAS-MELENDEZ *v.* UNITED STATES (82 Fed. Appx. 883); ELIAS VERA *v.* UNITED STATES (82 Fed. Appx. 931); YANEZ-GONZALEZ, AKA GONZALEZ-YANEZ *v.* UNITED STATES (82 Fed. Appx. 884); and SANDRES-MEDINA *v.* UNITED STATES (82 Fed. Appx. 917). C. A. 5th Cir. Certiorari denied.

No. 03–9386. ESQUIVEL-ROMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 597.

No. 03–9387. CRUZ-BOLANOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 895.

No. 03–9388. CURTIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9389. ESQUIVAL-SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 604.

No. 03–9392. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 511.

No. 03–9394. MORGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 786.

No. 03–9395. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–9396. ZAMORA-QUINTANILLA *v.* UNITED STATES; TINAJERO-REYES, AKA TINAJERO REYES *v.* UNITED STATES; GARCIA-REYES *v.* UNITED STATES; GARCIA-CAMACHO *v.* UNITED STATES; WILLIAMS *v.* UNITED STATES; VILLARREAL *v.* UNITED STATES; and DE LA CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 397 (fourth judgment), 912 (sixth judgment), and 927 (fifth judgment); 83 Fed. Appx. 610 (second judgment); 87 Fed. Appx. 387 (first judgment), 427 (seventh judgment), and 988 (third judgment).

No. 03–9397. LASTRAPES *v.* UNITED STATES; UNDERWOOD *v.* UNITED STATES; SANDERS *v.* UNITED STATES; JACKSON *v.* UNITED STATES; and CANTU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 897 (third judgment); 87 Fed. Appx. 411 (second judgment), 938 (fifth judgment), and 972 (fourth judgment); 88 Fed. Appx. 753 (first judgment).

No. 03–9399. TAPIA-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 893.

No. 03–9401. SCHOFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 798.

No. 03–9409. CHAO KANG LIN, AKA KANT CHAO LIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 806.

No. 03–9411. LERMA-LERMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–9414. EULLOQUI *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 807.

No. 03–9421. MEDLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 410.

No. 03–9426. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 875.

No. 03–9429. PELTIER *v.* BOOKER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 348 F. 3d 888.

No. 03–9430. BRUMMETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 355 F. 3d 343.

No. 03–9431. SMOOTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 995.

No. 03–9433. COLEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 881.

No. 03–9448. WELLINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 828.

No. 03–9449. LEWIS *v.* ROMINE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 871.

No. 03–9452. CARRILLO-NARAJO, aka CARRILLO-NARANJO *v.* UNITED STATES; GOMEZ-LOPEZ *v.* UNITED STATES; VALENCIA-GOMEZ *v.* UNITED STATES; VIRRUETA-TORRES *v.* UNITED STATES; and ZARAGOZA-ESPINOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–9453. DICKENS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 830.

No. 03–9455. WHAB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 355 F. 3d 155.

No. 03–9456. VASQUEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 352 F. 3d 1067.

No. 03–9458. MAYWEATHERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–9461. PEVARNIK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 816.

No. 03–9466. SANTIAGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 76 Fed. Appx. 397.

No. 03–9467. MEMBRANO-ACOSTA *v.* UNITED STATES (Reported below: 82 Fed. Appx. 887); VASQUEZ-FLORES, aka VASQUEZ, aka FLORES, aka HERNANDEZ, aka CARREON *v.* UNITED STATES (82 Fed. Appx. 942); GARZA-RODRIGUEZ *v.* UNITED STATES (82 Fed. Appx. 888); MEJIA-SANCHEZ, aka GARCIA-ARMENTA *v.* UNITED STATES (82 Fed. Appx. 963); ARAIZA-MORALES *v.* UNITED STATES (82 Fed. Appx. 915); MORALES-RAMIREZ *v.* UNITED STATES (84 Fed. Appx. 387); MUNOZ-MENDEZ *v.* UNITED STATES (82 Fed. Appx. 939); GONZALEZ-RODRIGUES *v.* UNITED STATES (82 Fed. Appx. 959); RAMIREZ-ROMERO, aka RAMIREZ *v.* UNITED STATES (82 Fed. Appx. 944); SANCHEZ-VENEGAS *v.* UNITED STATES (82 Fed. Appx. 886); and TORRES-MARQUEZ *v.* UNITED STATES (82 Fed. Appx. 941). C. A. 5th Cir. Certiorari denied.

No. 03–9471. MCCOY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9478. AUGARTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 564.

No. 03–9479. SHORTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 03–9481. BROWN, AKA BRYANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 54 Fed. Appx. 342.

No. 03–9486. CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–9487. RAMIREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 83 Fed. Appx. 384.

No. 03–9493. PERDOMO ESPANA, AKA DOE, AKA PERDOMO-ESPANA, AKA PERDOMO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 868.

No. 03–9497. HELM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 475.

No. 03–9500. JOYNER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 818 A. 2d 166 and 819 A. 2d 320.

No. 03–9502. JUNIOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 357.

No. 03–9505. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–9509. PEREZ RUIZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 353 F. 3d 1.

No. 03–9511. CASTLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 977.

No. 03–9515. BANKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 830 A. 2d 897.

No. 03–1153. LOUISIANA *v.* CISCO. Sup. Ct. La. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 861 So. 2d 118.

No. 03–1170. SHAFFER *v.* AMADA AMERICA, INC. C. A. 8th Cir. Motion of petitioner for sanctions and for leave to supplement the record denied. Certiorari denied.

No. 03–1213. MOORE *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 6, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 78 Fed. Appx. 8.

No. 03–8751. LOVITT *v.* TRUE, WARDEN. Sup. Ct. Va. Motion of National Association of Criminal Defense Lawyers et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 266 Va. 216, 585 S. E. 2d 801.

No. 03–8923. RUCKER *v.* SANTA CLARA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 03–761. RANCHO VIEJO, LLC *v.* NORTON, SECRETARY OF THE INTERIOR, ET AL., 540 U. S. 1218;

No. 03–771. CAGNA, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF CAGNA *v.* WEIRTON STEEL CORPORATION RETIREMENT PLAN-PLAN 001 ET AL., 540 U. S. 1158;

No. 03–790. SAFETY NATIONAL CASUALTY CORP. *v.* DOW CORNING CORP., 540 U. S. 1219;

No. 03–818. GALLAGHER, AKA FREEMAN *v.* MASSAD, 540 U. S. 1180;

No. 03–837. DERRINGER *v.* CHAPEL ET UX. (two judgments), 540 U. S. 1180;

No. 03–906. O'BRIEN *v.* CITY OF HACKENSACK, NEW JERSEY, 540 U. S. 1182;

No. 03–908. JOOS *v.* JOOS (MONTE), 540 U. S. 1183;

No. 03–947. MOTLEY *v.* VIRGINIA STATE BAR, 540 U. S. 1183;

No. 03–976. SULLIVAN ET AL. *v.* UNITED STATES ET AL., 540 U. S. 1184;

No. 03–7059. HOLLEY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 540 U. S. 1116;

No. 03–7070. BRADHAM *v.* MICHAEL, WARDEN, 540 U. S. 1117;

No. 03–7470. GAINES *v.* TEXAS, 540 U. S. 1153;

No. 03–7676. NEWMAN *v.* CALIFORNIA, 540 U. S. 1186;

No. 03–7684. LEWIS *v.* ROBINSON, WARDEN, 540 U. S. 1187;

No. 03–7762. COOPER *v.* PEGUESS, WARDEN, ET AL., 540 U. S. 1189;

No. 03–7781. BURGE *v.* GOURLEY, DIRECTOR, CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, 540 U. S. 1189;

No. 03–7834. GODINES *v.* UNITED STATES, 540 U. S. 1140;
No. 03–7852. EVANS *v.* UNITED STATES, 540 U. S. 1155;
No. 03–8001. BROOKS *v.* LUOMA, WARDEN, 540 U. S. 1196;
No. 03–8011. OLDS *v.* MISSOURI, 540 U. S. 1196;
No. 03–8126. MILNER *v.* WOLFE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL., 540 U. S. 1200;
No. 03–8134. JONES *v.* UNITED STATES, 540 U. S. 1200;
No. 03–8201. MCDAVIS *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL., 540 U. S. 1202;
No. 03–8272. EDMONSON *v.* UNITED STATES, 540 U. S. 1204; and
No. 03–8286. DAVIS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 540 U. S. 1224. Petitions for rehearing denied.

No. 02–1348. OLYMPIC AIRWAYS *v.* HUSAIN, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HANSON, DECEASED, ET AL., 540 U. S. 644. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

APRIL 23, 2004

Miscellaneous Order

No. 03A879. BAGLEY, WARDEN *v.* LOTT. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Sixth Circuit on April 22, 2004, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

APRIL 26, 2004

Certiorari Granted—Vacated and Remanded

No. 03–910. LEAKE, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL. *v.* NORTH CAROLINA RIGHT TO LIFE, INC., ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McConnell* v. *Federal Election Comm'n,* 540 U. S. 93 (2003). Reported below: 344 F. 3d 418.

*Miscellaneous Orders**

No. 03M65. LOGAN *v.* BRIDGEMAN ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 03M66. IN RE KHALID; and

No. 03M67. IN RE EL-BANNA ET AL. Motions for leave to proceed *in forma pauperis* without affidavits of indigency executed by petitioners granted.

No. 128, Orig. ALASKA *v.* UNITED STATES. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 540 U. S. 1043.]

No. 03–377. KOONS BUICK PONTIAC GMC, INC. *v.* NIGH. [Certiorari granted, 540 U. S. 1148.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 03–878. CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* SUAREZ MARTINEZ. [Certiorari granted, 540 U. S. 1217.] Motion of petitioner Crawford to dispense with printing the joint appendix granted.

No. 03–1424. AL-MARRI *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. 7th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 03–8253. BITTERMAN *v.* HOFFMAN ET AL. Sup. Ct. Fla. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 901] denied.

No. 03–9116. BASKER *v.* BOYCE ET AL. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 17, 2004, 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. 03–9699. IN RE HARRIS ET AL. Petition for writ of habeas corpus denied.

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*For the Court's orders prescribing amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1099; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1105.

No. 03–9498. In re Rigsby. Petition for writ of mandamus denied.

Certiorari Granted

No. 03–184. Ballard et ux. *v.* Commissioner of Internal Revenue. C. A. 11th Cir.; and

No. 03–1034. Estate of Kanter, Deceased, et al. *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari granted, cases consolidated, and a total of one hour alloted for oral argument. Reported below: No. 03–184, 321 F. 3d 1037; No. 03–1034, 337 F. 3d 833.

Certiorari Denied

No. 03–897. North Carolina Payphone Assn. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 334 F. 3d 69.

No. 03–909. Louis *v.* Ashcroft, Attorney General. C. A. 3d Cir. Certiorari denied.

No. 03–1042. Senior Technologies, Inc. *v.* R. F. Technologies, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 76 Fed. Appx. 318.

No. 03–1052. Glendale Unified High School District No. 205 of Maricopa County *v.* Savage. C. A. 9th Cir. Certiorari denied. Reported below: 343 F. 3d 1036.

No. 03–1063. Jones *v.* Flowserve FCD Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 706.

No. 03–1068. Nippon Kaiji Kyokai Corp. *v.* Otto Candies, L. L. C. C. A. 5th Cir. Certiorari denied. Reported below: 346 F. 3d 530.

No. 03–1174. Norton et vir *v.* Hall et al. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 834 A. 2d 928.

No. 03–1177. Zelinsky et ux. *v.* Tax Appeals Tribunal of New York et al. Ct. App. N. Y. Certiorari denied. Reported below: 1 N. Y. 3d 85, 801 N. E. 2d 840.

No. 03–1182. Riley et al. *v.* Eckard Brandes, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 338 F. 3d 1082.

No. 03–1184. DIBBLE *v.* FENIMORE. C. A. 2d Cir. Certiorari denied. Reported below: 339 F. 3d 120.

No. 03–1188. OLIVA ET AL. *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 762.

No. 03–1189. LEVY *v.* P&R DENTAL STRATEGIES, INC., ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 302 App. Div. 2d 255, 756 N. Y. S. 2d 3.

No. 03–1192. STAWSKI DISTRIBUTING CO., INC. *v.* BROWARY ZYWIEC S. A., DBA ZYWIEC BREWERIES, LLC. C. A. 7th Cir. Certiorari denied. Reported below: 349 F. 3d 1023.

No. 03–1193. GUESON ET AL. *v.* SHEPPARD, JUDGE, COURT OF COMMON PLEAS, FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 870.

No. 03–1194. GRAY *v.* FOXWORTHY, INC., ET AL. Sup. Ct. Ga. Certiorari denied.

No. 03–1196. FREEMAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 858 So. 2d 319.

No. 03–1197. GROSJEAN *v.* FIRST ENERGY CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 349 F. 3d 332.

No. 03–1204. SUTTON *v.* INTERSTATE HOTELS, LLC, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 349 F. 3d 1356.

No. 03–1205. SIBLEY *v.* ANSTEAD, CHIEF JUSTICE, SUPREME COURT OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 715.

No. 03–1206. CUNNINGHAM *v.* PEREZ. C. A. 9th Cir. Certiorari denied. Reported below: 345 F. 3d 802.

No. 03–1207. TEKSE *v.* MITCHELL ET AL. Ct. App. Minn. Certiorari denied.

No. 03–1210. JOHNSON *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 344 F. 3d 567.

No. 03–1214. ALLSTATE CORP. ET AL. *v.* DEHOYOS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 345 F. 3d 290.

No. 03–1215. CHRIST'S HOUSEHOLD OF FAITH *v.* ROONEY ET AL. Ct. App. Minn. Certiorari denied. Reported below: 669 N. W. 2d 362.

No. 03–1286. GODWIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATES OF GODWIN, ET AL. *v.* HILL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 193.

No. 03–1351. BARANSKI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 566.

No. 03–1356. ZVI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 03–7692. DE MEDEIROS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–8257. ABDUR'RAHMAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 03–8427. SAPP *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 4th 240, 73 P. 3d 433.

No. 03–8507. MONTALVO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 331 F. 3d 1052.

No. 03–8536. GARCIA-SALDIVAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 927.

No. 03–8914. DIAZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 860 So. 2d 960.

No. 03–8980. YOUNG *v.* THOMAS, SHERIFF, HARRIS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–8981. YOUNG *v.* MILLER ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–8988. KOSTE *v.* DORMIRE, SUPERINTENDENT, MISSOURI STATE PENITENTIARY. C. A. 8th Cir. Certiorari denied. Reported below: 345 F. 3d 974.

No. 03–8991. THOMPSON *v.* WHITE, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 563.

No. 03–8992. ALEXANDER *v.* TIPPAH COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 351 F. 3d 626.

No. 03–8998. RODRIGUEZ *v.* DISTRICT COURT OF NEVADA, CLARK COUNTY, ET AL. Sup. Ct. Nev. Certiorari denied.

No. 03–9009. J. K. *v.* DAUPHIN COUNTY CHILDREN AND YOUTH SERVICES. Super. Ct. Pa. Certiorari denied.

No. 03–9010. CROOM *v.* CORRECTIONS CORPORATION OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–9012. CLARK *v.* YUBA COUNTY DISTRICT ATTORNEY'S OFFICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 704.

No. 03–9013. COATES *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9017. HUNTER *v.* LEE. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 650.

No. 03–9023. HAWK *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 63 Fed. Appx. 325.

No. 03–9026. HUGGINS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 575 Pa. 395, 836 A. 2d 862.

No. 03–9029. WALKER *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 03–9033. GROSS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9034. FREEMAN *v.* THOMAS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9038. JOHNSON *v.* MUELLER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 304.

No. 03–9039. BEAVER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9043. PARMELEE *v.* MAYES ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–9052. BOHM *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9054. BALLARD *v.* BRAXTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 318.

No. 03–9059. FOGGY *v.* EMPLOYERS INSURANCE COMPANY OF NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 03–9061. HOLLOWAY *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9063. HENDERSON *v.* UNIVERSITY OF TEXAS MEDICAL BRANCH ET AL. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 03–9070. HOUSER *v.* PARKER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 655.

No. 03–9071. HUNG TIEN NGUYEN *v.* LARSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9076. RAHEMAN *v.* RAHEMAN. App. Ct. Mass. Certiorari denied. Reported below: 59 Mass. App. 915, 795 N. E. 2d 1239.

No. 03–9077. MEEKS *v.* BELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9082. MEDIACEJA *v.* HORNER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 488.

No. 03–9083. GARCIA *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 106 S. W. 3d 854.

No. 03–9084. ISSAC *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 222.

No. 03–9086. GILBERT *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9087. HUTCH *v.* ESPINDA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9093. MILLER *v.* MILLER. Ct. App. S. C. Certiorari denied.

No. 03–9095. HUTTON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 03–9103. MONTEROS *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–9104. WOODS *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9106. GRAHAM *v.* BATTLE, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 03–9113. WEST *v.* WORKMAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–9117. DENNIS *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 388.

No. 03–9120. CHALOR *v.* IONICS, INCORPORATED OF MASSACHUSETTS. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 387.

No. 03–9121. HAWKINS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 03–9123. HUNT *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 34.

No. 03–9124. MCTAGGART *v.* ROE V. WADE ET AL. Sup. Ct. Iowa. Certiorari denied.

No. 03–9126. WERBER *v.* BARTOS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 694.

No. 03–9128. FIELDS *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 03–9130. HOLIDAY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9131. GRIFFIN *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–9133. FORBES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 03–9134. GONZALEZ *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9142. HOLIDAY *v.* CITY OF KALAMAZOO, MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 03–9143. HENDRICKS *v.* YOUNG. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 700.

No. 03–9145. GUIDROZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9151. HUSS *v.* KING CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 338 F. 3d 647.

No. 03–9158. PRICE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–9169. KEENAN *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9171. JACK-BEY *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9176. MOORE *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9178. SMITH *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 185.

No. 03–9229. BUSSIERE *v.* SCRIBNER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 561.

No. 03–9245. CLAUS *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 694.

No. 03–9247. SCHUELLER *v.* MINNEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 132.

No. 03–9255. DANFORTH *v.* MCLEMORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9260. DYE *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 779.

No. 03–9279. WILLIAMS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 159 N. C. App. 468, 583 S. E. 2d 428.

No. 03–9280. WALKER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 329 Ill. App. 3d 1252, 835 N. E. 2d 205.

No. 03–9282. THOMAS *v.* SCHWARZENEGGER, GOVERNOR OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 03–9293. ALDER *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9314. ROBINSON *v.* CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 03–9324. MOORE *v.* GRANT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 676.

No. 03–9341. BRANCH *v.* BUTLER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9358. GLASS *v.* BROADWAY ELECTRIC SERVICE, INC. C. A. 6th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 599.

No. 03–9373. FIELDS *v.* BOARD OF MANAGERS OF THE HIDDEN GLEN CONDOMINIUM ASSN. ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 03–9375. GAMIERE *v.* KAYKO ET AL. Ct. App. Ohio, Trumbull County. Certiorari denied.

No. 03–9376. HOLTERMAN *v.* MORROW, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 136.

No. 03–9410. MARLER *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9417. SMITH *v.* MOORE, SUPERINTENDENT, WESTERN MISSOURI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 03–9419. WHALEY *v.* BERTRAND, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9436. BRYANT *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 260.

No. 03–9444. LIGON *v.* BOSWELL. C. A. 11th Cir. Certiorari denied.

No. 03–9447. OKEN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 378 Md. 179, 835 A. 2d 1105.

No. 03–9450. TORRES *v.* JAIMET, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9476. SPEARS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 03–9485. MCCOLLOUGH *v.* SNOW, SECRETARY OF THE TREASURY. C. A. 7th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 667.

No. 03–9488. ORTEGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 997.

No. 03–9518. RODRIGUEZ-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 12.

No. 03–9522. MUNOZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–9528. ARANDA *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 03–9533. ALVAREZ-GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 356.

No. 03–9534. ROBERTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 440.

No. 03–9548. SIEPKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 939.

No. 03–9550. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 388.

No. 03–9551. TAYLOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 353 F. 3d 868.

No. 03–9552. HEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 286.

No. 03–9555. HAMILTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–9557. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 964.

No. 03–9558. GWYNN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 787.

No. 03–9559. HAWKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 78 Fed. Appx. 193.

No. 03–9561. STOVER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 329 F. 3d 859.

No. 03–9567. FLEMING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 396.

No. 03–9568. HYATT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 278.

No. 03–9571. CARON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–9572. DEATON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 956.

No. 03–9573. CADAVID, AKA CAVADID *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9582. HINOJOSA *v.* MORRISON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 952.

No. 03–9586. HARPINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 627.

No. 03–9591. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 74 Fed. Appx. 113.

No. 03–9592. LOPEZ-LERMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 235.

No. 03–9596. CARRILLO-ANDRADE *v.* UNITED STATES; and DIAZ-MIRANDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 880 (second judgment) and 945 (first judgment).

No. 03–9598. DUGGINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 03–9599. CLAYBORN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 339 F. 3d 700.

No. 03–863. BUNTING ET AL. *v.* MELLEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 327 F. 3d 355.

Opinion of JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, respecting the denial of certiorari.

The "perceived procedural tangle" described by JUSTICE SCALIA's dissent, *post,* at 1022, is a byproduct of an unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity. JUSTICE BREYER and I both questioned the wisdom of an inflexible rule requiring the premature adjudication of constitutional issues when the Court adopted it. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 858, 859 (1998). Relaxing that rule could solve the problem that JUSTICE SCALIA addresses in his dissent. JUSTICE SCALIA is quite wrong, however, when he states that the "procedural tangle" created by our constitutional-question-first procedure explains our denial of certiorari in this case. *Post*, at 1022. Indeed, it is only one of three reasons for not granting review. The other two are, first, that we have no jurisdiction, and second, that the alleged conflict of authority is more apparent than real.

Respondents have graduated from the Virginia Military Institute (VMI). The Court of Appeals accordingly held that respondents' "claims for declaratory and injunctive relief are moot" and vacated the District Court's judgment insofar as it awarded such relief. 327 F. 3d 355, 360 (CA4 2003). That leaves respondents'

claim for damages against Bunting in his individual capacity. The Court of Appeals concluded that Bunting is entitled to qualified immunity, *id.*, at 376, and respondents have not challenged that ruling. All that remains, therefore, is the parties' dispute over the constitutionality of VMI's supper prayer.

Whether or not such a dispute would be sufficient to support jurisdiction in different circumstances, it plainly falls short in this case. Bunting has retired from his position as Superintendent of VMI, see *id.*, at 360, and will suffer no direct injury if VMI is unable to continue the prayer. Thus, there no longer is a live controversy between Bunting and respondents regarding the constitutionality of the prayer. As for the other named petitioner, new Superintendent Peay, there *never* was a live controversy. Peay was added to the case (apparently in error) after the Court of Appeals issued its decision vacating the District Court's award of injunctive and declaratory relief. At that point, the only issue was Bunting's individual-capacity liability—an issue in which Peay obviously has no interest. VMI itself is not a party.

The jurisdictional issue in this case differs from that presented in *Erie* v. *Pap's A. M.*, 529 U. S. 277 (2000). The respondent in *Erie*, which operated a nude dancing establishment, obtained an injunction barring the city from enforcing an ordinance banning public nudity. After we granted the city's petition for certiorari to review the state court's decision, respondent submitted an affidavit stating that it had "ceased to operate a nude dancing establishment in Erie." *Id.*, at 287 (internal quotation marks omitted). We concluded, nevertheless, that the case was not moot. We observed that respondent had "an interest in preserving the judgment" of the state court," *id.*, at 288, because it was "still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie," *id.*, at 287, notwithstanding the owner's "'advanced age'" of 72, *id.*, at 288. Meanwhile, the city had "an ongoing injury because it [was] barred from enforcing the public nudity provisions of its ordinance." *Ibid.* "If the challenged ordinance is found constitutional," we explained, "then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot." *Ibid.* Finally, we emphasized that the case did not involve "run of the mill voluntary cessation" because respondent was seeking to have the case declared moot after *prevailing* in state court. *Ibid.* Respondent's argument, if successful, would have resulted in dis-

missal of the petition, leaving intact the state court's ruling. We noted that "[o]ur interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsel[ed] against a finding of mootness." *Ibid.*

In this case, by contrast, none of the parties has a present stake in the outcome. There is no reason to believe that Bunting ever will return to VMI in an official capacity, and even if there were, we have made clear that such speculation cannot "shield [a] case from a mootness determination." *City News & Novelty, Inc.* v. *Waukesha*, 531 U. S. 278, 283 (2001) (explaining that the possibility that the respondent in *Erie* would reopen or reinvest in the business was not sufficient to explain our rejection of mootness in that case). Unlike the situation in *Erie*, moreover, there is no injunction presently barring VMI from reinstituting the supper prayer. This case also lacks the potential for gamesmanship that concerned us in *Erie*. Respondents are not seeking to have the case declared moot after prevailing below (respondents lost on the issue of damages), and their graduation from VMI obviously is distinguishable from the voluntary cessation of a business enterprise.

The second reason justifying a denial of certiorari is the absence of a direct conflict among the Circuits. The Courts of Appeals for the Sixth and Seventh Circuits have rejected constitutional challenges to state universities' inclusion of a nondenominational prayer or religious invocation in their graduation ceremonies, reasoning that college-age students are not particularly "susceptible to pressure from their peers towards conformity," *Lee* v. *Weisman*, 505 U. S. 577, 593 (1992). See *Chaudhuri* v. *Tennessee*, 130 F. 3d 232 (CA6 1997); *Tanford* v. *Brand*, 104 F. 3d 982 (CA7 1997). The Fourth Circuit endorsed that principle in theory, but found it unhelpful in this case because of the features of VMI that distinguish it from more traditional institutions of higher education—for example, its use of the "adversative" method and its emphasis on submission and conformity. 327 F. 3d, at 371–372. Given the unique features of VMI, we do not know how the Fourth Circuit would resolve a case involving prayer at a state university, or, indeed, how the Sixth or Seventh Circuits would analyze the supper prayer at issue in this case. Thus, while the importance of this case might have

justified a decision to grant, it is not accurate to suggest that a conflict of authority would have mandated such a decision.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

In this case, the current and former Superintendents of the Virginia Military Institute have asked this Court to review the conclusion, reached by a panel of the Fourth Circuit, that an invocation of God during VMI's Supper Roll Call ceremony is unconstitutional. See 327 F. 3d 355 (2003). The prayer was voluntary, but nonparticipating cadets were required to remain respectfully "at rest" for its duration. *Id.*, at 362. This, the panel concluded, amounted to unconstitutional religious coercion of the sort prohibited by our precedent—principally *Lee* v. *Weisman*, 505 U. S. 577 (1992), a case that involved public high school prayer. The weighty questions raised by petitioners—about the proper application of *Lee* where adults rather than children are the subjects, and about the constitutionality of traditional religious observance in military institutions—deserve this Court's attention, particularly since the decisions of two other Circuits are in apparent contradiction as to whether *Lee* can extend so far. The only explanation for the Court's refusal to resolve a Circuit conflict of such consequence is a perceived procedural tangle of the Court's own making. Far from finding that tangle a justification for rejecting the petition, I find it an additional reason for granting.

This Court has established a mandatory order of priority for resolution of the two standard issues that arise in damages suits brought against government officers under Rev. Stat. § 1979, 42 U. S. C. § 1983, or *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). A court must ask, first, whether "the facts alleged show the officer's conduct violated a constitutional right"; if so, "the next, sequential step" is to resolve the qualified-immunity claim by asking "whether the right was clearly established." *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). See *Wilson* v. *Layne*, 526 U. S. 603, 609 (1999); *Conn* v. *Gabbert*, 526 U. S. 286, 290 (1999). "[T]he requisites of a qualified immunity defense *must* be considered in proper sequence." *Saucier*, *supra*, at 200 (emphasis added).

The *Saucier* constitutional-question-first procedure played a central role in the proceedings below. Two cadets filed suit against Josiah Bunting, then-Superintendent of VMI, challenging

the constitutionality of the prayer, and seeking declaratory and injunctive relief, nominal damages, costs, and attorney's fees. The District Court entered summary judgment for the cadets. That judgment was appealed, and by the time the Fourth Circuit panel ruled, the cadets had graduated. This mooted the declaratory and injunctive relief claims (the only claims the current Superintendent might have inherited when he succeeded Bunting), but the money damages claim against Bunting in his personal capacity remained, and raised the same constitutional question. In accordance with its obligation under *Saucier*, the panel first considered whether the Establishment Clause forbade the prayer, concluding after lengthy analysis that it did. 327 F. 3d, at 365–376. Turning to the second step, the panel quickly determined that the relevant constitutional right was not clearly established because, among other things, several Circuits had previously approved prayer at university functions. See *id.*, at 376 (citing earlier discussion of *Tanford* v. *Brand*, 104 F. 3d 982 (CA7 1997), and *Chaudhuri* v. *Tennessee*, 130 F. 3d 232 (CA6 1997)). The court therefore granted qualified immunity, and judgment, to Bunting.

The Fourth Circuit's determination that a state military college's grace before meals violates the Establishment Clause, creating a conflict with Circuits upholding state-university prayers, would normally make this case a strong candidate for certiorari. But it is questionable whether Bunting's request for review can be entertained, since he *won judgment* in the court below. For although the statute governing our certiorari jurisdiction permits application by "any party" to a case in a federal court of appeals, 28 U. S. C. § 1254(1), our practice reflects a "settled refusal" to entertain an appeal by a party on an issue as to which he prevailed. R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 79 (8th ed. 2002). We sit, after all, not to correct errors in dicta; "[t]his Court reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U. S. 307, 311 (1987) *(per curiam)* (internal quotation marks omitted).

I think it plain that this general rule should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination. That constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the

availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases.

In areas other than this, we have in the past entertained two appeals on collateral issues by parties who won below. See *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 333–336 (1980); *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939). That these exceptions have been few is simply a consequence of the fact that suitable candidates seldom present themselves. Cf. *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89, 99, n. 6 (1954). But the *Saucier* procedure gives rise to—*and is designed to give rise to*—constitutional rulings (such as this one) with precedential effect. It seems to me this sort of situation is exactly what we had in mind when we said, in *Deposit Guaranty Nat. Bank*, that "[i]n an appropriate case" a petitioner may appeal an adverse collateral ruling despite having secured a favorable judgment, 445 U. S., at 334. Not only is the denial of review unfair to the litigant (and to the institution that the litigant represents) but it undermines the purpose served by initial consideration of the constitutional question, which is to clarify constitutional rights without undue delay. See, *e. g.*, *Wilson*, *supra*, at 609; *County of Sacramento* v. *Lewis*, 523 U. S. 833, 841–842, n. 5 (1998).

This problem has attracted the attention of lower courts. Two Circuits have noticed that if the constitutional determination remains locked inside a § 1983 suit in which the defendant received a favorable judgment on qualified immunity grounds, then "government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts." *Horne* v. *Coughlin*, 191 F. 3d 244, 247 (CA2 1999) (quoted in *Kalka* v. *Hawk*, 215 F. 3d 90, 96 (CADC 2000)); see *Horne*, *supra*, at 247, n. 1 (concluding that this Court could not have reviewed the judgment in *County of Sacramento* v. *Lewis*, *supra*, if the Ninth Circuit had not believed the right clearly established). As both Circuits recognized, the mess up here is replicated below. See *Horne*, *supra*, at 247 (noting the parallel between unreviewability of district court and court of appeals decisions); *Kalka*, 215 F. 3d, at 96, and n. 9 (similar). This understandable concern has led some courts to conclude (mistakenly) that the constitutional-question-first rule is customary, not mandatory. See *id.*, at 96, 98; *Horne*, *supra*, at 247, 250; see

also *Pearson* v. *Ramos*, 237 F. 3d 881, 884 (CA7 2001) (doubting that the *Saucier* rule is "absolute," for the reasons given in *Kalka* and *Horne*). The perception of unreviewability undermines adherence to the sequencing rule we have created. Cf. *Koch* v. *Brattleboro*, 287 F. 3d 162, 166 (CA2 2002) (citing *Horne* for the proposition that "[a]lthough we normally apply this two-step test, where we are convinced that the purported constitutional right violated is not 'clearly established,' we retain the discretion to refrain from determining whether, under the first step of the test, a constitutional right was violated at all").

This situation should not be prolonged. We should either make clear that constitutional determinations are *not* insulated from our review (for which purpose this case would be an appropriate vehicle), or else drop any pretense at requiring the ordering in every case.

* * *

In sum, we have before us in this petition a constitutional issue of considerable consequence on which the Courts of Appeals are in disagreement. The only apparent obstacle to our review* is in fact an additional incentive to our review, so that we might eliminate the confusion spawned by our civil-rights constitutional-issue-first jurisprudence. VMI has previously seen another of its traditions abolished by this Court. See *United States* v. *Vir-*

*There is another concern for me, though it is not one that should affect the majority of the Court: Bunting is now retired from VMI. Whether he retains the requisite Article III stake in resolution of the constitutional question after his retirement seems dubious to me, but not to the Court majority, which has upheld standing in a case where the party who had challenged regulation of a nude dancing establishment had retired from that business but could (barely conceivably) return. See *Erie* v. *Pap's A. M.*, 529 U. S. 277, 287–289 (2000). Even if the majority has had a change of heart about this standing point, the case should *still* be taken, to clarify the ordinary availability of appeal, as discussed above, and to specify that, in the unusual situation such as this where lack of standing precludes appeal, resolution of the constitutional question does not have *stare decisis* effect. Cf. 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4421, p. 559 (2d ed. 2002) (issue preclusive effect denied to nonappealable findings; "[s]ince appellate review is an integral part of the system, there is strong reason to insist that preclusion should be denied to findings that could not be tested by the appellate procedure ordinarily available"); 18A *id.*, § 4433, at 98 ("If ordinary opportunities to appeal are thwarted by the circumstances of a particular case . . . preclusion may prove unwise").

ginia, 518 U. S. 515 (1996). This time, however, its cause has been ignored rather than rejected—though the consequence will be just the same.

JUSTICE STEVENS disagrees that certiorari should be granted for three reasons. *Ante*, p. 1019 (opinion respecting denial of certiorari). The first is that he would prefer to take the course we have repeatedly rejected, viz., to repudiate the *Saucier* procedure. Apart from the unlikelihood that that preference will ever be satisfied, it speaks neither to the feasibility of my proposal nor to the desirability of giving it a thorough airing by this Court. The second reason, that "we have no jurisdiction," *ante*, at 1019, because this case is different from *Erie* v. *Pap's A. M.*, 529 U. S. 277 (2000), seems to me both erroneous and beside the point. A court always has jurisdiction to determine jurisdiction, which is the precise issue I would consider on certiorari. See *United States* v. *Mine Workers*, 330 U. S. 258, 291 (1947). If the Court ultimately concluded that the case is moot (presumably because the prospect that Bunting will return to VMI is significantly more remote than was the prospect that the 72-year-old, retired former owner of Pap's, who swore in an affidavit that he had no plans to reenter the nude dancing business, would nonetheless do so), it would still have established that an appeal is ordinarily available.

The final reason pertains to the merits. *Ante*, at 1021–1022. Although JUSTICE STEVENS concedes the importance of this case, he relies upon the fact that there is no "*direct* conflict among the Circuits," *ante*, at 1021 (emphasis added). That conclusion rests upon factual differences of the sort that ordinarily exist between judgments that evaluate specific practices at specific institutions. It is no surprise that, as JUSTICE STEVENS notes, the Fourth Circuit distinguished cases from other Circuits; that is what courts ordinarily do. But the basis for the distinguishing—that this was a supper prayer at a state military college, whereas the other cases involved graduation prayers at state nonmilitary colleges—is, to put it mildly, a frail one. (In fact, it might be said that the former is *more*, rather than *less*, likely to be constitutional, since group prayer before military mess is more traditional than group prayer at ordinary state colleges.) In any event, the absence of a direct conflict is perhaps a reason why certiorari *need* not be granted, but hardly a reason why it *should* not be. It is surely ironic to invoke, as the basis for denying review of the judgment unfavorable to VMI in this case, the fact

that VMI is in some sense, as we said in *United States* v. *Virginia*, *supra*, at 519, "an incomparable military college"—inasmuch as that incomparability did not insulate its favorable judgment from our review and reversal in *United States* v. *Virginia* itself. JUSTICE STEVENS's comforting observation that "there is no injunction presently barring VMI from reinstituting the supper prayer," *ante*, at 1021, simply ignores the reality that, if it should choose that course, the present judgment of the Court of Appeals with jurisdiction over the Commonwealth would deny VMI officials a good-faith, qualified-immunity defense against suits for damages.

No. 03–1046. AT&T CORP. *v.* ALLEN ET UX., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED. Ct. Civ. App. Okla. Motion of Council on State Taxation for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 03–1049. IDAHO POTATO COMMISSION *v.* M & M PRODUCE FARM & SALES, DBA M & M PRODUCE, ET AL. C. A. 2d Cir. Motions of Underwriters Laboratories Inc. et al. and Florida Department of Citrus/Florida Citrus Commission for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 335 F. 3d 130.

No. 03–1199. EMPLOYERS INSURANCE COMPANY OF WAUSAU *v.* JOHNSON CONTROLS, INC., ET AL. Sup. Ct. Wis. Motion of Complex Insurance Claims Litigation Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 264 Wis. 2d 60, 665 N. W. 2d 257.

No. 03–1208. OKULEY *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 344 F. 3d 578.

Rehearing Denied

No. 03–769. ELJACK *v.* ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS ET AL., 540 U. S. 1178;

No. 03–824. NAETHING *v.* COVINGTON, DIRECTOR, AMERICAN GENERAL LIFE & ACCIDENT INSURANCE CO., ET AL., *ante*, p. 902;

No. 03–875. ELJACK *v.* SECURITY ENGINEERS, INC., ET AL., 540 U. S. 1181;

No. 03–942. DAHLQUIST *v.* VUKICH, 540 U. S. 1219;

No. 03–7042. FEGAN *v.* YARBOROUGH, WARDEN, 540 U. S. 1116;

No. 03–7215. DONATO *v.* MCCARTHY, 540 U. S. 1121;

No. 03–7872. HOFF *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 540 U. S. 1155;

No. 03–7914. HOFFMAN *v.* JONES, WARDEN, ET AL., 540 U. S. 1193;

No. 03–7936. JURICH *v.* MCLEMORE, WARDEN, 540 U. S. 1194;

No. 03–7950. HOLLAND *v.* JONES, WARDEN, 540 U. S. 1194;

No. 03–8092. JEFFERSON *v.* ROCKETT ET AL., 540 U. S. 1222;

No. 03–8425. MILLER *v.* ST. LOUIS COUNTY, MISSOURI, 540 U. S. 1225;

No. 03–8488. LUNA *v.* ROCHE, SECRETARY OF THE AIR FORCE, 540 U. S. 1225; and

No. 03–8605. OWENS *v.* UNITED STATES, 540 U. S. 1227. Petitions for rehearing denied.

MAY 3, 2004

Certiorari Granted—Reversed and remanded. (See No. 03–1028, *ante*, p. 433.)

Certiorari Dismissed

No. 03–9228. KEELEN *v.* CAIN, WARDEN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 03M68. RODMAN *v.* FLORIDA; and

No. 03M70. GARCIA *v.* CITY OF CLAYTON, NEW MEXICO. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 03M69. DOE *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 03–1238. IBP, INC. *v.* ALVAREZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 03–8476. IN RE SHERRILLS. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 934] denied.

No. 03–9730. IN RE BRADLEY;
No. 03–9734. IN RE CLAY; and
No. 03–9759. IN RE BELLON. Petitions for writs of habeas corpus denied.

No. 03–1243. IN RE GREEN TREE FINANCIAL CORP., AKA GREEN TREE ACCEPTANCE CORP., AKA GREEN TREE FINANCIAL SERVICES CORP., NKA CONSECO FINANCE CORP.;
No. 03–9141. IN RE METCALF;
No. 03–9162. IN RE WHITE; and
No. 03–9682. IN RE WILLIAMS. Petitions for writs of mandamus denied.

No. 03–1242. IN RE HOLBROOK; and
No. 03–9161. IN RE BELL. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Denied

No. 03–915. DEFENDERS OF WILDLIFE ET AL. *v.* HOGARTH, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 330 F. 3d 1358.

No. 03–992. HATCHETT ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 330 F. 3d 875.

No. 03–1071. COUNTY OF OKANOGAN, WASHINGTON, ET AL. *v.* NATIONAL MARINE FISHERIES SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 347 F. 3d 1081.

No. 03–1074. BRONX LEGAL SERVICES *v.* LEGAL SERVICES FOR NEW YORK CITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 78 Fed. Appx. 781.

No. 03–1080. CONNECTICUT *v.* PEELER. Sup. Ct. Conn. Certiorari denied. Reported below: 265 Conn. 460, 828 A. 2d 1216.

No. 03–1081. DOMTAR MAINE CORP., INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 347 F. 3d 304.

No. 03–1109. FRANDSEN ET AL. *v.* BREVARD COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 989.

No. 03–1114. A-ONE MEDICAL SERVICES, INC., ET AL. *v.* CHAO, SECRETARY OF LABOR. C. A. 9th Cir. Certiorari denied. Reported below: 346 F. 3d 908.

No. 03–1144. BASIL *v.* MAXIM HEALTHCARE SERVICES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 347 F. 3d 1240.

No. 03–1162. LEAVITT, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 336 F. 3d 1236.

No. 03–1218. ROANE *v.* NATIONAL CHILDREN'S CENTER, INC., ET AL. C. A. D. C. Cir. Certiorari denied.

No. 03–1220. CHAPMAN ET AL. *v.* KING RANCH, INC., ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 118 S. W. 3d 742.

No. 03–1229. DEMOSS *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 03–1231. VENTURELLI *v.* ARC COMMUNITY SERVICES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 350 F. 3d 592.

No. 03–1249. FILOSO *v.* PRINCE WILLIAM COUNTY SCHOOL BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 791.

No. 03–1257. BOIVIN *v.* TOWN OF ADDISON, VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 176 Vt. 653, 845 A. 2d 1027.

No. 03–1289. DAISLEY ET AL. *v.* OSBOURNE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 594.

No. 03–1309. PINKSTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 112 Cal. App. 4th 387, 5 Cal. Rptr. 3d 274.

No. 03–1315. BUDDHU *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 264 Conn. 449, 825 A. 2d 48.

No. 03–1318. WHITEHORN *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 63 Fed. Appx. 346.

No. 03–1332. KANT ET UX. *v.* BREGMAN, BERBERT & SCHWARTZ, LLC, ET AL. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 03–1344. NICKLIN *v.* POTTER, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 352 F. 3d 1077.

No. 03–1346. DORAN ET AL. *v.* MASSACHUSETTS TURNPIKE AUTHORITY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 348 F. 3d 315.

No. 03–1358. ROCKEFELLER *v.* TACHA, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 03–1362. MOODY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 219.

No. 03–1378. MARCH ET UX. *v.* INTERNAL REVENUE SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 335 F. 3d 1186.

No. 03–8634. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 677.

No. 03–8709. CAMPOS-BELASQUEZ *v.* UNITED STATES; CARAPIA-HERNANDEZ *v.* UNITED STATES; and NOLASCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 666 (first judgment); 81 Fed. Appx. 506 (second and third judgments).

No. 03–8727. FOSTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 344 F. 3d 799.

No. 03–8730. GARZA-GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 635.

No. 03–8735. MULLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 315 F. 3d 449.

No. 03–9140. CRYNS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 03–9160. RESENDIZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 112 S. W. 3d 541.

No. 03–9163. TEJEDA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–9165. MEDBERRY *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 351 F. 3d 1049.

No. 03–9172. MATHIS *v.* KNOWLES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 906.

No. 03–9174. ALLMAN ET UX. *v.* IRVIN HOME EQUITY CORP. C. A. 6th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 816.

No. 03–9177. SALINAS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 354 F. 3d 425.

No. 03–9181. KHODANIAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–9183. KELLY *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9187. RILEY *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied.

No. 03–9189. BELIVEAU *v.* HOFBAUER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9190. CONNOR *v.* ESPINDA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 525.

No. 03–9191. CLARK *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 522.

No. 03–9192. TUCKER *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 350 F. 3d 433.

No. 03–9198. SMITH *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 277 Ga. 213, 586 S. E. 2d 639.

No. 03–9200. WOODRUFF *v.* MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. Certiorari denied.

No. 03–9202. SANG VAN PHAM *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–9203. O'BRYANT *v.* PORTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 780.

No. 03–9204. BUCHANAN *v.* CITY OF FOREST PARK, GEORGIA, POLICE DEPARTMENT, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9205. MARKS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 4th 197, 72 P. 3d 1222.

No. 03–9206. TOODLE *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–9207. BIFFEL *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 03–9211. ROBINSON *v.* WALLS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9220. PARNELL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 725.

No. 03–9221. MOORE *v.* MOSLEY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 03–9222. JOHNS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9223. HURST *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 832 A. 2d 1251.

No. 03–9227. PHELPS *v.* ALAMEDA COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–9230. TODDY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 03–9234. SHIELDS *v.* YMCA OF GREATER ST. LOUIS. C. A. 8th Cir. Certiorari denied.

No. 03–9236. MANGAN *v.* MANGAN. Sup. Jud. Ct. Me. Certiorari denied.

No. 03–9239. JONES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9240. PALAFOX *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 03–9244. CORDER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 03–9251. TURNER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 339 F. 3d 1247.

No. 03–9339. LAW *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9344. CRAFT *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9357. GARDNER *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 318 Mont. 436, 80 P. 3d 1262.

No. 03–9391. RYKSCHROEFF *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9403. SAVIOR *v.* MCGUIRE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 61 Fed. Appx. 318.

No. 03–9434. THAMES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 03–9477. SPERRY *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 31 Kan. App. 2d xxviii, 77 P. 3d 1008.

No. 03–9484. MORRIS *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9536. COLON *v.* CONNOLLY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 78 Fed. Appx. 732.

No. 03–9539. SAMPLE *v.* FEDERAL BUREAU OF PRISONS. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 704.

No. 03–9544. ADAMS *v.* NEGRON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 676.

No. 03–9569. FOURSTAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 603.

No. 03–9570. GONZALEZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 915.

No. 03–9600. SCOTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–9601. CURRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 377.

No. 03–9603. NAVA-SOTELA, AKA MONTOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 354 F. 3d 1202.

No. 03–9604. MALTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 246.

No. 03–9605. NESTOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 386.

No. 03–9614. LOVELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 754.

No. 03–9618. QUEZADA-CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 318.

No. 03–9628. QUINTERO-RENDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 354 F. 3d 1320.

No. 03–9630. BATES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–9632. COSBY *v.* MEADORS, ASSOCIATE WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 351 F. 3d 1324.

No. 03–9637. BRENNAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 885.

No. 03–9638. ALEQUIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9648. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 547.

No. 03–9649. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 365.

No. 03–9652. STEWART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 606.

No. 03–9653. CARMONA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 285.

No. 03–9673. BROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 345.

No. 03–9676. CHAVEZ-GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 825.

No. 03–9677. COLEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 428.

No. 03–9678. EMMANUEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 57 Fed. Appx. 170.

No. 03–9680. DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9681. VILLEGAS-MIRANDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 387.

No. 03–9684. WHEELER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 304.

No. 03–9691. SKINNER *v.* WILEY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 355 F. 3d 1293.

No. 03–9700. LONDONO-MEJIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 825.

No. 03–9703. SAUNDERS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 267 Conn. 363, 838 A. 2d 186.

No. 03–9704. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 983.

No. 03–9709. BRAGGS *v.* PEREZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 147.

No. 03–9727. WITCHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 386.

No. 03–1050. GREEN LEAF NURSERY, INC., ET AL. *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 341 F. 3d 1292.

No. 03–1108. DAKOTA RURAL ACTION ET AL. *v.* SOUTH DAKOTA FARM BUREAU, INC., ET AL.; and

No. 03–1111. NELSON, SECRETARY OF STATE OF SOUTH DAKOTA, ET AL. *v.* SOUTH DAKOTA FARM BUREAU, INC., ET AL. C. A. 8th Cir. Motion of National Farmers Union et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 340 F. 3d 583.

No. 03–1235. ARIZONA *v.* DAVIS. Sup. Ct. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 206 Ariz. 377, 79 P. 3d 64.

No. 03–1252. DICK CORP. ET AL. *v.* MELLON BANK, N. A. C. A. 7th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 351 F. 3d 290.

No. 03–1307. MITCHELL, WARDEN *v.* VAN LYNN. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 347 F. 3d 735.

No. 03–9432. ROBINSON *v.* MONTANA. Sup. Ct. Mont. Motion of National Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 319 Mont. 82, 82 P. 3d 27.

Rehearing Denied

No. 03–830. BUSH *v.* ZEELAND BOARD OF EDUCATION ET AL., 540 U. S. 1150;

No. 03–921. KOUKIOS *v.* MICHAEL GANSON, L. P. A., ET AL., 540 U. S. 1219;

No. 03–7453. SOTO *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, 540 U. S. 1126;

No. 03–7778. HILL *v.* GWINNETT COUNTY TRAFFIC COURT, 540 U. S. 1189;

No. 03–8145. SIMMONS *v.* CASPARI, ASSISTANT DIRECTOR, MISSOURI BOARD OF PROBATION AND PAROLE, *ante*, p. 906;

No. 03–8186. MCCARRON *v.* BRITISH TELECOM, DBA YELLOW BOOK USA, ET AL., 540 U. S. 1202;

No. 03–8198. COOMBS *v.* KELCHNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CAMP HILL, ET AL., *ante*, p. 907;

No. 03–8211. BELL *v.* HALL, WARDEN, *ante*, p. 907;

No. 03–8406. SULLIVAN *v.* ENVIRONMENTAL PROTECTION AGENCY, *ante*, p. 909;

No. 03–8439. LAWSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 540 U. S. 1208; and

No. 03–8509. WIGGINS, AKA CARRUTH *v.* NORTH CAROLINA, *ante*, p. 910. Petitions for rehearing denied.

No. 03–886. SMITH *v.* BANK OF AMERICA MORTGAGE, FSB, 540 U. S. 1213. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

MAY 7, 2004

Dismissal Under Rule 46

No. 03–9610. STIGLITZ *v.* WISCONSIN. Ct. App. Wis. Certiorari dismissed under this Court's Rule 46.

MAY 13, 2004

Certiorari Denied

No. 03–10348 (03A873). PATTERSON *v.* TEXAS. 3d Jud. Dist. Ct. Tex., Anderson County. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MAY 14, 2004

Miscellaneous Order

No. 03A936. LARGESS ET AL. *v.* SUPREME JUDICIAL COURT FOR THE STATE OF MASSACHUSETTS ET AL. Application for in-

junction pending appeal, presented to JUSTICE SOUTER, and by him referred to the Court, denied.

MAY 17, 2004

Certiorari Granted—Vacated and Remanded

No. 02–10386. DONOGHUE *v.* DOHERTY ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jones* v. *R. R. Donnelley & Sons Co.*, *ante,* p. 369.

No. 03–9286. PRASERTPHONG *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washington*, *ante*, p. 36. Reported below: 206 Ariz. 70, 75 P. 3d 675.

Certiorari Dismissed

No. 03–9617. TRIPATI *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam).* JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 03–9728. PERRY *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. 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: 202 F. 3d 270.

Miscellaneous Orders

No. 03M72. BRADLEY *v.* MILLER ET AL.;

No. 03M73. DIXIE *v.* YARBOROUGH, WARDEN; and
No. 03M74. WILLIAMS *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. D–2359. IN RE DISBARMENT OF HACKMAN. Disbarment entered. [For earlier order herein, see *ante*, p. 931.]

No. 03–633. ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* SIMMONS. Sup. Ct. Mo. [Certiorari granted, 540 U. S. 1160.] Motion of respondent for appointment of counsel granted. Jennifer Herndon, Esq., of St. Louis, Mo., is appointed to serve as counsel for respondent in this case.

No. 03–1304. WARD *v.* SOUTH CAROLINA. Sup. Ct. S. C. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 03–9861. IN RE SANCHEZ;
No. 03–9969. IN RE KHALID ET AL.;
No. 03–9970. IN RE EL-BANNA ET AL.; and
No. 03–9977. IN RE ELLIS. Petitions for writs of habeas corpus denied.

No. 03–1379. IN RE ALLUSTIARTE ET UX.;
No. 03–9667. IN RE MCGUIRE; and
No. 03–9696. IN RE LEE. Petitions for writs of mandamus denied.

No. 03–1285. IN RE HUFF ET UX. Motion of petitioners for sanctions denied. Petition for writ of mandamus denied.

No. 03–9743. IN RE TINNER. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 03–525. ROSARIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 330 F. 3d 964.

No. 03–866. ROUTIER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 112 S. W. 3d 554.

No. 03–867. CF INDUSTRIES, INC. *v.* UNITED STATES; and
No. 03–882. THOMSON, INC., FKA THOMSON MULTIMEDIA INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 340 F. 3d 1355.

No. 03–960. GROSS SEED CO. *v.* DEPARTMENT OF TRANSPORTATION ET AL.; and

No. 03–968. SHERBROOKE TURF, INC. *v.* MINNESOTA DEPARTMENT OF TRANSPORTATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 345 F. 3d 964.

No. 03–965. LOS ANGELES NEWS SERVICE *v.* REUTERS TELEVISION INTERNATIONAL, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 340 F. 3d 926.

No. 03–984. BALSER ET UX. *v.* DEPARTMENT OF JUSTICE, OFFICE OF THE UNITED STATES TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 327 F. 3d 903.

No. 03–999. MURPHY *v.* UNIVERSITY OF CINCINNATI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 288.

No. 03–1004. AMMEX, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 334 F. 3d 1052.

No. 03–1030. CUNIGAN ET AL. *v.* SHAMAEIZADEH. C. A. 6th Cir. Certiorari denied. Reported below: 338 F. 3d 535.

No. 03–1140. CALOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 340 F. 3d 428.

No. 03–1248. HEFFELBOWER ET VIR *v.* CITY OF LINCOLN, NEBRASKA. Ct. App. Neb. Certiorari denied.

No. 03–1251. WALKER *v.* QUADGRAPHICS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 505.

No. 03–1253. MACKAY ET AL. *v.* MONTANA BOARD OF REGENTS ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 317 Mont. 467, 79 P. 3d 236.

No. 03–1254. NONMACHER *v.* RITTER ET AL. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 03–1255. PHONOMETRICS, INC., ET AL. *v.* HOSPITALITY FRANCHISE SYSTEMS, INC., ET AL. C. A. Fed. Cir. Certiorari denied.

No. 03–1260. ALBINGIA VERSICHERUNGS A. G. ET AL. *v.* SCHENKER INTERNATIONAL INC. C. A. 9th Cir. Certiorari denied. Reported below: 344 F. 3d 931 and 350 F. 3d 916.

No. 03–1262. ALDRICH *v.* NELSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 505.

No. 03–1264. MOORE *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 8, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 82.

No. 03–1267. KAIMOWITZ *v.* CITY OF ORLANDO, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–1272. LOHRENZ *v.* DONNELLY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 350 F. 3d 1272.

No. 03–1275. MUNOZ *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–1276. NICHOLS *v.* CHICAGO TRANSIT AUTHORITY HARDSHIP COMMITTEE. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 338 Ill. App. 3d 829, 790 N. E. 2d 1.

No. 03–1279. FOREMAN *v.* GRIFFITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 432.

No. 03–1283. HACKER *v.* WEST VIRGINIA. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 03–1284. HERRING *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 862 So. 2d 727.

No. 03–1287. MORETON ROLLESTON, JR. LIVING TRUST *v.* KENNEDY ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 277 Ga. 541, 591 S. E. 2d 834.

No. 03–1291. BOUCHAT *v.* BALTIMORE RAVENS FOOTBALL CLUB, INC., AKA BALTIMORE RAVENS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 346 F. 3d 514.

No. 03–1292. VIRIYAPANTHU *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–1297. LI YU *v.* PERRY, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 993.

No. 03–1299. UNUM LIFE INSURANCE COMPANY OF AMERICA ET AL. *v.* TIERNEY. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 97 S. W. 3d 842.

No. 03–1301. BURRIS, DBA VIDEO PLUS *v.* HILL, STATE ATTORNEY FOR THE TENTH JUDICIAL CIRCUIT OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 382.

No. 03–1303. COGSWELL *v.* CITY OF SEATTLE, WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 347 F. 3d 809.

No. 03–1305. KRYSTAL CADILLAC-OLDSMOBILE-GMC TRUCK, INC. *v.* GENERAL MOTORS CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 337 F. 3d 314.

No. 03–1306. ROBINETT *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 638.

No. 03–1308. ROSENQUIST *v.* OTTAWAY NEWSPAPERS, INC., DBA PLATTSBURGH PRESS-REPUBLICAN. C. A. 2d Cir. Certiorari denied. Reported below: 90 Fed. Appx. 564.

No. 03–1310. ALDANA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–1311. DUENAS ET UX. *v.* MONTEGUT ET UX. Sup. Ct. Tex. Certiorari denied. Reported below: 119 S. W. 3d 707.

No. 03–1317. WAGH *v.* METRIS DIRECT, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 363 F. 3d 821.

No. 03–1319. ROBERT J. ADAMS & ASSOCIATES ET AL. *v.* BETHEA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 352 F. 3d 1125.

No. 03–1320. SILVA *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 266 Wis. 2d 906, 670 N. W. 2d 385.

No. 03–1325. GREY *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 91 Fed. Appx. 747.

No. 03–1330. "K" LINE AMERICA, INC. *v.* ST. PAUL FIRE & MARINE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 565.

No. 03–1340. WHEELER *v.* MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION, AKA MISSOURI DEPARTMENT OF TRANS-

PORTATION. C. A. 8th Cir. Certiorari denied. Reported below: 348 F. 3d 744.

No. 03–1345. BUCKLEY *v.* MEIS, REGIONAL CHIEF COUNSEL, OFFICE OF GENERAL COUNSEL, SEATTLE REGION X, SOCIAL SECURITY ADMINISTRATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 852.

No. 03–1349. MADIC *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 382.

No. 03–1371. U. S. RESTAURANT PROPERTIES, INC., ET AL. *v.* CONVENIENCE USA, INC., ET AL. C. A. 4th Cir. Certiorari denied.

No. 03–1373. ST. HILAIRE *v.* ST. HILAIRE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 841 A. 2d 783.

No. 03–1377. SUAREZ *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 75 Fed. Appx. 790.

No. 03–1380. BREWER *v.* MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 392.

No. 03–1393. BREDIMUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 352 F. 3d 200.

No. 03–1403. MIKELL ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 485.

No. 03–1406. GRANT *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS. C. A. D. C. Cir. Certiorari denied.

No. 03–1434. LAUERSEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 362 F. 3d 160.

No. 03–1438. ROBLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 347 F. 3d 471.

No. 03–7732. RODRIGUEZ *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 103 S. W. 3d 460.

No. 03–8235. ARTERBERRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 75 Fed. Appx. 858.

No. 03–8361. SANTIAGO *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 387.

No. 03–8365. PONDEXTER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 346 F. 3d 142.

No. 03–8557. BROWN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 4th 518, 73 P. 3d 1137.

No. 03–8584. DURHAM, AKA DEZARN, AKA PETTRY, AKA CARNEY, AKA MULLINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 214.

No. 03–8807. DANIEL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 119 Nev. 498, 78 P. 3d 890.

No. 03–8809. FUENTES MARTINEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 31 Cal. 4th 673, 74 P. 3d 748.

No. 03–8867. THARP *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 574 Pa. 202, 830 A. 2d 519.

No. 03–8892. JENNINGS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–9246. RUGGIERE *v.* RUGGIERE. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 305 App. Div. 2d 485, 759 N. Y. S. 2d 342.

No. 03–9249. PHOUNG HO TRAN *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9254. DAVIS *v.* BOCK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9256. CLEVELAND *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9257. DODD *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–9258. DIXON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–9259. CAUDLE *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9261. PAYNE *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 389.

No. 03–9267. WILLIAMS *v.* HUMPHREY, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 03–9268. TAGGART *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 880.

No. 03–9270. COLEMAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–9278. ALLEN *v.* HOFBAUER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 457.

No. 03–9294. BROOKS *v.* CALIFORNIA (two judgments). Sup. Ct. Cal. Certiorari denied.

No. 03–9295. PARISI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–9296. MONNAR *v.* HINES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9305. CRUTCHFIELD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 141 Md. App. 735.

No. 03–9306. CUTTS ET UX. *v.* LINCOLN FINANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 752.

No. 03–9307. DIXON, AKA MOHHOMMED *v.* OISTEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 105.

No. 03–9308. SNOW *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 337 Ill. App. 3d 1161, 843 N. E. 2d 514.

No. 03–9311. STEWART *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 342 Ill. App. 3d 350, 795 N. E. 2d 335.

No. 03–9317. GUTIERREZ ARCE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–9318. BAXTER *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–9322. RESTUCCI *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 03–9325. MCKOY *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9326. TUEROS *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 343 F. 3d 587.

No. 03–9331. BUTLER *v.* CLOUD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 374.

No. 03–9337. SOIL *v.* TAYLOR, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 180.

No. 03–9338. ANDREWS *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 608.

No. 03–9348. LYNN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 700.

No. 03–9349. HAYNES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 354 Ark. 514, 127 S. W. 3d 456.

No. 03–9350. GREENO *v.* OHIO. Ct. App. Ohio, Seneca County. Certiorari denied.

No. 03–9352. FLORES-GODOY *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied.

No. 03–9353. GRIGGS *v.* HUBBARD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 309.

No. 03–9359. HALL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 03–9360. STURGIS *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 03–9362. ABUISO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 813 A. 2d 898.

No. 03–9363. STRINGER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 03–9368. LLOYD *v.* ATLANTIC RICHFIELD CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 428.

No. 03–9370. GREGORY *v.* SPANNAGEL ET UX. Sup. Ct. Mont. Certiorari denied. Reported below: 319 Mont. 423, 82 P. 3d 36.

No. 03–9372. HOLDEN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 788 N. E. 2d 1253.

No. 03–9378. HERNANDEZ-HERNANDEZ *v.* HILL, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 950.

No. 03–9380. ADAMS *v.* MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 03–9385. DEBEJARE *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 559.

No. 03–9390. ABU-JAMAL, AKA COOK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 03–9393. REED *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–9400. WHITFIELD *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 03–9404. LILES *v.* PORTUONDO, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 84 Fed. Appx. 162.

No. 03–9405. MEI LING *v.* CALIFORNIA BREEZE HOMEOWNERS' ASSN. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–9406. KEARLEY *v.* PARRISH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 445.

No. 03–9407. LOGAN *v.* COTTON, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 03–9408. BELSER *v.* MOSLEY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9413. DAVIDSON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 121 S. W. 3d 600.

No. 03–9416. NANKIVIL *v.* LOCKHEED MARTIN CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 713.

No. 03–9418. MILLER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9420. WILLIAMS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–9422. SANCHEZ *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–9424. BROWN, AKA COLE *v.* DONNELLY, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–9425. BLACKWELL *v.* MATHES, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 349 F. 3d 529.

No. 03–9427. KRAUSE *v.* HIROSHIGE, JUDGE, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. C. A. 9th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 602.

No. 03–9428. BRYANT *v.* FLETCHER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9437. SARR *v.* KAPTURE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9439. PARRISH *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9440. DEPIETRO *v.* NEW JERSEY RACING COMMISSION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 03–9445. SANCHEZ *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–9459. O'NEAL *v.* NATIONAL PLASTICS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 896.

No. 03–9483. BRATTON *v.* HAMLET, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–9490. SMITH *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 03–9495. MCKINNEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 03–9503. PARR *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9504. LADO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 03–9506. WATTLETON *v.* LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 304.

No. 03–9508. ALLAH *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 256.

No. 03–9510. MROZEK *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET. C. A. 3d Cir. Certiorari denied.

No. 03–9512. CHASE *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 339.

No. 03–9517. PARRISH *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 121 S. W. 3d 198.

No. 03–9525. WHEELER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 121 S. W. 3d 173.

No. 03–9526. RICKMAN *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 03–9527. ANDERSON *v.* STICKMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–9538. RASHAD *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 865 So. 2d 486.

No. 03–9542. BAZLEY *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 702.

No. 03–9543. AUSTIN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–9556. GARCIA-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 910.

No. 03–9574. HARRIS *v.* BRILEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9581. WALKER *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9593. WILLIAM V. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 111 Cal. App. 4th 1464, 4 Cal. Rptr. 3d 695.

No. 03–9597. DEMOPULOS *v.* BATON ROUGE CITY POLICE DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 55.

No. 03–9608. DAVILA *v.* ARMSTRONG ET AL. C. A. 2d Cir. Certiorari denied.

No. 03–9615. JOHNSON *v.* UNKNOWN FEMALE FOOD SERVICE SUPERVISOR AT JOHN LILLEY CORRECTIONAL CENTER ET AL. Ct. Civ. App. Okla. Certiorari denied.

No. 03–9626. BRYAN *v.* KLINE, ATTORNEY GENERAL OF KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 03–9634. WALKER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 03–9640. STARR *v.* CATTELL, WARDEN. Super. Ct. N. H., Coos County. Certiorari denied.

No. 03–9641. EADES *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–9662. WILLIAMS *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–9665. ANDERSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–9666. COLEMAN *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–9679. COLLIER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 9th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 991.

No. 03–9688. COMBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 432.

No. 03–9689. ELDER *v.* DODRILL, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 870.

No. 03–9693. ROBERTSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 350 F. 3d 1109.

No. 03–9694. LEE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 842 A. 2d 715.

No. 03–9697. LOUVIERE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–9701. MCNAIR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 532.

No. 03–9706. PIGGOT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 03–9711. BONDI *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 03–9713. EPPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 03–9714. WEATHERFORD *v.* ARKANSAS. Ct. App. Ark. Certiorari denied.

No. 03–9718. ANDERSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 354 F. 3d 70.

No. 03–9720. MORENO *v.* BROWNLEE, ACTING SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 23.

No. 03–9724. ANTONELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 523.

No. 03–9729. FAGAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 219.

No. 03–9731. SAYRE *v.* MCBRIDE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 796.

No. 03–9737. PAJOOH *v.* HARMON, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 898.

No. 03–9738. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 87 Fed. Appx. 195.

No. 03–9739. PRATT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 351 F. 3d 131.

No. 03–9741. TREVINO *v.* SLADE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9742. ZEPEDA-MEDRANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 913.

No. 03–9744. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 439.

No. 03–9748. WEBBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–9752. WYATT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 318.

No. 03–9753. TORRES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9754. SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 354 F. 3d 70.

No. 03–9756. FLOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 343 F. 3d 363.

No. 03–9761. GONZALEZ-GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 160.

No. 03–9765. CHAMBERS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 03–9767. DONALD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 939.

No. 03–9768. CONCEPCION-LIRIANO, AKA GONZALEZ, AKA CONCEPCION *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–9770. ROSALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–9772. GLOVER *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 59 M. J. 225.

No. 03–9773. GRAHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 387.

No. 03–9775. TALLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 656.

No. 03–9776. ZARATE-RAMIREZ, AKA ZARATE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 784.

No. 03–9778. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 96.

No. 03–9779. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 436.

No. 03–9783. RODGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 483.

No. 03–9784. LOPEZ-POCAZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 366.

No. 03–9786. BARRON-IRACHETA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 450.

No. 03–9787. BAKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 968.

No. 03–9791. DAVALOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 9.

No. 03–9792. DEWILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 154.

No. 03–9793. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 94.

No. 03–9794. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9796. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9799. PINTO-SANTELLANO, AKA PINTO, AKA SANTANA-PINTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 301.

No. 03–9800. MCELHINEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 112.

No. 03–9804. WORTHY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 349 F. 3d 1077.

No. 03–9807. BERKEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 318 F. 3d 768.

No. 03–9812. LAWRENCE *v.* DEROSA, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 03–9819. SIFFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 973.

No. 03–9824. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9825. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 467.

No. 03–9828. HASSON, AKA GALERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 333 F. 3d 1264.

No. 03–9830. GOODWIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–9832. GREENE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 286.

No. 03–9847. HIRSCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 329.

No. 03–9852. TINDLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9853. YOUNG *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–9857. COOPER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 912.

No. 03–9867. VARGAS-CORTEZ *v.* UNITED STATES; HERRERA-SUSTAITA *v.* UNITED STATES; and ESCAMILLA-TORRES, AKA ESCAMILLA, AKA GARZA, AKA GZRZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–9869. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 875.

No. 03–9873. BARLOW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 387.

No. 03–9886. BEAR CHILD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 629.

No. 03–1198. FLORIDA *v.* ARMSTRONG. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 862 So. 2d 705.

No. 03–1270. MASON ET AL. *v.* AMERICAN TOBACCO CO. ET AL. C. A. 2d Cir. Motion of Charles E. Grassley for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 346 F. 3d 36.

No. 03–1290. EASTON *v.* FALLMAN ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 81 Fed. Appx. 942.

No. 03–1328. GOUGHNOUR, ACTING WARDEN *v.* COOPER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 358 F. 3d 1117.

No. 03–8778. GRAVES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 351 F. 3d 143.

Rehearing Denied

No. 02–409. FAVISH *v.* NATIONAL ARCHIVES AND RECORDS ADMINISTRATION ET AL., *ante*, p. 972;

No. 02–626. SOUTH FLORIDA WATER MANAGEMENT DISTRICT *v.* MICCOSUKEE TRIBE OF INDIANS ET AL., *ante*, p. 95;

No. 02–954. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION *v.* FAVISH ET AL., *ante*, p. 157;

No. 03–975. IN RE LYONS, 540 U. S. 1217;

No. 03–1000. BERAS, AKA SILVESTRE *v.* UNITED STATES, 540 U. S. 1184;

No. 03–1047. ADAIR ET AL. *v.* ALABAMA DEPARTMENT OF ECONOMIC AND COMMUNITY AFFAIRS ET AL., *ante*, p. 938;

No. 03–1062. IN RE NORMAN, *ante*, p. 902;

No. 03–1227. PO KEE WONG *v.* PATENT AND TRADEMARK OFFICE, BOARD OF PATENT APPEALS AND INTERFERENCES, *ante*, p. 975;

No. 03–7353. DAVIS *v.* UNITED STATES, 540 U. S. 1084;

No. 03–7669. PAGEL *v.* UTAH STATE PRISON ET AL., 540 U. S. 1186;

No. 03–7672. WALLACE *v.* WALLER, WARDEN, 540 U. S. 1186;

No. 03–7747. BONDURANT *v.* UNITED STATES, 540 U. S. 1138;
No. 03–7913. GLASS *v.* UNITED STATES, 540 U. S. 1166;
No. 03–7978. LOUIE *v.* POPPELL, WARDEN, 540 U. S. 1195;
No. 03–7981. LAMAR *v.* PERDUE ET AL., 540 U. S. 1195;
No. 03–8181. ARLEDGE *v.* GLENN ET AL., 540 U. S. 1223;
No. 03–8231. VOITS *v.* OREGON, *ante*, p. 908;
No. 03–8243. COBBS *v.* DUNCAN, WARDEN, *ante*, p. 908;
No. 03–8300. STEVENS *v.* MICHIGAN, *ante*, p. 909;
No. 03–8323. WHITE *v.* MICHIGAN CENTER FOR FORENSIC PSYCHIATRY, *ante*, p. 942;
No. 03–8384. HOWARD *v.* ZEMMELMAN, JUDGE, COURT OF COMMON PLEAS OF OHIO, LUCAS COUNTY, ET AL., *ante*, p. 944;
No. 03–8458. BANDA *v.* MORGAN ET AL., *ante*, p. 945;
No. 03–8477. BARKCLAY *v.* MARICOPA COUNTY, ARIZONA, ET AL., *ante*, p. 946;
No. 03–8492. IN RE SIMMONS, *ante*, p. 934;
No. 03–8518. RIVERS *v.* PENNSYLVANIA, *ante*, p. 961;
No. 03–8688. WILLIAMS *v.* ROWLEY, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER, *ante*, p. 976;
No. 03–8700. SMITH *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 949;
No. 03–8703. MILNES *v.* PRINCIPI, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 949;
No. 03–8746. ROUNTREE *v.* OHIO, *ante*, p. 950;
No. 03–8747. BEAVER *v.* FLORIDA, *ante*, p. 950;
No. 03–8768. LEVINE *v.* ELLIS, WARDEN, *ante*, p. 912;
No. 03–8794. SIMMS *v.* UNITED STATES, *ante*, p. 951;
No. 03–8859. MCDONALD *v.* HARO, WARDEN, *ante*, p. 953; and
No. 03–9099. LANG *v.* UNITED STATES, *ante*, p. 967. Petitions for rehearing denied.

No. 02–11299. DUBOIS *v.* NEW JERSEY ET AL., 540 U. S. 866; and
No. 03–7986. IN RE GREEN, 540 U. S. 1103. Motions for leave to file petitions for rehearing denied.

MAY 18, 2004

Certiorari Denied

No. 03–10401 (03A939). PATTERSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of ex-

ecution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 370 F. 3d 480.

MAY 19, 2004

Dismissal Under Rule 46

No. 03–1335. PARKINSON *v.* ANNE ARUNDEL MEDICAL CENTER ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 79 Fed. Appx. 602.

MAY 24, 2004

Certiorari Granted—Vacated and Remanded

No. 03–279. COLUMBIA RIVER CORRECTIONAL INSTITUTE ET AL. *v.* PHIFFER. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tennessee* v. *Lane*, *ante*, p. 509. Reported below: 63 Fed. Appx. 335.

No. 03–533. PARR *v.* MIDDLE TENNESSEE STATE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tennessee* v. *Lane*, *ante*, p. 509. Reported below: 63 Fed. Appx. 874.

No. 03–534. FEASTER *v.* FLORIDA DEPARTMENT OF HEALTH, BOARD OF NURSING. Dist. Ct. App. Fla., 1st Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tennessee* v. *Lane*, *ante*, p. 509. Reported below: 846 So. 2d 1238.

No. 03–559. RENDON ET AL. *v.* FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tennessee* v. *Lane*, *ante*, p. 509. Reported below: 832 So. 2d 141.

No. 03–6536. SPENCER *v.* EASTER ET AL. 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 *Tennessee* v. *Lane*, *ante*, p. 509. Reported below: 63 Fed. Appx. 160.

No. 03–7364. KIMAN *v.* NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS ET AL. C. A. 1st 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 *Tennessee* v. *Lane*, *ante*, p. 509. Reported below: 332 F. 3d 29.

Certiorari Dismissed

No. 03–9826. FORTE *v.* REILLY, ATTORNEY GENERAL OF MASSACHUSETTS. App. Ct. Mass. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 60 Mass. App. 1111, 801 N. E. 2d 324.

Miscellaneous Orders

No. 03M75. DA LU TUNG *v.* REPUBLIC NATIONAL BANK ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–2360. IN RE DISBARMENT OF FAUNTLEROY. Disbarment entered. [For earlier order herein, see *ante*, p. 931.]

No. D–2361. IN RE DISBARMENT OF CORIZZI. Disbarment entered. [For earlier order herein, see *ante*, p. 931.]

No. D–2362. IN RE DISBARMENT OF CACCHIOTTI. Disbarment entered. [For earlier order herein, see *ante*, p. 931.]

No. D–2363. IN RE DISBARMENT OF VAILLANCOURT. Disbarment entered. [For earlier order herein, see *ante*, p. 931.]

No. D–2364. IN RE DISBARMENT OF KLINGENBERG. Disbarment entered. [For earlier order herein, see *ante*, p. 931.]

No. D–2365. IN RE DISBARMENT OF CUELLER. Disbarment entered. [For earlier order herein, see *ante*, p. 932.]

No. D–2366. IN RE DISBARMENT OF GARSIDE. Disbarment entered. [For earlier order herein, see *ante*, p. 932.]

No. D–2367. IN RE DISBARMENT OF CARTELLONE. Disbarment entered. [For earlier order herein, see *ante*, p. 932.]

No. D–2368. IN RE DISBARMENT OF WARREN. Disbarment entered. [For earlier order herein, see *ante*, p. 932.]

No. D–2369. IN RE DISBARMENT OF ABBELL. Disbarment entered. [For earlier order herein, see *ante*, p. 932.]

No. D–2370. IN RE DISBARMENT OF FABER. Disbarment entered. [For earlier order herein, see *ante*, p. 932.]

No. D–2371. IN RE DISBARMENT OF GALLAGHER. Disbarment entered. [For earlier order herein, see *ante*, p. 932.]

No. D–2372. IN RE DISBARMENT OF SPERY. Disbarment entered. [For earlier order herein, see *ante*, p. 933.]

No. D–2374. IN RE DISBARMENT OF AYENI. Disbarment entered. [For earlier order herein, see *ante*, p. 933.]

No. 128, Orig. ALASKA *v.* UNITED STATES. Motion of the Special Master for allowance of fees and reimbursement granted, and the Special Master is awarded a total of $74,376.56 for the period October 17, 2003, through April 19, 2004, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, *ante*, p. 1008.]

No. 02–1192. COOPER INDUSTRIES, INC. *v.* AVIALL SERVICES, INC. C. A. 5th Cir. [Certiorari granted, 540 U. S. 1099.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 02–10038. TENNARD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. [Certiorari granted, 540 U. S. 945.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 03–377. KOONS BUICK PONTIAC GMC, INC. *v.* NIGH. C. A. 4th Cir. [Certiorari granted, 540 U. S. 1148.] Motion of National Automobile Dealers Association for leave to file a brief as *amicus curiae* granted.

No. 03–8376. NABELEK *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 930] denied.

No. 03–8381. NABELEK *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 930] denied.

No. 03–9005. CUYLER *v.* WAL-MART STORES, INC. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis*

denied. Petitioner is allowed until June 14, 2004, 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. JUSTICE BREYER took no part in the consideration or decision of this motion.

No. 03–10034. IN RE WATTLETON. Petition for writ of habeas corpus denied.

No. 03–9492. IN RE BILLS. Petition for writ of mandamus denied.

No. 03–9496. IN RE BRISON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 03–1039. GOUGHNOUR, ACTING WARDEN *v.* PAYTON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 346 F. 3d 1204.

No. 03–1116. GRANHOLM, GOVERNOR OF MICHIGAN, ET AL. *v.* HEALD ET AL. C. A. 6th Cir.;

No. 03–1120. MICHIGAN BEER & WINE WHOLESALERS ASSN. *v.* HEALD ET AL. C. A. 6th Cir.; and

No. 03–1274. SWEDENBURG ET AL. *v.* KELLY, CHAIRMAN, NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL, STATE LIQUOR AUTHORITY, ET AL. C. A. 2d Cir. Certiorari granted limited to the following question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?" Cases consolidated, and a total of one hour allotted for oral argument. Reported below: Nos. 03–1116 and 03–1120, 342 F. 3d 517; No. 03–1274, 358 F. 3d 223.

No. 03–1164. VENEMAN, SECRETARY OF AGRICULTURE, ET AL. *v.* LIVESTOCK MARKETING ASSN. ET AL.; and

No. 03–1165. NEBRASKA CATTLEMEN, INC., ET AL. *v.* LIVESTOCK MARKETING ASSN. ET AL. C. A. 8th Cir. Motion of 48 Cattle and Agricultural Associations for leave to file a brief as *amicus curiae* in No. 03–1164 granted. Certiorari granted limited to Question 1 presented by each petition. Cases consoli-

dated, and a total of one hour allotted for oral argument. Reported below: 335 F. 3d 711.

Certiorari Denied

No. 02–1478. SHEEHAN, TRUSTEE, ET AL. *v.* WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION. C. A. 4th Cir. Certiorari denied. Reported below: 55 Fed. Appx. 121.

No. 03–871. MCENROE ET AL. *v.* RAMIREZ. C. A. 9th Cir. Certiorari denied. Reported below: 334 F. 3d 850.

No. 03–879. COMMISSIONER OF REVENUE OF MASSACHUSETTS *v.* H. J. WILSON CO., INC. C. A. 6th Cir. Certiorari denied. Reported below: 333 F. 3d 666.

No. 03–1138. TURN-KEY-TECH, LLC *v.* NATIONAL FILM LABORATORY, INC., DBA CREST NATIONAL OPTICAL MEDIA, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 74 Fed. Appx. 58.

No. 03–1172. LINSENMEYER ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 101.

No. 03–1187. ALLOC, INC., ET AL. *v.* INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 342 F. 3d 1361.

No. 03–1203. RELIANCE STANDARD LIFE INSURANCE CO. *v.* LASSER. C. A. 3d Cir. Certiorari denied. Reported below: 344 F. 3d 381.

No. 03–1226. HUNTER *v.* MUELLER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–1316. NEIL *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–1321. ROTEC INDUSTRIES, INC. *v.* MITSUBISHI CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 348 F. 3d 1116.

No. 03–1323. BROOKS-MCCOLLUM *v.* BERRY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 869.

No. 03–1329. SARULLO *v.* POTTER, POSTMASTER GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 352 F. 3d 789.

No. 03–1331. KOERNER *v.* GARDEN DISTRICT ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 960.

No. 03–1333. HERNANDEZ, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF HERNANDEZ *v.* EL PASO ENERGY CORP., NKA EL PASO CORP., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 719.

No. 03–1336. BLACKSTOCK *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied.

No. 03–1365. HONZAWA ET AL. *v.* HONZAWA ET UX. Ct. App. N. Y. Certiorari denied. Reported below: 1 N. Y. 3d 564, 807 N. E. 2d 890.

No. 03–1367. FRANKSTON *v.* GLENN ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–1368. PETER FARRELL SUPERCARS, INC., ET AL. *v.* MONSEN. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 293.

No. 03–1401. SOUTH DAKOTA DEPARTMENT OF REVENUE *v.* POURIER, DBA MUDDY CREEK OIL & GAS, INC., ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: 674 N. W. 2d 314.

No. 03–6270. CABRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 328 F. 3d 506.

No. 03–7223. BYRD *v.* NORTH CAROLINA STATE UNIVERSITY, UNIVERSITY TEMPORARY SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 60 Fed. Appx. 954.

No. 03–8532. GROHS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 713.

No. 03–8748. RAAFLAUB *v.* GRIEVANCE ADMINISTRATOR, ATTORNEY GRIEVANCE COMMISSION OF MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 469 Mich. 1241, 670 N. W. 2d 670.

No. 03–8903. REYNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 358 F. 3d 344.

No. 03–8985. AVALOS ALBA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–9021. HYLTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 349 F. 3d 781.

No. 03–9098. LOPEZ-ORTIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 773.

No. 03–9423. SMITH *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9435. POPE *v.* MARSHALL. C. A. 1st Cir. Certiorari denied. Reported below: 77 Fed. Appx. 534.

No. 03–9441. EDGE *v.* STALDER, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 678.

No. 03–9442. WIMBUSH *v.* GADDIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 382.

No. 03–9443. YOUNG *v.* AMERITECH/SBC, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 801.

No. 03–9446. SYKES *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–9451. CARTER *v.* CALDERON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–9454. DUPRE *v.* FREDLUND, CHAIRMAN, LOUISIANA BOARD OF REVIEW. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 857 So. 2d 1135.

No. 03–9457. WHIT *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9460. BATOR *v.* HALLOCK ELECTRIC ET AL. Ct. App. Minn. Certiorari denied.

No. 03–9462. MILLAN *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9463. RAMSEY *v.* PALMATEER, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 253.

No. 03–9464. SALAZAR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9468. PURINTUN *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–9469. MOTE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 277 Ga. 429, 588 S. E. 2d 748.

No. 03–9473. BYNUM *v.* DUNCAN, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–9475. OLDHAM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 03–9480. ATKINSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9482. WASKO *v.* MOORE. Ct. App. N. M. Certiorari denied.

No. 03–9489. RUSSELL *v.* GARRARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 781.

No. 03–9491. SPENCER *v.* ELO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 389.

No. 03–9494. MUHAMMAD, FKA KNIGHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 866 So. 2d 1195.

No. 03–9501. MITCHELL *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 898.

No. 03–9507. TRAYLOR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9513. CODDINGTON *v.* LANGLEY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 869.

No. 03–9516. FALLS DOWN *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 318 Mont. 219, 79 P. 3d 797.

No. 03–9523. ANDERSON *v.* WALLS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9524. WORKMAN *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 342 F. 3d 1100.

No. 03–9529. AHMED *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–9530. KALASHO *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 774.

No. 03–9531. BURGESS *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 03–9532. BELL *v.* SMITH, SUPERINTENDENT, EASTERN CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied.

No. 03–9565. HARRIS *v.* DICARLO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9583. HADLEY *v.* HOLMES, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 341 F. 3d 661.

No. 03–9606. CHAUDRY *v.* WHISPERING RIDGE HOMEOWNERS ASSN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–9631. DANIEL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 387.

No. 03–9633. EVANCHYK *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 340 F. 3d 933.

No. 03–9647. CASON *v.* MARYLAND DIVISION OF CORRECTION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 63 Fed. Appx. 741.

No. 03–9650. DUY NGOC TRAN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 558.

No. 03–9651. PATTERSON *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 03–9655. DENNIS *v.* MITCHELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 354 F. 3d 511.

No. 03–9740. WEBB *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 307 App. Div. 2d 782, 762 N. Y. S. 2d 866.

No. 03–9750. WHITE *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–9762. GRIFFIN *v.* MOORE, SUPERINTENDENT, MONROE CORRECTIONAL COMPLEX. C. A. 9th Cir. Certiorari denied.

No. 03–9802. SAMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 592.

No. 03–9805. WILLIAMS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–9811. BEARD *v.* BUSH, GOVERNOR OF FLORIDA, ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 861 So. 2d 1153.

No. 03–9817. POZO *v.* ESSER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 968.

No. 03–9821. SCHLINGHEYDE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 03–9838. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 353 F. 3d 490.

No. 03–9874. MCKENZIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 656.

No. 03–9879. MAXWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 305.

No. 03–9880. JOHNSTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 353 F. 3d 617.

No. 03–9881. VELARDE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 339.

No. 03–9882. EMUCHAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9884. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 788.

No. 03–9885. MOTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 03–9888. TROFIMOFF *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9895. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 980.

No. 03–9900. MYERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 355 F. 3d 1040.

No. 03–9910. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 686.

No. 03–9911. MEDINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9912. MORRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9914. DUNCAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–9915. DANSER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–9916. WILLIAMSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 943.

No. 03–9918. MCCALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 417.

No. 03–9921. SEGUI-RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 356 F. 3d 104.

No. 03–9924. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–9929. WILSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 84 Fed. Appx. 152.

No. 03–9930. HINOJOSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 349 F. 3d 200.

No. 03–9937. DAWSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 141 F. 3d 1160.

No. 03–9945. MCGRAW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 351 F. 3d 443.

No. 03–9946. WILLIAMS, AKA STRONG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 307.

No. 03–9947. ROHLSEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 307.

No. 03–9954. GRACIA-GRACIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 709.

No. 03–9961. FOSTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–9968. DORVAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–860. MUNDY ET AL. *v.* RHEAD. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 71 Fed. Appx. 729.

No. 03–1079. CARUSO, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS *v.* ABELA. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 348 F. 3d 164.

No. 03–1353. ORR *v.* WAL-MART STORES, INC. C. A. 8th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 297 F. 3d 720.

No. 03–1392. STRIPLING *v.* HEAD, WARDEN. Sup. Ct. Ga. Motion of The ARC of the United States et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 277 Ga. 403, 590 S. E. 2d 122.

Rehearing Denied

No. 03–929. RAPANOS *v.* UNITED STATES, *ante*, p. 972;

No. 03–1084. ROLE *v.* ATCO PRODUCTS, INC., *ante,* p. 973;

No. 03–1141. GISSLEN *v.* CITY OF CRYSTAL, MINNESOTA, ET AL., *ante,* p. 960;

No. 03–1219. IN RE VEY, *ante,* p. 958;

No. 03–7607. RUSSELL *v.* GARRARD ET AL., 540 U. S. 1164;

No. 03–7864. HENSON *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 540 U. S. 1155;

No. 03–7949. HOGAN *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL., *ante,* p. 975;

No. 03–8292. IN RE COLE, *ante,* p. 934;

No. 03–8502. JONES *v.* BIRKETT, WARDEN, *ante,* p. 946;

No. 03–8676. WILLIAMS *v.* FLORIDA, *ante,* p. 949;

No. 03–8833. PALLADINO *v.* PERLMAN, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY, *ante,* p. 964;

No. 03–8885. WILLIAMS *v.* AVIALL SERVICES, INC., *ante,* p. 964;

No. 03–9030. HAYES *v.* GEMMA POWER SYSTEM, LLC, ET AL., *ante,* p. 979; and

No. 03–9136. CAMPA-FABELA *v.* UNITED STATES, *ante,* p. 967. Petitions for rehearing denied.

JUNE 1, 2004

Certiorari Dismissed

No. 03–9564. FLYNN *v.* MURPHY. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 03M76. HUGHES ET VIR *v.* PRICE CO. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 105, Orig. KANSAS v. COLORADO. Motion of Kansas for leave to file a surreply granted. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, *ante,* p. 1101.]

No. 03–10116. IN RE HOOKER;

No. 03–10118. IN RE HESS;

No. 03–10142. IN RE LYON;

No. 03–10153. IN RE WEST;

No. 03–10196. IN RE HOLLOWAY; and

No. 03–10229. IN RE CAYTON. Petitions for writs of habeas corpus denied.

Certiorari Denied

No. 03–1073. BAILEY ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 341 F. 3d 1342.

No. 03–1088. RISE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 345 F. 3d 952.

No. 03–1135. FERRER, POIROT & WANSBROUGH ET AL. *v.* BOMBARDIER AEROSPACE EMPLOYEE WELFARE BENEFITS PLAN. C. A. 5th Cir. Certiorari denied. Reported below: 354 F. 3d 348.

No. 03–1211. MACLACHLAN ET AL. *v.* EXXONMOBIL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 350 F. 3d 472.

No. 03–1212. CLAMPITT *v.* STARVING STUDENTS, INC. Ct. App. Ark. Certiorari denied.

No. 03–1350. ELLIS *v.* METZ. C. A. 9th Cir. Certiorari denied.

No. 03–1352. BELCASTRO *v.* MONEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–1354. SMITH *v.* BIRDSALL, CHIEF JUDGE, 11TH JUDICIAL DISTRICT COURT OF NEW MEXICO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 176.

No. 03–1355. CONTRACT MANAGEMENT SERVICES, INC., ET AL. *v.* TRAVEL NURSES INTERNATIONAL, INC. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 978.

No. 03–1357. BUSH *v.* CITY OF ZEELAND, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 581.

No. 03–1360. ADMIRAL INSURANCE CO. *v.* CAST STEEL PRODUCTS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 348 F. 3d 1298.

No. 03–1361. CONELY *v.* TOWNSHIP OF YORK, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 49.

No. 03–1363. KATZ *v.* MAX MANAGEMENT CORP. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 302 App. Div. 2d 496, 755 N. Y. S. 2d 282.

No. 03–1364. GERMAN *v.* THERM-O-DISC, INC., ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 100 Ohio St. 3d 305, 798 N. E. 2d 1078.

No. 03–1366. GALLO *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 349 F. 3d 1169.

No. 03–1370. TOWN OF NORWOOD, MASSACHUSETTS, ET AL. *v.* NEW ENGLAND POWER CO. App. Ct. Mass. Certiorari denied. Reported below: 59 Mass. App. 1106, 797 N. E. 2d 26.

No. 03–1372. DALLAS GLEN HILLS, LP *v.* CORFIELD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 355 F. 3d 853.

No. 03–1374. PONCA TRIBE OF NEBRASKA ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, RIVERSIDE COUNTY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–1376. SANYO NORTH AMERICA CORP. ET AL. *v.* HARRIS CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 79 Fed. Appx. 438.

No. 03–1383. GANESAN *v.* VALLABHANENI ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 421.

No. 03–1394. EGBUNE *v.* COLORADO. Dist. Ct. Colo., Arapahoe County. Certiorari denied.

No. 03–1408. BURTON *v.* MOTTOLESE, FORMER JUDGE OF THE SUPERIOR COURT OF CONNECTICUT, FAIRFIELD JUDICIAL DISTRICT. Sup. Ct. Conn. Certiorari denied. Reported below: 267 Conn. 1, 835 A. 2d 998.

No. 03–1409. BURKHARDT *v.* OKLAHOMA EX REL. DEPARTMENT OF REHABILITATION SERVICES ET AL. Ct. Civ. App. Okla. Certiorari denied.

No. 03–1416. RUNNINGEN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 03–1432. ROSS *v.* SANTA BARBARA NEWS-PRESS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–1435. LAS VEGAS SANDS, INC. *v.* CULINARY WORKERS UNION, LOCAL 226. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 580.

No. 03–1458. PETIT ET AL. *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 352 F. 3d 1111.

No. 03–1465. HUNT *v.* PERRY. Sup. Ct. Ark. Certiorari denied. Reported below: 355 Ark. 303, 138 S. W. 3d 656.

No. 03–1470. LILEIKIS *v.* SBC AMERITECH. C. A. 7th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 645.

No. 03–1471. YATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 925.

No. 03–1474. SIMON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 355.

No. 03–1481. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 343 F. 3d 415.

No. 03–8334. MCLUCKIE *v.* ABBOTT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 337 F. 3d 1193.

No. 03–8575. MCFADDEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–8946. VEGA-PACHECO *v.* UNITED STATES;
No. 03–9935. VEGA-COLON ET AL. *v.* UNITED STATES;
No. 03–9938. ALICEA-TORRES *v.* UNITED STATES;
No. 03–9940. GARCIA-GARCIA ET AL. *v.* UNITED STATES;
No. 03–10001. FERNANDEZ-MALAVE *v.* UNITED STATES; and
No. 03–10033. SOTO-BENIQUEZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 356 F. 3d 1.

No. 03–9152. HAKIM, AKA LOWERY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 344 F. 3d 324.

No. 03–9170. KING *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 03–9514. CREUSERE *v.* BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI ET AL.

C. A. 6th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 813.

No. 03–9520. PANNELL *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY, ET AL. C. A. 7th Cir. Certiorari denied.

No. 03–9521. PENNIX *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 927.

No. 03–9537. CODY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 03–9540. ROMAN *v.* MCGRATH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 191.

No. 03–9545. ROBERTSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9546. SLOAN *v.* EARLY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9547. SMOOT *v.* PEGUESE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 236.

No. 03–9554. HOWARD *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–9562. GADSON *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 03–9563. BALL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9566. FANUS *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 336 Ore. 63, 79 P. 3d 847.

No. 03–9575. GOMEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9576. HOUSER *v.* WATHEN, ASSISTANT WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 363.

No. 03–9578. LATSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9580. BARTHMAIER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 869 So. 2d 549.

No. 03–9584. HALL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 03–9585. GALES *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 31 Kan. App. 2d xxxii, 74 P. 3d 594.

No. 03–9587. HOLMES *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 03–9588. GUTIERREZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9589. TAYLOR *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 294.

No. 03–9590. TORRES ET AL. *v.* RUNYON. C. A. 9th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 594.

No. 03–9594. PERRY *v.* LOCKHEED MISSILES & SPACE CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 821.

No. 03–9595. ROBB *v.* O'KEEFE, COMMISSIONER, MINNESOTA DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 725.

No. 03–9602. SUTHERLIN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9607. DI NARDO ET AL. *v.* CIRCUIT COURT OF FLORIDA, PALM BEACH COUNTY, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9609. REECE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9612. MANGAN *v.* DAVIS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 84 Fed. Appx. 104.

No. 03–9613. ALEXANDER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9616. MILES *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 03–9620. MITCHELL ET AL. *v.* CONNOR, TEXAS SECRETARY OF STATE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 899.

No. 03–9621. ANDERSON *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 03–9622. BURGESS *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 03–9624. BURNETTE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 867 So. 2d 684.

No. 03–9625. BENSON *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9668. STEWART *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–9671. RISDAL *v.* HALFORD ET AL. C. A. 8th Cir. Certiorari denied.

No. 03–9690. BURNES *v.* BUSH, PRESIDENT OF THE UNITED STATES; BURNES *v.* AMERICAN ELECTRIC POWER ET AL.; BURNES *v.* AMERICAN BAR ASSN. ET AL.; BURNES *v.* AMERICAN BROADCASTING CO. ET AL.; BURNES *v.* NATIONAL BROADCASTING CO. ET AL.; and BURNES *v.* COLUMBIA BROADCAST ET AL. C. A. 6th Cir. Certiorari denied.

No. 03–9695. NOWIK *v.* NORTH DAKOTA. C. A. 8th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 899.

No. 03–9707. IBANEZ *v.* VERIZON VIRGINIA INC. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 797.

No. 03–9712. BRANHAM *v.* BUDGE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 208.

No. 03–9721. NGANG *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 380.

No. 03–9726. WELCH *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 350 F. 3d 1079.

No. 03–9757. SENECA *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 978.

No. 03–9774. WILLIAMS *v.* FARWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9815. AUSTIN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA. C. A. 9th Cir. Certiorari denied.

No. 03–9816. MCINTOSH *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 03–9822. JUSTICE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 03–9827. GARCIA-LOPEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 308 App. Div. 2d 366, 764 N. Y. S. 2d 264.

No. 03–9835. HERNANDEZ *v.* SMITH. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 615.

No. 03–9837. ALLEY *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 841 A. 2d 803.

No. 03–9846. FORCUM *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 344 Ill. App. 3d 427, 800 N. E. 2d 499.

No. 03–9865. MUNDAY *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 81 Fed. Appx. 310.

No. 03–9870. JENNINGS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 112 Cal. App. 4th 459, 5 Cal. Rptr. 3d 243.

No. 03–9871. CUONG LE *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9887. PEREA *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9889. MITCHELL *v.* DEPARTMENT OF COMMERCE. C. A. 6th Cir. Certiorari denied. Reported below: 68 Fed. Appx. 701.

No. 03–9899. MOORE *v.* SCHUETZLE, WARDEN. Sup. Ct. N. D. Certiorari denied.

No. 03–9906. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–9923. SINISTERRA *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 543.

No. 03–9936. WARREN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 842 A. 2d 714.

No. 03–9951. SCALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–9952. HIGHTOWER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 750.

No. 03–9957. MINES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 703.

No. 03–9958. SCRUGGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 356 F. 3d 539.

No. 03–9965. TUCKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–9966. TOLIVER *v.* UNITED STATES; and
No. 03–9971. PATTERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 351 F. 3d 423.

No. 03–9973. TAYLOR ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 381.

No. 03–9975. DARRINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 351 F. 3d 632.

No. 03–9978. SAUNDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 200.

No. 03–9982. RIVERA-GALVAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 579.

No. 03–9983. LEARY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 559.

No. 03–9986. SANDOVAL-VENEGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 921.

No. 03–9989. BURGESS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 865.

No. 03–9991. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 902.

No. 03–9996. WATTS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 633.

No. 03–10000. VELOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 47.

No. 03–10002. LUPERCIO-OLIVARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 226.

No. 03–10011. MELENDEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 88 Fed. Appx. 529.

No. 03–10012. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 556.

No. 03–10015. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 194.

No. 03–10026. MCQUIDDY *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10028. BURNETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 137.

No. 03–10030. COLEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 349 F. 3d 1077.

No. 03–10037. RAINEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 362 F. 3d 733.

No. 03–10042. EMERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 696.

No. 03–10043. WELLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 347 F. 3d 280.

No. 03–10047. EVANS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 837 A. 2d 87.

No. 03–10048. COVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 392.

No. 03–10050. CANNON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 508.

No. 03–10053. DUGAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–10054. BALLARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 886.

No. 03–10056. THOMSON, AKA THOMPSON, AKA THOMSOM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 354 F. 3d 1197.

No. 03–10057. COTTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 192.

No. 03–10059. COLEMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 03–10061. DANIELS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–10064. TILLITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–10068. FULTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 03–10069. GAUCIN FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 528.

No. 03–10071. GIBSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 905.

No. 03–10072. FROELICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 333.

No. 03–10074. HORN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 355 F. 3d 610.

No. 03–10075. GONZALEZ-EDEZA, AKA PELAEZ-MORGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 359 F. 3d 1246.

No. 03–10076. GARCIA-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 774.

No. 03–10077. FAULKNER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 577.

No. 03–10078. HELTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 889.

No. 03–10081. GREEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 842.

No. 03–10083. GRAHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10087. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 71.

No. 03–10092. YOUNG *v.* DODRILL, WARDEN, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 03–10094. FREEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 768.

No. 03–10105. VILLEGAS-ZAPATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 693.

No. 03–10125. OKEH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–10126. MORALES-MERCED *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 03–836. COLORADO *v.* MILLER. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 75 P. 3d 1108.

No. 03–1338. SANTA BARBARA NEWS-PRESS ET AL. *v.* ROSS. Ct. App. Cal., 2d App. Dist. Motion of Media Entities for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 03–9858. DIXON *v.* EQUICREDIT CORP. ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 82 Fed. Appx. 501.

Rehearing Denied

No. 02–1270. PERLMAN *v.* DEPARTMENT OF JUSTICE, *ante*, p. 970;

No. 03–898. ORTIZ VELEZ, MAYOR OF SABANA GRANDE, PUERTO RICO, ET AL. *v.* RIVERA-TORRES ET AL., *ante*, p. 972;

No. 03–1100. JONES, DBA MELDER PUBLISHING CO. *v.* HAWKINS ET AL., *ante*, p. 973;

No. 03–1239. FACONTI *v.* POTTER, POSTMASTER GENERAL, *ante*, p. 975;

No. 03–8208. LANN *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, *ante*, p. 907;

No. 03–8338. SACCO *v.* NEW YORK, *ante*, p. 943;

No. 03–8587. OGUNJOBI-YOBO *v.* DEKALB COUNTY, GEORGIA, *ante*, p. 962;

No. 03–8646. PARKS *v.* CITY OF CHATTANOOGA, TENNESSEE, ET AL., *ante*, p. 963;

No. 03–8706. BAHODA *v.* MICHIGAN, *ante*, p. 977;

No. 03–8889. D'ANTUONO *v.* NEW YORK, *ante*, p. 994;

No. 03–8978. PLEASANT, AKA PLEASANTS *v.* UNITED STATES, *ante*, p. 956; and

No. 03–9301. MATHISON ET UX. *v.* CORRECTIONS CORPORATION OF AMERICA ET AL., *ante*, p. 999. Petitions for rehearing denied.

No. 02–10418. SHELTON *v.* MAKEL, WARDEN, 539 U. S. 963. Motion for leave to file petition for rehearing denied.

JUNE 7, 2004

Certiorari Granted—Vacated and Remanded

No. 03–9708. GOFF *v.* OHIO. Ct. App. Ohio, Summit County. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washing-*

ton, ante, p. 36. Reported below: 154 Ohio App. 3d 59, 796 N. E. 2d 50.

Miscellaneous Orders

No. 03M77. PALUMBO *v.* BROWN, WARDEN; and

No. 03M78. KNIGHT *v.* STEPHENS, DIRECTOR, WASHINGTON STATE DEPARTMENT OF LICENSING, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 03–1230. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL.;

No. 03–1234. MID-CON FREIGHT SYSTEMS, INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL.; and

No. 03–1250. TROY CAB, INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL. Ct. App. Mich. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 03–7434. BENITEZ *v.* MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, IMMIGRATION AND CUSTOMS ENFORCEMENT. C. A. 11th Cir. [Certiorari granted, 540 U. S. 1147.] Motion of petitioner for appointment of counsel granted. John S. Mills, Esq., of Jacksonville, Fla., is appointed to serve as counsel for petitioner in this case.

No. 03–9011. CORBIN *v.* FLORIDA BAR. Sup. Ct. Fla. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 986] denied.

No. 03–9675. STRANGE *v.* NORFOLK SOUTHERN CORP. C. A. 11th Cir.; and

No. 03–10067. HOLLAND *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 28, 2004, 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. 03–10311. IN RE WILSON;

No. 03–10315. IN RE KELLEY; and

No. 03–10358. IN RE PARMAR. Petitions for writs of habeas corpus denied.

No. 03–10284. IN RE BROOKS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of

habeas corpus dismissed. See this Court's Rule 39.8. 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. 03–9623. IN RE SHEEHAN; and

No. 03–9654. IN RE CRUZ. Petitions for writs of mandamus denied.

No. 03–9619. IN RE BRONSON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 03–1407. ROUSEY ET UX. *v.* JACOWAY. C. A. 8th Cir. Certiorari granted. Reported below: 347 F. 3d 689.

Certiorari Denied

No. 03–1085. SAMIRAH *v.* ASHCROFT, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 335 F. 3d 545.

No. 03–1097. RITCHESON *v.* C. C. SERVICES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 927.

No. 03–1125. TEXAS CITIES COALITION ON STORMWATER *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 344 F. 3d 832.

No. 03–1247. BATZEL *v.* SMITH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 333 F. 3d 1018.

No. 03–1259. ROGERS *v.* NORFOLK SOUTHERN CORP. ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 356 S. C. 85, 588 S. E. 2d 87.

No. 03–1273. SPARGO ET AL. *v.* NEW YORK COMMISSION ON JUDICIAL CONDUCT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 351 F. 3d 65.

No. 03–1384. FOLLOWELL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GURLEY *v.* MILLS. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 387.

No. 03–1385. HOLGUIN *v.* FLOOD CONTROL DISTRICT OF GREENLEE COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 70 Fed. Appx. 958.

No. 03–1386. GRANITE STATE OUTDOOR ADVERTISING, INC. *v.* CITY OF ST. PETERSBURG, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 348 F. 3d 1278.

No. 03–1387. PHILSON, AKA ALLAH *v.* SHERRER, ADMINISTRATOR, NORTHERN STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 77 Fed. Appx. 123.

No. 03–1398. CRUM ET AL. *v.* FLOWERS ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–1402. SATRE-BUISSON *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 03–1419. FITZGERALD, TREASURER OF IOWA *v.* RACING ASSOCIATION OF CENTRAL IOWA ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 675 N. W. 2d 1.

No. 03–1453. CENDEJAS *v.* ENGLAND, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 639.

No. 03–1472. LOCAL UNION NO. 38, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO *v.* PELELLA. C. A. 2d Cir. Certiorari denied. Reported below: 350 F. 3d 73.

No. 03–1473. PERSIK *v.* MANPOWER INC. C. A. 10th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 127.

No. 03–1490. CLAIM OF KAWCZYNSKI ET AL. *v.* ESTATE OF CUMMINGS, DECEASED. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 03–8172. DEJESUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 347 F. 3d 500.

No. 03–8225. CHEVALIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–8728. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 639.

No. 03–8788. MURPHY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 115 Wash. App. 297, 62 P. 3d 533.

No. 03–9002. GREER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 72 Fed. Appx. 793.

No. 03–9218. BUSBY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 359 F. 3d 708.

No. 03–9287. PINEDA-CORTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 387.

No. 03–9553. HALIBURTON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 342 F. 3d 1233.

No. 03–9611. SORIANO *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9635. MOPPINS *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 661.

No. 03–9636. THOMAS *v.* BLUMENTHAL. C. A. 2d Cir. Certiorari denied.

No. 03–9639. SMITH *v.* MOHAMED. C. A. 9th Cir. Certiorari denied.

No. 03–9642. CHILDERS *v.* SCOTT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–9643. JONES *v.* KOLB ET AL. (five judgments). C. A. 6th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 779 (fifth judgment) and 789 (third judgment); 84 Fed. Appx. 560 (first judgment); 91 Fed. Appx. 367 (fourth judgment).

No. 03–9645. DARDEN *v.* BASKERVILLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 597.

No. 03–9646. CHARLES *v.* SMITH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9657. DULISSE *v.* CENTRAL PENN PROPERTY SERVICE, INC. Sup. Ct. Pa. Certiorari denied.

No. 03–9658. DANIELS *v.* MCLEMORE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9660. TATUM *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 267.

No. 03–9661. WALKER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9663. BRAGGS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 869 So. 2d 558.

No. 03–9669. BOOKER *v.* ANDERSON, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 100 Ohio St. 3d 355, 800 N. E. 2d 28.

No. 03–9670. ALDRICH *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 11.

No. 03–9674. POWELL *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9683. TAYLOR *v.* RUSHTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 303.

No. 03–9687. CUESTA *v.* BERTRAND, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9692. SIMS *v.* KEMP, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9698. LLOYD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9702. SQUIRES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 357 N. C. 529, 591 S. E. 2d 837.

No. 03–9705. RODRIGUEZ *v.* EDDOWES. Sup. Ct. Nev. Certiorari denied.

No. 03–9710. BRYANT-BEY *v.* GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 391.

No. 03–9722. OWENS *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–9723. HONG BAO LI *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–9725. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–9732. BYRD *v.* RALEIGH HOUSING AUTHORITY. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 798.

No. 03–9733. BAKER *v.* TURNER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 423.

No. 03–9769. DONNELLY *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 2d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 701.

No. 03–9780. SPIES *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 672 N. W. 2d 792.

No. 03–9862. VALDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–9902. MENDEZ, AKA BENITEZ *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 165.

No. 03–9919. ETOKIE *v.* DISABILITY ACTION CENTER, INC. C. A. 4th Cir. Certiorari denied.

No. 03–9960. FAULKNER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 03–9967. LYNCH *v.* STERNES, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9976. CARTER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 208 Ill. 2d 309, 802 N. E. 2d 1185.

No. 03–9981. RIGGS *v.* WILLIAMS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 103.

No. 03–9995. DEVINE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 03–9999. NOBLES *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 03–10009. BINH LY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 277 Kan. 386, 85 P. 3d 1200.

No. 03–10025. BROWN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 03–10046. CARTER *v.* LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 254.

No. 03–10063. TOWNSEND *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 728.

No. 03–10070. GARCIA, AKA GARCIA-OLVERA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 323.

No. 03–10085. RUSSELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 906.

No. 03–10086. SHAW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 102.

No. 03–10107. KASTNEROVA *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 365 F. 3d 980.

No. 03–10109. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–10111. MILAN-GARDUNO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 1000.

No. 03–10117. HINTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 794.

No. 03–10121. GAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–10123. HERRICK *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10136. GASTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 357 F. 3d 77.

No. 03–10137. ARNETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 353 F. 3d 765 and 84 Fed. Appx. 939.

No. 03–10143. MADRIGAL-FERREIRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 713.

No. 03–10144. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 84 Fed. Appx. 159.

No. 03–10149. BOBBITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 301.

No. 03–10154. MISSOURI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 307.

No. 03–10157. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 621.

No. 03–10158. MAXWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 03–10159. MADERA-SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 654.

No. 03–10166. BREITWEISER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 357 F. 3d 1249.

No. 03–10170. LUGONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 780.

No. 03–10171. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 953.

No. 03–10173. CARDENAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 65 Fed. Appx. 651.

No. 03–10176. WHITE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 350 F. 3d 231.

No. 03–10181. SANDMEYER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 356 F. 3d 831.

No. 03–10185. SALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 512.

No. 03–10186. LIGHTNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 678.

No. 03–10187. WATERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 196.

No. 03–10188. GRAHAM *v.* ADAMS ET AL. C. A. 8th Cir. Certiorari denied.

No. 03–10190. HEWITT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 830 A. 2d 416.

No. 03–10191. FOUNTAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 389.

No. 03–10193. FLEMING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 314.

No. 03–10203. HERRIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 349 F. 3d 544.

No. 03–10205. GRUBBS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10206. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 712.

No. 03–10210. GRIFFIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 326 F. 3d 45.

No. 03–10216. HARVEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 90 Fed. Appx. 437.

No. 03–10218. FOURSTAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 62.

No. 03–10220. ZAKHARY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 357 F. 3d 186.

No. 03–10221. WALLACE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 380.

No. 03–10223. HARRIS, AKA SULUKI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10237. BLUNT *v.* HIGHLAND PARK CITY SCHOOL DISTRICT. Ct. App. Mich. Certiorari denied.

No. 03–1082. COLORADO GENERAL ASSEMBLY *v.* SALAZAR, ATTORNEY GENERAL OF COLORADO, ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 79 P. 3d 1221.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

As a result of the 2000 census, Congress allotted an additional seat in the House of Representatives to Colorado. The Colorado General Assembly failed to pass a congressional redistricting plan in time for the 2002 elections. In response to a suit brought by Colorado voters, a Colorado State District Court drew a congressional district map for the 2002 elections that took account of the new census figures and conformed to federal voting rights requirements. *Avalos* v. *Davidson*, No. 01–CV–2897, 2002 WL 1895406 (Jan. 25, 2002), aff'd *sub nom. Beauprez* v. *Avalos*, 42 P. 3d 642 (Colo. 2002) (en banc).

At the end of the 2003 regular session, the newly elected General Assembly enacted a redistricting plan, which was signed into law on May 9, 2003. Shortly thereafter, the Colorado Attorney General, Ken Salazar, filed an original action in the Supreme Court of Colorado, seeking an injunction to prevent the Colorado Secretary of State, Donetta Davidson, from implementing the General Assembly's redistricting plan and requesting a writ of mandamus requiring Davidson to return to the 2002 redistricting plan. The General Assembly intervened on the respondents' side to join Davidson.

The Supreme Court of Colorado held, *inter alia*, that Article V, § 44, of the Colorado Constitution limits redistricting to once per decade, to be completed in the time between the decennial census and the first election of the decade. *People ex rel. Salazar* v. *Davidson*, 79 P. 3d 1221, 1231 (2003) (en banc). The court stated:

> "We recognize and emphasize that the General Assembly has primary responsibility for drawing congressional districts.

> But we also hold that when the General Assembly fails to provide a constitutional redistricting plan in the face of an upcoming election and courts are forced to step in, these judicially-created districts are just as binding and permanent as districts created by the General Assembly. We further hold that regardless of the method by which the districts are created, the state constitution prohibits redrawing the districts until after the next decennial census." *Ibid.*

The court ordered Davidson to employ the judicially created plan through the 2010 elections. While purporting to decide the issues presented exclusively on state-law grounds, the court made an express and necessary interpretation of the term "Legislature" in the Federal Elections Clause in concluding that "[n]othing in state or federal law contradicts this limitation." *Id.*, at 1232. The General Assembly and Davidson have asked this Court to review the Colorado Supreme Court's conclusion that Article V, § 44, of the Colorado Constitution (as construed by the Supreme Court of Colorado) does not violate Article I, § 4, cl. 1, of the Federal Constitution. While not disputing state courts' remedial authority to impose temporary redistricting plans "so long as the legislature does not fulfill its duty to redistrict," Pet. for Cert. 22, they argue that the *permanent* use of a court-ordered plan, despite the legislature's proposal of a valid alternative, violates the Federal Constitution.

Article I, § 4, cl. 1, of the United States Constitution provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

By interpreting "general assembly" in Article V, § 44, of the Colorado Constitution to include the state courts, the Supreme Court of Colorado held that the Colorado Constitution makes the state courts part of the legislative process. The court relies on *Smiley* v. *Holm*, 285 U. S. 355 (1932), for the proposition that the States have the right to define "Legislature" under Article I, § 4.

In *Smiley*, the Supreme Court of Minnesota had interpreted Article I, § 4, as vesting the power to redistrict solely in the legislative body of Minnesota, without the need for gubernatorial

approval. We first noted that there was no question as to what "body" the term "legislature" describes:

> "As this Court said in *Hawke* v. *Smith, No. 1,* 253 U. S. 221, 227 [(1920)], the term was not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people.'" 285 U. S., at 365.

We next explained that the focus of our inquiry was not the "body" but the function to be performed. We concluded that the function referred to by Article I, § 4, was the lawmaking process, which is defined by state law. 285 U. S., at 372. In Minnesota, the lawmaking process, as defined by the State, included the participation of the Governor. *Id.*, at 372–373.

And in *Ohio ex rel. Davis* v. *Hildebrant,* 241 U. S. 565 (1916), we examined referenda to approve or disapprove by popular vote any law enacted by the Ohio General Assembly. In each of these decisions, we concluded that the lawmaking mechanisms were consistent with Article I, § 4. Conspicuously absent from the Colorado lawmaking regime, under the Supreme Court of Colorado's construction of the Colorado Constitution to include state-court orders as part of the lawmaking, is participation in the process by a body representing the people, or the people themselves in a referendum.

Generally the separation of powers among branches of a State's government raises no federal constitutional questions, subject to the requirement that the government be republican in character. But the words "shall be prescribed in each State by the *Legislature* thereof" operate as a limitation on the State. Cf. *McPherson* v. *Blacker,* 146 U. S. 1, 26 (1892) (discussing Article II, § 1, cl. 2, of the U. S. Constitution). And to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts.

We should grant certiorari to review the Colorado state court's debatable interpretation of this provision of federal law. I dissent from the denial of the petition for writ of certiorari.

No. 03–1382. HUFFMAN, WARDEN *v.* FRAZIER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis*

granted. Certiorari denied. Reported below: 343 F. 3d 780 and 348 F. 3d 174.

No. 03–1397. CIVIL LIBERTIES FOR URBAN BELIEVERS ET AL. *v.* CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Motions of Becket Fund for Religious Liberty et al. and American Jewish Congress et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 342 F. 3d 752.

No. 03–1502. RANGER CELLULAR ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Motion of petitioners for partial remand for consideration of settlement agreement denied. Certiorari denied. Reported below: 348 F. 3d 1044.

No. 03–9656. DULISSE *v.* HOMESIDE LENDING, INC. Sup. Ct. Pa. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

Rehearing Denied

No. 03–8096. MORRISON *v.* GEORGIA, *ante*, p. 940;

No. 03–8517. SIMPSON *v.* COLORADO, *ante*, p. 947;

No. 03–8625. MCCOY *v.* YARBOROUGH, WARDEN, ET AL., *ante*, p. 962;

No. 03–8779. CRISWELL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 991;

No. 03–8899. JANES *v.* UNITED STATES, *ante*, p. 954;

No. 03–8905. RONDEAU *v.* RONDEAU, *ante*, p. 978;

No. 03–8912. ERVIN *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, *ante*, p. 954;

No. 03–9086. GILBERT *v.* RENICO, WARDEN, *ante*, p. 1013;

No. 03–9309. BREEN *v.* UNITED STATES, *ante*, p. 999;

No. 03–9358. GLASS *v.* BROADWAY ELECTRIC SERVICE, INC., *ante*, p. 1016; and

No. 03–9472. IN RE MCQUIDDY, *ante*, p. 986. Petitions for rehearing denied.

JUNE 8, 2004

Certiorari Denied

No. 03–10767 (03A1002). BRYAN *v.* MULLIN, WARDEN, ET AL. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. Reported below: 100 Fed. Appx. 801.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 26, 2004, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1098. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, and 538 U. S. 1075.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2004

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2004

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1011, 2002, and 9014.

[See *infra*, pp. 1101–1102.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2004, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1011. Responsive pleading or motion in involuntary and ancillary cases.

(*a*) *Who may contest petition.*—The debtor named in an involuntary petition or a party in interest to a petition commencing a case ancillary to a foreign proceeding may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

. . . . .

Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.

. . . . .

(*j*) *Notices to the United States.*—Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at any place the Commission designates, if the Commission has filed either a notice of appearance in the case or a written request to receive notices; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D. C.; (3) in a chapter 11 case, to the Internal Revenue Service at its address set out in the register maintained under Rule 5003(e) for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor became indebted; or (5) if the filed papers disclose a stock inter-

est of the United States, to the Secretary of the Treasury at Washington, D. C.

. . . . .

Rule 9014. Contested matters.

. . . . .

(*c*) *Application of Part VII Rules.*—Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

. . . . .

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure and to the Rules Governing Cases in the United States District Courts under 28 U. S. C. §§ 2254 and 2255 were prescribed by the Supreme Court of the United States on April 26, 2004, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1104. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, and 535 U. S. 1157.

For earlier publication of the Rules Governing 28 U. S. C. §§ 2254 and 2255 Cases, and amendments thereto, see 425 U. S. 1167, 441 U. S. 1001, and 456 U. S. 1031.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 26, 2004

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure and the rules and forms governing cases in the United States district courts under Sections 2254 and 2255 of Title 28, United States Code, that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 26, 2004

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein an amendment to Criminal Rule 35.

[See *infra*, p. 1107.]

2. That the rules and forms governing cases in the United States District Courts under Section 2254 and Section 2255 of Title 28, United States Code, be, and they hereby are, amended by including therein amendments to Rules 1 through 11 of the Rules Governing Section 2254 Cases in the United States District Courts, Rules 1 through 12 of the Rules Governing Section 2255 Cases in the United States District Courts, and forms for use in applications under Section 2254 and motions under Section 2255.

[See *infra*, pp. 1109–1149.]

3. That the foregoing amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Cases in the United States District Courts shall take effect on December 1, 2004, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Cases in the United States District Courts in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35. Correcting or reducing a sentence.

. . . . .

(*c*) *"Sentencing" defined.*—As used in this rule, "sentencing" means the oral announcement of the sentence.

RULES GOVERNING 28 U. S. C. § 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 1. Scope.

(*a*) *Cases involving a petition under 28 U. S. C. § 2254.*—These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U. S. C. § 2254 by:

(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and

(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.

(*b*) *Other cases.*—The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a).

Rule 2. The petition.

(*a*) *Current custody; naming the respondent.*—If the petitioner is currently in custody under a state-court judgment, the petition must name as respondent the state officer who has custody.

(*b*) *Future custody; naming the respondents and specifying the judgment.*—If the petitioner is not yet in custody—but may be subject to future custody—under the state-court judgment being contested, the petition must name as respondents both the officer who has current custody and the attorney general of the state where the judgment was entered. The petition must ask for relief from the state-court judgment being contested.

(*c*) *Form.*—The petition must:

(1) specify all the grounds for relief available to the petitioner;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the petitioner or by a person authorized to sign it for the petitioner under 28 U. S. C. § 2242.

(*d*) *Standard form.*—The petition must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to petitioners without charge.

(*e*) *Separate petitions for judgments of separate courts.*—A 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.

Rule 3. Filing the petition; inmate filing.

(*a*) *Where to file; copies; filing fee.*—An original and two copies of the petition must be filed with the clerk and must be accompanied by:

(1) the applicable filing fee, or

(2) a motion for leave to proceed in forma pauperis, the affidavit required by 28 U. S. C. § 1915, and a certificate from the warden or other appropriate officer of the place of confinement showing the amount of money or securities that the petitioner has in any account in the institution.

(*b*) *Filing.*—The clerk must file the petition and enter it on the docket.

(*c*) *Time to file.*—The time for filing a petition is governed by 28 U. S. C. § 2244(d).

(*d*) *Inmate filing.*—A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an

institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U. S. C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Rule 4. Preliminary review; serving the petition and order.

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

Rule 5. The answer and the reply.

(*a*) *When required.*—The respondent is not required to answer the petition unless a judge so orders.

(*b*) *Contents: Addressing the allegations; stating a bar.*—The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations.

(*c*) *Contents: Transcripts.*—The answer must also indicate what transcripts (of pretrial, trial, sentencing, or post-conviction proceedings) are available, when they can be furnished, and what proceedings have been recorded but not transcribed. The respondent must attach to the answer parts of the transcript that the respondent considers relevant. The judge may order that the respondent furnish other parts of existing transcripts or that parts of untranscribed recordings be transcribed and furnished. If a transcript

cannot be obtained, the respondent may submit a narrative summary of the evidence.

(*d*) *Contents: Briefs on appeal and opinions.*—The respondent must also file with the answer a copy of:

(1) any brief that the petitioner submitted in an appellate court contesting the conviction or sentence, or contesting an adverse judgment or order in a post-conviction proceeding;

(2) any brief that the prosecution submitted in an appellate court relating to the conviction or sentence; and

(3) the opinions and dispositive orders of the appellate court relating to the conviction or the sentence.

(*e*) *Reply.*—The petitioner may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Rule 6. Discovery.

(*a*) *Leave of court required.*—A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U. S. C. § 3006A.

(*b*) *Requesting discovery.*—A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(*c*) *Deposition expenses.*—If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

Rule 7. Expanding the record.

(*a*) *In general.*—If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(*b*) *Types of materials.*—The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

(*c*) *Review by the opposing party.*—The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Rule 8. Evidentiary hearing.

(*a*) *Determining whether to hold a hearing.*—If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

(*b*) *Reference to a magistrate judge.*—A judge may, under 28 U. S. C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(*c*) *Appointing counsel; time of hearing.*—If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U. S. C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

Rule 9. Second or successive petitions.

Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of

appeals authorizing the district court to consider the petition as required by 28 U. S. C. §§ 2244(b)(3) and (4).

Rule 10. Powers of a magistrate judge.

A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U. S. C. § 636.

Rule 11. Applicability of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

PETITION FOR RELIEF FROM A CONVICTION OR SENTENCE BY A PERSON IN STATE CUSTODY
(Petition Under 28 U. S. C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.
2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U. S. C. § 2255 in the federal court that entered the judgment.
3. Make sure the form is typed or neatly written.
4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.
6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $, you must pay the filing fee.
7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.
8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

PETITION UNDER 28 U. S. C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District
Name (under which you were convicted):	Docket or Case No.:
Place of Confinement:	Prisoner No.:
Petitioner (include the name under which you were convicted)	Respondent (authorized person having custody of petitioner)
v.	
The Attorney General of the State of	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

   _____

   _____

   (b) Criminal docket or case number (if you know): _____

2. (a) Date of the judgment of conviction (if you know): _____
   (b) Date of sentencing: _____

3. Length of sentence: _____

4. In this case, were you convicted on more than one count or of more than one crime?

   Yes ☐ No ☐

5. Identify all crimes of which you were convicted and sentenced in this case: _____

   _____

   _____

   _____

   _____

6. (a) What was your plea? (Check one)

   (1) Not guilty ☐ (3) Nolo contendere (no contest) ☐
   (2) Guilty ☐ (4) Insanity plea ☐

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? _____

(c) If you went to trial, what kind of trial did you have? (Check one)
Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?
Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?
Yes ☐ No ☐

9. If you did appeal, answer the following:
(a) Name of court: _____
(b) Docket or case number (if you know): _____
(c) Result: _____
(d) Date of result (if you know): _____
(e) Citation to the case (if you know): _____
(f) Grounds raised: _____

(g) Did you seek further review by a higher state court?
Yes ☐ No ☐
If yes, answer the following:
(1) Name of court: _____
(2) Docket or case number (if you know): _____
(3) Result: _____
(4) Date of result (if you know): _____
(5) Citation to the case (if you know): _____
(6) Grounds raised: _____

(h) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐ No ☐

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☐ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(3) Third petition: Yes ☐ No ☐

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not: _____

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the *facts* supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): _____

(b) If you did not exhaust your state remedies on Ground One, explain why: _____

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did *not* raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:
Type of motion or petition: _____
Name and location of the court where the motion or petition was filed: _____
_____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
_____
_____

(3) Did you receive a hearing on your motion or petition?
Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?
Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
_____
_____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
_____
_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____
_____
_____
_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: _____
_____
_____

GROUND TWO: _____
_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): _____
_____

(b) If you did not exhaust your state remedies on Ground Two, explain why: _____

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did *not* raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:
Type of motion or petition: _____
Name and location of the court where the motion or petition was filed: _____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:
Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: _____

GROUND THREE: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): _____

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did *not* raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:
Type of motion or petition: _____
Name and location of the court where the motion or petition was filed: _____
_____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
_____
_____

(3) Did you receive a hearing on your motion or petition?
Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?
Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
_____
_____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
_____
_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: _____
_____
_____
_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: _____
_____
_____

GROUND FOUR: _____
_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): _____
_____

(b) If you did not exhaust your state remedies on Ground Four, explain why: _____

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did *not* raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:
Type of motion or petition: _____
Name and location of the court where the motion or petition was filed: _____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:
Name and location of the court where the appeal was filed:

Docket or case number (if you know):
Date of the court's decision:
Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction?

Yes ☐ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition?

Yes ☐ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal *now pending* (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging?

Yes ☐ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised:

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

(b) At arraignment and plea:

(c) At trial:

(d) At sentencing:

(e) On appeal:

(f) In any post-conviction proceeding:

(g) On appeal from any ruling against you in a post-conviction proceeding:

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

Yes ☐ No ☐

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future?

Yes ☐ No ☐

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U. S. C. § 2244(d) does not bar your petition.* _____

_____

_____

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_____

_____

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U. S. C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief:

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

IN FORMA PAUPERIS DECLARATION

[Insert appropriate court]

* * * * *

RULES GOVERNING 28 U. S. C. § 2255 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 1. Scope.

These rules govern a motion filed in a United States district court under 28 U. S. C. § 2255 by:

(*a*) a person in custody under a judgment of that court who seeks a determination that:

(1) the judgment violates the Constitution or laws of the United States;

(2) the court lacked jurisdiction to enter the judgment;

(3) the sentence exceeded the maximum allowed by law; or

(4) the judgment or sentence is otherwise subject to collateral review; and

(*b*) a person in custody under a judgment of a state court or another federal court, and subject to future custody under a judgment of the district court, who seeks a determination that:

(1) future custody under a judgment of the district court would violate the Constitution or laws of the United States;

(2) the district court lacked jurisdiction to enter the judgment;

(3) the district court's sentence exceeded the maximum allowed by law; or

(4) the district court's judgment or sentence is otherwise subject to collateral review.

Rule 2. The motion.

(*a*) *Applying for relief.*—The application must be in the form of a motion to vacate, set aside, or correct the sentence.

(*b*) *Form.*—The motion must:

(1) specify all the grounds for relief available to the moving party;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant.

(*c*) *Standard form.*—The motion must substantially follow either the form appended to these rules or a form prescribed by a local district-court rule. The clerk must make forms available to moving parties without charge.

(*d*) *Separate motions for separate judgments.*—A moving party who seeks relief from more than one judgment must file a separate motion covering each judgment.

Rule 3. Filing the motion; inmate filing.

(*a*) *Where to file; copies.*—An original and two copies of the motion must be filed with the clerk.

(*b*) *Filing and service.*—The clerk must file the motion and enter it on the criminal docket of the case in which the challenged judgment was entered. The clerk must then deliver or serve a copy of the motion on the United States attorney in that district, together with a notice of its filing.

(*c*) *Time to file.*—The time for filing a motion is governed by 28 U. S. C. § 2255, para. 6.

(*d*) *Inmate filing.*—A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U. S. C. § 1746 or by a notarized statement, either of

which must set forth the date of deposit and state that first-class postage has been prepaid.

Rule 4. Preliminary review.

(*a*) *Referral to a judge.*—The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged. If the appropriate judge is not available, the clerk must forward the motion to a judge under the court's assignment procedure.

(*b*) *Initial consideration by the judge.*—The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

Rule 5. The answer and the reply.

(*a*) *When required.*—The respondent is not required to answer the motion unless a judge so orders.

(*b*) *Contents.*—The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.

(*c*) *Records of prior proceedings.*—If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings.

(*d*) *Reply.*—The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Rule 6. Discovery.

(*a*) *Leave of court required.*—A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U. S. C. § 3006A.

(*b*) *Requesting discovery.*—A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

(*c*) *Deposition expenses.*—If the government is granted leave to take a deposition, the judge may require the government to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.

Rule 7. Expanding the record.

(*a*) *In general.*—If the motion is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the motion. The judge may require that these materials be authenticated.

(*b*) *Types of materials.*—The materials that may be required include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record.

(*c*) *Review by the opposing party.*—The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Rule 8. Evidentiary hearing.

(*a*) *Determining whether to hold a hearing.*—If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.

(*b*) *Reference to a magistrate judge.*—A judge may, under 28 U. S. C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within 10 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

(*c*) *Appointing counsel; time of hearing.*—If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U. S. C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

(*d*) *Producing a statement.*—Federal Rule of Criminal Procedure 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party does not comply with a Rule 26.2(a) order to produce a witness's statement, the court must not consider that witness's testimony.

Rule 9. Second or successive motions.

Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion, as required by 28 U. S. C. § 2255, para. 8.

Rule 10. Powers of a magistrate judge.

A magistrate judge may perform the duties of a district judge under these rules, as authorized by 28 U. S. C. § 636.

Rule 11. Time to appeal.

Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules

do not extend the time to appeal the original judgment of conviction.

Rule 12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

MOTION TO VACATE, SET ASIDE, OR CORRECT A SENTENCE BY A PERSON IN FEDERAL CUSTODY
(Motion Under 28 U. S. C. § 2255)

Instructions

1. To use this form, you must be a person who is serving a sentence under a judgment against you in a federal court. You are asking for relief from the conviction or the sentence. This form is your motion for relief.
2. You must file the form in the United States district court that entered the judgment that you are challenging. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file the motion in the federal court that entered that judgment.
3. Make sure the form is typed or neatly written.
4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.
6. If you cannot pay for the costs of this motion (such as costs for an attorney or transcripts), you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you.
7. In this motion, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different judge or division (either in the same district or in a different district), you must file a separate motion.
8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for _____
   Address
   City, State Zip Code

9. **CAUTION: You must include in this motion all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.**
10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

MOTION UNDER 28 U. S. C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District
Name (under which you were convicted):	Docket or Case No.:
Place of Confinement:	Prisoner No.:
UNITED STATES OF AMERICA	Movant (include name under which you were convicted)
v.	

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____

   (b) Criminal docket or case number (if you know): _____
2. (a) Date of the judgment of conviction (if you know): _____

   (b) Date of sentencing: _____
3. Length of sentence: _____
4. Nature of crime (all counts): _____
5. (a) What was your plea? (Check one)

   (1) Not guilty ☐ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐

   (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____
6. If you went to trial, what kind of trial did you have? (Check one)

   Jury ☐ Judge only ☐
7. Did you testify at a pretrial hearing, trial, or post-trial hearing?

   Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☐

9. If you did appeal, answer the following:

(a) Name of court: _____

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

_____

_____

_____

_____

_____

_____

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐ No ☐

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

_____

_____

_____

_____

_____

_____

_____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____

_____

_____

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the

United States. Attach additional pages if you have more than four grounds. State the *facts* supporting each ground.

GROUND ONE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed: _____

_____

_____

Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

GROUND TWO: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:
Type of motion or petition: _____
Name and location of the court where the motion or petition was filed: _____
_____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
_____
_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:
_____
_____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
_____
_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____
_____
_____
_____
_____

GROUND THREE: _____
_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

_____

_____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed:

Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim): _____

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:
Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

_____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

_____

_____

_____

_____

13. Is there any ground in this motion that you have *not* previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

_____

_____

_____

_____

_____

_____

_____

14. Do you have any motion, petition, or appeal *now pending* (filed and not decided yet) in any court for the judgment you are challenging?

Yes ☐ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised: _____

_____

_____

_____

_____

_____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: _____

_____

(b) At arraignment and plea: _____

_____

(c) At trial: _____

_____

(d) At sentencing: _____

_____

(e) On appeal: _____

_____

(f) In any post-conviction proceeding: _____

_____

_____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____

_____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

Yes ☐ No ☐

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____

_____

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future?

Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U. S. C. § 2255 does not bar your motion.* _____

Therefore, movant asks that the Court grant the following relief: _____

or any other relief to which movant may be entitled.

_____
Signature of Attorney (if any)

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U. S. C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction became final;

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U. S. C. § 2255 was placed in the prison mailing system on _____ (month, date, year).

Executed (signed) on _____ (date).

_____
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. _____

_____

_____

IN FORMA PAUPERIS DECLARATION

_____

[Insert appropriate court]

* * * * *

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

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1. Amendments to Rules Governing 28 U. S. C. § 2254 Proceedings, pp. 1103, 1109.

2. *State prisoner—Actual innocence claim—Excusing procedural defaults in state court.*—A federal habeas court faced with allegations of actual innocence, whether of sentence or of crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse a procedural default in state court. Dretke v. Haley, p. 386.

3. *State prisoner—Erroneous jury instructions.*—In granting federal habeas relief, Ninth Circuit erred in holding that California state court unreasonably applied federal law in concluding that there was no reasonable likelihood that jury in respondent's murder trial was misled by an erroneous instruction on "imperfect self-defense." Middleton v. McNeil, p. 433.

4. *State prisoner—Exhaustion of state remedies—Presentation of federal claim.*—To exhaust state remedies before seeking federal habeas relief, a state prisoner ordinarily does not "fairly present" a federal claim to a state court if that court must read beyond a petition, brief, or similar papers to find material that will alert it to such a claim's presence. Baldwin v. Reese, p. 27.

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1. *Diversity jurisdiction—Postfiling change in citizenship.*—A party's postfiling citizenship change cannot cure a lack of subject-matter jurisdiction that existed at time diversity action was filed in federal court. Grupo Dataflux v. Atlas Global Group, L. P., p. 567.

2. *Supreme Court jurisdiction—Final judgment.*—Because Supreme Court of California's decision interpreting *Batson* v. *Kentucky*, 476 U. S. 79, is not a final judgment under 28 U. S. C. § 1257, this case is dismissed for want of jurisdiction. Johnson v. California, p. 428.

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1. Amendments to Federal Rules of Bankruptcy Procedure, p. 1997.

2. Amendments to Federal Rules of Criminal Procedure, p. 1103.

3. Amendments to Rules Governing 28 U. S. C. §§ 2254 and 2255 Proceedings, p. 1103.

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TAXES.

Federal employment taxes—Partnerships—Collection action—Extension of limitations period.—Proper federal tax assessment against a partnership suffices to extend statute of limitations to collect tax in a judicial proceeding from general partners who are liable for payment of partnership's debts. United States v. Galletti, p. 114.

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Delivery of telecommunications services—Pre-emption of state and local law.—Class of "entit[ies]" enabled to provide telecommunications services under § 101(a) of Act, 47 U. S. C. § 253, does not include a State's own subdivisions, so as to pre-empt power of States and localities to

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restrict their own (or their political inferiors') delivery of such services. Nixon v. Missouri Municipal League, p. 125.

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Credit limits—Finance charges—Over-limit fees.—Federal Reserve Board's Regulation Z, which excludes from "finance charge[s]" "over-limit fees" imposed for exceeding a credit limit, is not an unreasonable interpretation of 15 U. S. C. § 1605(a), which defines "finance charge" as an amount "payable . . . as an incident to the extension of credit." Household Credit Services, Inc. v. Pfennig, p. 232.

VEHICLE FLEET RULES. See **Clean Air Act.**

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WORDS AND PHRASES.
1. *"Any entity."* § 101(a), Telecommunications Act of 1996, 47 U. S. C. § 253(a). Nixon v. Missouri Municipal League, p. 125.
2. *"Finance charge"; "payable . . . as an incident to the extension of credit."* Truth in Lending Act, 15 U. S. C. § 1605(a). Household Credit Services, Inc. v. Pfennig, p. 232.
3. *"Under an Act of Congress enacted after [December 1, 1990]."* 26 U. S. C. § 1658. Jones v. R. R. Donnelley & Sons Co., p. 369.

WORKING OWNERS. See **Employee Retirement Income Security Act of 1974,** 2.

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