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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2006

APRIL 17 THROUGH MAY 29, 2007

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATUM

542 U. S., at 581, line 1: Delete "principle" and substitute "principal".

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OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
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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 February 1, 2006, viz.:

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

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

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

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

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

For the Tenth Circuit, Stephen Breyer, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

February 1, 2006.

(For next previous allotment, see 546 U. S., p. v.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 2000 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The opinion reported on page 1301 *et seq.* is that written in chambers by an individual Justice.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2006

WATTERS, COMMISSIONER, MICHIGAN OFFICE OF FINANCIAL AND INSURANCE SERVICES *v.* WACHOVIA BANK, N. A., ET AL.

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

No. 05–1342. Argued November 29, 2006—Decided April 17, 2007

National banks' business activities are controlled by the National Bank Act (NBA), 12 U. S. C. § 1 *et seq.*, and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC), see §§ 24, 93a, 371(a). OCC is charged with supervision of the NBA and, thus, oversees the banks' operations and interactions with customers. See *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 254, 256. The NBA grants OCC, as part of its supervisory authority, visitorial powers to audit the banks' books and records, largely to the exclusion of other state or federal entities. See § 484(a); 12 CFR § 7.4000. The NBA specifically authorizes federally chartered banks to engage in real estate lending, 12 U. S. C. § 371, and "[t]o exercise . . . such incidental powers as shall be necessary to carry on the business of banking," § 24 Seventh. Among incidental powers, national banks may conduct certain activities through "operating subsidiaries," discrete entities authorized to engage solely in activities the bank itself could undertake, and subject to the same terms and conditions as the bank. See § 24a(g)(3)(A); 12 CFR § 5.34(e).

Respondent Wachovia Bank is an OCC-chartered national banking association that conducts its real estate lending business through respond-

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ent Wachovia Mortgage Corporation, a wholly owned, North Carolina-chartered entity licensed as an operating subsidiary by OCC, and doing business in Michigan and elsewhere. Michigan law exempts banks, both national and state, from state mortgage lending regulation, but requires their subsidiaries to register with the State's Office of Financial and Insurance Services (OFIS) and submit to state supervision. Although Wachovia Mortgage initially complied with Michigan's requirements, it surrendered its Michigan registration once it became a wholly owned operating subsidiary of Wachovia Bank. Subsequently, petitioner Watters, the OFIS commissioner, advised Wachovia Mortgage it would no longer be authorized to engage in mortgage lending in Michigan. Respondents sued for declaratory and injunctive relief, contending that the NBA and OCC's regulations preempt application of the relevant Michigan mortgage lending laws to a national bank's operating subsidiary. Watters responded that, because Wachovia Mortgage was not itself a national bank, the challenged Michigan laws were applicable and were not preempted. She also argued that the Tenth Amendment to the U. S. Constitution prohibits OCC's exclusive regulation and supervision of national banks' lending activities conducted through operating subsidiaries. Rejecting those arguments, the Federal District Court granted the Wachovia plaintiffs summary judgment in relevant part, and the Sixth Circuit affirmed.

Held:

1. Wachovia's mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates. Pp. 10–21.

(a) The NBA vests in nationally chartered banks enumerated powers and all "necessary" incidental powers. 12 U. S. C. § 24 Seventh. To prevent inconsistent or intrusive state regulation, the NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ." § 484(a). Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or purposes of the NBA. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way. *E. g.*, *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 32–34. The NBA expressly authorizes national banks to engage in mortgage lending, subject to OCC regulation, § 371(a). State law may not significantly burden a bank's exercise of that power, see, *e. g.*, *id.*, at 33–34. In particular, real estate lending, when conducted by a national bank, is immune from state visitorial con-

trol: The NBA specifically vests exclusive authority to examine and inspect in OCC. 12 U. S. C. § 484(a). The Michigan provisions at issue exempt national banks themselves from coverage. This is not simply a matter of the Michigan Legislature's grace. For, as the parties recognize, the NBA would spare a national bank from state controls of the kind here involved. Pp. 10–15.

(b) Since 1966, OCC has recognized national banks' "incidental" authority under § 24 Seventh to do business through operating subsidiaries. See 12 CFR § 5.34(e)(1). That authority is uncontested by Michigan's Commissioner. OCC licenses and oversees national bank operating subsidiaries just as it does national banks. See, *e. g.*, § 5.34(e)(3); 12 U. S. C. § 24a(g)(3)(A). Just as duplicative state examination, supervision, and regulation would significantly burden national banks' mortgage lending, so too those state controls would interfere with that same activity when engaged in by a national bank's operating subsidiary. This Court has never held that the NBA's preemptive reach extends only to a national bank itself; instead, the Court has focused on the exercise of a national bank's *powers*, not on its corporate structure, in analyzing whether state law hampers the federally permitted activities of a national bank. See, *e. g.*, *Barnett Bank*, 517 U. S., at 32. And the Court has treated operating subsidiaries as equivalent to national banks with respect to powers exercised under federal law (except where federal law provides otherwise). See, *e. g.*, *NationsBank*, 513 U. S., at 256–261. Security against significant interference by state regulators is a characteristic condition of "the business of banking" conducted by national banks, and mortgage lending is one aspect of that business. See, *e. g.*, 12 U. S. C. § 484(a). That security should adhere whether the business is conducted by the bank itself or by an OCC-licensed operating subsidiary whose authority to carry on the business coincides completely with the bank's.

Watters contends that if Congress meant to deny States visitorial powers over operating subsidiaries, it would have written § 484(a)'s ban on state inspection to apply not only to national banks but also to their affiliates. She points out that § 481, which authorizes OCC to examine "affiliates" of national banks, does not speak to state visitorial powers. This argument fails for two reasons. *First*, any intention regarding operating subsidiaries cannot be ascribed to the 1864 Congress that enacted §§ 481 and 484, or the 1933 Congress that added the affiliate examination provisions to § 481 and the "affiliate" definition to § 221a, because operating subsidiaries were not authorized until 1966. *Second*, Watters ignores the distinctions Congress recognized among "affiliates." Unlike affiliates that may engage in functions not authorized by the NBA, an operating subsidiary is tightly tied to its parent by the

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specification that it may engage only in "the business of banking," § 24a(g)(3)(A). Notably, when Congress amended the NBA to provide that operating subsidiaries may "engag[e] solely in activities that national banks are permitted to engage in directly," *ibid.*, it did so in an Act providing that other affiliates, authorized to engage in nonbanking financial activities, *e. g.*, securities and insurance, are subject to state regulation in connection with those activities, see, *e. g.*, §§ 1843(k), 1844(c)(4). Pp. 15–20.

(c) Recognizing the necessary consequence of national banks' authority to engage in mortgage lending through an operating subsidiary "subject to the same terms and conditions that govern the conduct of such activities by national banks," § 24a(g)(3)(A), OCC promulgated 12 CFR § 7.4006: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Watters disputes OCC's authority to promulgate this regulation and contends that, because preemption is a legal question for determination by courts, § 7.4006 should attract no deference. This argument is beside the point, for § 7.4006 merely clarifies and confirms what the NBA already conveys: A national bank may engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern the bank itself; that power cannot be significantly impaired or impeded by state law. Though state law governs incorporation-related issues, state regulators cannot interfere with the "business of banking" by subjecting national banks or their OCC-licensed operating subsidiaries to multiple audits and surveillance under rival oversight regimes. Pp. 20–21.

2. Watters' alternative argument, that 12 CFR § 7.4006 violates the Tenth Amendment, is unavailing. The Amendment expressly disclaims any reservation to the States of a power delegated to Congress in the Constitution, *New York* v. *United States*, 505 U. S. 144, 156. Because regulation of national bank operations is Congress' prerogative under the Commerce and Necessary and Proper Clauses, see *Citizens Bank* v. *Alafabco, Inc.*, 539 U. S. 52, 58, the Amendment is not implicated here. P. 22.

431 F. 3d 556, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA, J., joined, *post*, p. 22. THOMAS, J., took no part in the consideration or decision of the case.

Counsel

E. John Blanchard, Assistant Attorney General of Michigan, argued the cause for petitioner. With him on the briefs were *Michael A. Cox*, former Attorney General, and *Thomas L. Casey*, Solicitor General.

Robert A. Long argued the cause for respondents. With him on the brief were *Stuart C. Stock*, *Keith A. Noreika*, *Emily Johnson Henn*, *Lori McAllister*, and *William J. Perrone*.

Sri Srinivasan argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Hungar*, *Julie L. Williams*, *Daniel P. Stipano*, *Horace G. Sneed*, and *Douglas B. Jordan*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Eliot Spitzer*, former Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Michelle Aronowitz*, Deputy Solicitor General, and *Kathryn Sheingold*, Assistant Solicitor General, by *Anne Milgram*, former Acting Attorney General of New Jersey, and by the Attorneys General and former Attorneys General for their respective jurisdictions as follows: *Troy King* of Alabama, *David W. Márquez* of Alaska, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *John Suthers* of Colorado, *Richard Blumenthal* of Connecticut, *Carl C. Danberg* of Delaware, *Robert J. Spagnoletti* of the District of Columbia, *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, *Thomas Miller* of Iowa, *Phill Kline* of Kansas, *Greg Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Tom Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *George J. Chanos* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Roberto J. Sánchez-Ramos* of Puerto Rico, *Patrick Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Larry Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of

JUSTICE GINSBURG delivered the opinion of the Court.

Business activities of national banks are controlled by the National Bank Act (NBA or Act), 12 U. S. C. § 1 *et seq.*, and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC). See §§ 24, 93a, 371(a). As the agency charged by Congress with supervision of the NBA, OCC oversees the operations of national banks and their interactions with customers. See *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 254, 256 (1995). The agency exercises visitorial powers, including the authority to audit the bank's books and records,

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Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Robert F. McDonnell* of Virginia, *Rob McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *Peggy A. Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming; for Charles W. Turnbaugh, Commissioner of Financial Regulation for the State of Maryland et al. by *Mr. Curran*, former Attorney General of Maryland, *Steven M. Sullivan*, Solicitor General, *Jonathan R. Krasnoff*, *Thomas L. Gounaris*, and *Christopher J. Young*, Assistant Attorneys General, and *Keith R. Fisher*, Special Assistant Attorney General; for AARP et al. by *Amanda Quester;* for the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc., by *Thomas W. Merrill* and *Stephen D. Houck;* for the National Association of Realtors by *David C. Frederick*, *Scott H. Angstreich*, and *Ralph W. Holmen;* and for the National Conference of State Legislatures et al. by *Richard Ruda* and *Arthur E. Wilmarth, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the American Bankers Association et al. by *Theodore B. Olson*, *Mark A. Perry*, *John D. Hawke, Jr.*, *Howard N. Cayne*, *Laurence J. Hutt*, and *Nancy L. Perkins;* for the Chamber of Commerce of the United States of America by *Alan Untereiner*, *Robin S. Conrad*, and *Amar D. Sarwal;* for the Clearing House Association L.L.C. by *Michael M. Wiseman*, *Robert J. Giuffra, Jr.*, *Suhana S. Han*, *Seth P. Waxman*, *Christopher R. Lipsett*, *Paul R. Q. Wolfson*, and *David A. Luigs;* for National City Bank by *Glen D. Nager* and *Beth Heifetz;* for the New England Legal Foundation by *Michael E. Malamut* and *Martin J. Newhouse;* for Richard J. Pierce, Jr., et al. by *Walter Dellinger*, *Jonathan D. Hacker*, *Christopher H. Schroeder*, and *Nicole A. Saharsky;* and for Marcus Cole et al. by *Sam Kazman* and *Hans Bader*.

largely to the exclusion of other governmental entities, state or federal. See § 484(a); 12 CFR § 7.4000 (2006).

The NBA specifically authorizes federally chartered banks to engage in real estate lending. 12 U. S. C. § 371. It also provides that banks shall have power "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." § 24 Seventh. Among incidental powers, national banks may conduct certain activities through "operating subsidiaries," discrete entities authorized to engage solely in activities the bank itself could undertake, and subject to the same terms and conditions as those applicable to the bank. See § 24a(g)(3)(A); 12 CFR § 5.34(e) (2006).

Respondent Wachovia Bank, a national bank, conducts its real estate lending business through Wachovia Mortgage Corporation, a wholly owned, state-chartered entity, licensed as an operating subsidiary by OCC. It is uncontested in this suit that Wachovia's real estate business, if conducted by the national bank itself, would be subject to OCC's superintendence, to the exclusion of state registration requirements and visitorial authority. The question in dispute is whether the bank's mortgage lending activities remain outside the governance of state licensing and auditing agencies when those activities are conducted, not by a division or department of the bank, but by the bank's operating subsidiary. In accord with the Courts of Appeals that have addressed the issue,[1] we hold that Wachovia's mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates.

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[1] *National City Bank of Indiana* v. *Turnbaugh*, 463 F. 3d 325 (CA4 2006); *Wachovia Bank, N. A.* v. *Burke*, 414 F. 3d 305 (CA2 2005); 431 F. 3d 556 (CA6 2005) (case below); *Wells Fargo Bank N. A.* v. *Boutris*, 419 F. 3d 949 (CA9 2005).

I

Wachovia Bank is a national banking association chartered by OCC. Respondent Wachovia Mortgage is a North Carolina corporation that engages in the business of real estate lending in the State of Michigan and elsewhere. Michigan's statutory regime exempts banks, both national and state, from state mortgage lending regulation, but requires mortgage brokers, lenders, and servicers that are subsidiaries of national banks to register with the State's Office of Financial and Insurance Services (OFIS) and submit to state supervision. Mich. Comp. Laws Ann. §§ 445.1656(1), 445.1679(1)(a) (West 2002), 493.52(1), and 493.53a(d) (West 1998).[2] From 1997 until 2003, Wachovia Mortgage was registered with OFIS to engage in mortgage lending. As a registrant, Wachovia Mortgage was required, *inter alia*, to pay an annual operating fee, file an annual report, and open its books and records to inspection by OFIS examiners. §§ 445.1657, 445.1658, 445.1671 (West 2002), 493.54, 493.56a(2), (13) (West 1998).

Petitioner Linda Watters, the commissioner of OFIS, administers the State's lending laws. She exercises "general supervision and control" over registered lenders, and has authority to conduct examinations and investigations and to enforce requirements against registrants. See §§ 445.1661, 445.1665, 445.1666 (West 2002), 493.58, 493.56b, 493.59, 493.62a (West 1998 and Supp. 2005). She also has authority to investigate consumer complaints and take enforcement action if she finds that a complaint is not "being adequately pursued by the appropriate federal regulatory authority." § 445.1663(2) (West 2002).

On January 1, 2003, Wachovia Mortgage became a wholly owned operating subsidiary of Wachovia Bank. Three

[2] Michigan's law exempts subsidiaries of national banks that maintain a main office or branch office in Michigan. Mich. Comp. Laws Ann. §§ 445.1652(1)(b) (West Supp. 2006), 445.1675(m) (West 2002), 493.53a(d) (West 1998). Wachovia Bank has no such office in Michigan.

months later, Wachovia Mortgage advised the State of Michigan that it was surrendering its mortgage lending registration. Because it had become an operating subsidiary of a national bank, Wachovia Mortgage maintained, Michigan's registration and inspection requirements were preempted. Watters responded with a letter advising Wachovia Mortgage that it would no longer be authorized to conduct mortgage lending activities in Michigan.

Wachovia Mortgage and Wachovia Bank filed suit against Watters, in her official capacity as commissioner, in the United States District Court for the Western District of Michigan. They sought declaratory and injunctive relief prohibiting Watters from enforcing Michigan's registration prescriptions against Wachovia Mortgage, and from interfering with OCC's exclusive visitorial authority. The NBA and regulations promulgated thereunder, they urged, vest supervisory authority in OCC and preempt the application of the state-law controls at issue. Specifically, Wachovia Mortgage and Wachovia Bank challenged as preempted certain provisions of two Michigan statutes—the Mortgage Brokers, Lenders, and Services Licensing Act and the Secondary Mortgage Loan Act. The challenged provisions (1) require mortgage lenders—including national bank operating subsidiaries but not national banks themselves—to register and pay fees to the State before they may conduct banking activities in Michigan, and authorize the commissioner to deny or revoke registrations, §§ 445.1652(1) (West Supp. 2006), 445.1656(1)(d) (West 2002), 445.1657(1), 445.1658, 445.1679(1)(a), 493.52(1) (West 1998), 493.53a(d), 493.54, 493.55(4), 493.56a(2), and 493.61; (2) require submission of annual financial statements to the commissioner and retention of certain documents in a particular format, §§ 445.1657(2) (West 2002), 445.1671, 493.56a(2) (West 1998); (3) grant the commissioner inspection and enforcement authority over registrants, §§ 445.1661 (West 2002), 493.56b (West Supp.

2005); and (4) authorize the commissioner to take regulatory or enforcement actions against covered lenders, §§ 445.1665 (West 2002), 445.1666, 493.58–59, and 493.62a (West 1998).

In response, Watters argued that, because Wachovia Mortgage was not itself a national bank, the challenged Michigan controls were applicable and were not preempted. She also contended that the Tenth Amendment to the Constitution of the United States prohibits OCC's exclusive superintendence of national bank lending activities conducted through operating subsidiaries.

The District Court granted summary judgment to the banks in relevant part. 334 F. Supp. 2d 957, 966 (WD Mich. 2004). Invoking the two-step framework of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), the court deferred to the Comptroller's determination that an operating subsidiary is subject to state regulation only to the extent that the parent bank would be if it performed the same functions. 334 F. Supp. 2d, at 963–965 (citing, *e. g.*, 12 CFR §§ 5.34(e)(3), 7.4006 (2004)). The court also rejected Watters' Tenth Amendment argument. 334 F. Supp. 2d, at 965–966. The Sixth Circuit affirmed. 431 F. 3d 556 (2005). We granted certiorari. 547 U. S. 1205 (2006).

II

A

Nearly 200 years ago, in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), this Court held federal law supreme over state law with respect to national banking. Though the bank at issue in *McCulloch* was short-lived, a federal banking system reemerged in the Civil War era. See *Atherton* v. *FDIC*, 519 U. S. 213, 221–222 (1997); B. Hammond, Banks and Politics in America: from the Revolution to the Civil War (1957). In 1864, Congress enacted the NBA, establishing the system of national banking still in place today. National Bank Act,

ch. 106, 13 Stat. 99;[3] *Atherton*, 519 U. S., at 222; *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 439 U. S. 299, 310, 314–315 (1978). The Act vested in nationally chartered banks enumerated powers and "all such incidental powers as shall be necessary to carry on the business of banking." 12 U. S. C. §24 Seventh. To prevent inconsistent or intrusive state regulation from impairing the national system, Congress provided: "No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ." §484(a).

In the years since the NBA's enactment, we have repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation. See, *e. g.*, *Beneficial Nat. Bank* v. *Anderson*, 539 U. S. 1, 10 (2003) (national banking system protected from "possible unfriendly State legislation" (quoting *Tiffany* v. *National Bank of Mo.*, 18 Wall. 409, 412 (1874))). Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 290 (1896). See also *Atherton*, 519 U. S., at 223. For example, state usury laws govern the maximum rate of interest national banks can charge on loans, 12 U. S. C. §85, contracts made by national banks "are governed and construed by State laws," *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 (1870), and national banks' "acquisition and transfer of property [are] based on State law," *ibid.* However, "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is an abuse, because it is the usurpation of power which a single State cannot give." *Farmers' and Mechan-*

[3] The Act of June 3, 1864, ch. 106, 13 Stat. 99, was originally entitled "An Act to provide a National Currency . . . "; its title was altered by Congress in 1874 to "the National Bank Act." Ch. 343, 18 Stat. 123.

ics' Nat. Bank v. *Dearing*, 91 U. S. 29, 34 (1875) (internal quotation marks omitted).

We have "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 32 (1996). See also *Franklin Nat. Bank of Franklin Square* v. *New York*, 347 U. S. 373, 375–379 (1954). States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way. *Barnett Bank*, 517 U. S., at 32–34 (federal law permitting national banks to sell insurance in small towns preempted state statute prohibiting banks from selling most types of insurance); *Franklin Nat. Bank*, 347 U. S., at 377–379 (local restrictions preempted because they burdened exercise of national banks' incidental power to advertise).

The NBA authorizes national banks to engage in mortgage lending, subject to OCC regulation. The Act provides:

> "Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U. S. C. § 371(a).[4]

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[4] Title 12 U. S. C. §1828(*o*) requires federal banking agencies to adopt uniform regulations prescribing standards for real estate lending by depository institutions and sets forth criteria governing such standards. See, *e. g.*, § 1828(*o*)(2)(A) ("In prescribing standards . . . the agencies shall consider—(i) the risk posed to the deposit insurance funds by such extensions of credit; (ii) the need for safe and sound operation of insured depository institutions; and (iii) the availability of credit.").

Beyond genuine dispute, state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the NBA. See *Barnett Bank*, 517 U. S., at 33–34; *Franklin*, 347 U. S., at 375–379. See also 12 CFR § 34.4(a)(1) (2006) (identifying preempted state controls on mortgage lending, including licensing and registration). In particular, real estate lending, when conducted by a national bank, is immune from state visitorial control: The NBA specifically vests exclusive authority to examine and inspect in OCC. 12 U. S. C. § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by Federal law.").[5]

Harmoniously, the Michigan provisions at issue exempt national banks from coverage. Mich. Comp. Laws Ann. § 445.1675(a) (West 2002). This is not simply a matter of the Michigan Legislature's grace. Cf. *post*, at 34, and n. 17. For, as the parties recognize, the NBA would have preemptive force, *i. e.*, it would spare a national bank from state controls of the kind here involved. See Brief for Petitioner 12; Brief for Respondents 14; Brief for United States as *Amicus Curiae* 9. State laws that conditioned national banks' real estate lending on registration with the State, and subjected such lending to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business: National banks would be subject to registration, inspection, and enforcement regimes imposed not just by Michigan, but by all States in which the banks operate.[6] Diverse and duplicative superintendence of

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[5] See also 2 R. Taylor, Banking Law § 37.02, p. 37–5 (2006) ("[OCC] has exclusive authority to charter and examine [national] banks." (footnote omitted)).

[6] See 69 Fed. Reg. 1908 (2004) ("The application of multiple, often unpredictable, different state or local restrictions and requirements prevents [national banks] from operating in the manner authorized under Federal

national banks' engagement in the business of banking, we observed over a century ago, is precisely what the NBA was designed to prevent: "Th[e] legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." *Easton* v. *Iowa*, 188 U. S. 220, 229 (1903). Congress did not intend, we explained, "to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. . . . [C]onfusion would necessarily result from control possessed and exercised by two independent authorities." *Id.*, at 231–232.

Recognizing the burdens and undue duplication state controls could produce, Congress included in the NBA an express command: "No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . ." 12 U. S. C. § 484(a). See *supra*, at 11–12, 13; *post*, at 31 (acknowledging that national banks have been "exemp[t] from state visitorial authority . . . for more than 140 years"). "Visitation," we have explained "is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." *Guthrie* v. *Harkness*, 199 U. S. 148, 158 (1905) (internal quotation marks omitted). See also 12 CFR § 7.4000(a)(2) (2006) (defining "visitorial" power as "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities"). Michigan, therefore, cannot confer on its commissioner examina-

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law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure.").

tion and enforcement authority over mortgage lending, or any other banking business done by national banks.[7]

B

While conceding that Michigan's licensing, registration, and inspection requirements cannot be applied to national banks, see, *e. g.*, Brief for Petitioner 10, 12, Watters argues that the State's regulatory regime survives preemption with respect to national banks' operating subsidiaries. Because such subsidiaries are separately chartered under some State's law, Watters characterizes them simply as "affiliates" of national banks, and contends that even though they are subject to OCC's superintendence, they are also subject to multistate control. *Id.*, at 17–22. We disagree.

Since 1966, OCC has recognized the "incidental" authority of national banks under § 24 Seventh to do business through

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[7] Ours is indeed a "dual banking system." See *post*, at 22–26, 43. But it is a system that has never permitted States to license, inspect, and supervise national banks as they do state banks. The dissent repeatedly refers to the policy of "competitive equality" featured in *First Nat. Bank in Plant City* v. *Dickinson*, 396 U. S. 122, 131 (1969). See *post*, at 25, 35, 40, 43. Those words, however, should not be ripped from their context. *Plant City* involved the McFadden Act (Branch Banks), 44 Stat. 1228, 12 U. S. C. § 36, in which Congress expressly authorized national banks to establish branches "only when, where, and how state law would authorize a state bank to establish and operate such [branches]." 396 U. S., at 130. See also *id.*, at 131 ("[W]hile Congress has absolute authority over national banks, the [McFadden Act] has incorporated by reference the limitations which state law places on branch banking activities by state banks. Congress has deliberately settled upon a policy intended to foster competitive equality. . . . [The] Act reflects the congressional concern that neither system ha[s] advantages over the other in the use of branch banking." (quoting *First Nat. Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U. S. 252, 261 (1966))). "[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 34 (1996). The NBA provisions before us, unlike the McFadden Act, do not condition the exercise of power by national banks on state allowance of similar exercises by state banks. See *supra*, at 13.

operating subsidiaries. See 31 Fed. Reg. 11459–11460 (1966); 12 CFR § 5.34(e)(1) (2006) ("A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking . . . ."). That authority is uncontested by Michigan's commissioner. See Brief for Petitioner 21 ("[N]o one disputes that 12 USC § 24 (Seventh) authorizes national banks to use nonbank operating subsidiaries . . . ."). OCC licenses and oversees national bank operating subsidiaries just as it does national banks. § 5.34(e)(3) ("An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank.");[8] United States Office of the Comptroller of the Currency, Related Organizations: Comptroller's Handbook 53 (Aug. 2004) (hereinafter Comptroller's Handbook) ("Operating subsidiaries are subject to the same supervision and regulation as the parent bank, except where otherwise provided by law or OCC regulation.").

In 1999, Congress defined and regulated "financial" subsidiaries; simultaneously, Congress distinguished those national bank affiliates from subsidiaries—typed "operating subsidiaries" by OCC—which may engage only in activities national banks may engage in directly, "subject to the same terms and conditions that govern the conduct of such activities by national banks." Gramm-Leach-Bliley Act (GLBA), § 121(a)(2), 113 Stat. 1378 (codified at 12 U. S. C.

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[8] The regulation further provides:

"If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities." 12 CFR § 5.34(e)(3) (2006).

§ 24a(g)(3)(A)).[9] For supervisory purposes, OCC treats national banks and their operating subsidiaries as a single economic enterprise. Comptroller's Handbook 64. OCC oversees both entities by reference to "business line," applying the same controls whether banking "activities are conducted directly or through an operating subsidiary." *Ibid.*[10]

As earlier noted, Watters does not contest the authority of national banks to do business through operating subsidiaries. Nor does she dispute OCC's authority to supervise and regulate operating subsidiaries in the same manner as national banks. Still, Watters seeks to impose state regulation on operating subsidiaries over and above regulation undertaken by OCC. But just as duplicative state examination, supervision, and regulation would significantly burden mortgage lending when engaged in by national banks, see *supra*, at

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[9] OCC subsequently revised its regulations to track the statute. See § 5.34(e)(1), (3); Financial Subsidiaries and Operating Subsidiaries, 65 Fed. Reg. 12905, 12911 (2000). Cf. *post*, at 29, 30 (dissent's grudging acknowledgment that Congress "may have acquiesced" in OCC's position that national banks may engage in "the business of banking" through operating subsidiaries empowered to do only what the bank itself can do).

[10] For example, "for purposes of applying statutory or regulatory limits, such as lending limits or dividend restrictions," *e. g.*, 12 U. S. C. §§ 56, 60, 84, 371d, "[t]he results of operations of operating subsidiaries are consolidated with those of its parent." Comptroller's Handbook 64. Likewise, for accounting and regulatory reporting purposes, an operating subsidiary is treated as part of the member bank; assets and liabilities of the two entities are combined. See 12 CFR §§ 5.34(e)(4)(i), 223.3(w) (2006). OCC treats financial subsidiaries differently. A national bank may not consolidate the assets and liabilities of a financial subsidiary with those of the bank. Comptroller's Handbook 64. It cannot be fairly maintained "that the transfer in 2003 of [Wachovia Mortgage's] ownership from the holding company to the Bank" resulted in no relevant changes to the company's business. Compare *post*, at 35, with *supra*, at 16, n. 8. On becoming Wachovia's operating subsidiary, Wachovia Mortgage became subject to the same terms and conditions as national banks, including the full supervisory authority of OCC. This change exposed the company to significantly more federal oversight than it experienced as a state nondepository institution.

11–15, so too would those state controls interfere with that same activity when engaged in by an operating subsidiary.

We have never held that the preemptive reach of the NBA extends only to a national bank itself. Rather, in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers*, not on its corporate structure. See, *e. g.*, *Barnett Bank*, 517 U. S., at 32. And we have treated operating subsidiaries as equivalent to national banks with respect to powers exercised under federal law (except where federal law provides otherwise). In *NationsBank of N. C., N. A.*, 513 U. S., at 256–261, for example, we upheld OCC's determination that national banks had "incidental" authority to act as agents in the sale of annuities. It was not material that the function qualifying as within "the business of banking," § 24 Seventh, was to be carried out not by the bank itself, but by an operating subsidiary, *i. e.*, an entity "subject to the same terms and conditions that govern the conduct of [the activity] by national banks [themselves]," § 24a(g)(3)(A); 12 CFR § 5.34(e)(3) (2006). See also *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388 (1987) (national banks, acting through operating subsidiaries, have power to offer discount brokerage services).[11]

Security against significant interference by state regulators is a characteristic condition of the "business of banking" conducted by national banks, and mortgage lending is one aspect of that business. See, *e. g.*, 12 U. S C. § 484(a); 12 CFR § 34.4(a)(1) (2006). See also *supra*, at 11–15; *post*, at 27 (acknowledging that, in 1982, Congress broadly authorized national banks to engage in mortgage lending); *post*, at 36–37, and n. 20 (acknowledging that operating subsidiaries "are subject to the same federal oversight as their national bank

[11] Cf. *Marquette Nat. Bank of Minneapolis* v. *First of Omaha Service Corp.*, 439 U. S. 299, 308, and n. 19 (1978) (holding that national bank may charge home State's interest rate, regardless of more restrictive usury laws in borrower's State, but declining to consider operating subsidiaries).

parents"). That security should adhere whether the business is conducted by the bank itself or is assigned to an operating subsidiary licensed by OCC whose authority to carry on the business coincides completely with that of the bank. See *Wells Fargo Bank, N. A.* v. *Boutris*, 419 F. 3d 949, 960 (CA9 2005) (determination whether to conduct business through operating subsidiaries or through subdivisions is "essentially one of internal organization").

Watters contends that if Congress meant to deny States visitorial powers over operating subsidiaries, it would have written § 484(a)'s ban on state inspection to apply not only to national banks but also to their affiliates. She points out that § 481, which authorizes OCC to examine "affiliates" of national banks, does not speak to state visitorial powers. This argument fails for two reasons. *First*, one cannot ascribe any intention regarding operating subsidiaries to the 1864 Congress that enacted §§ 481 and 484, or the 1933 Congress that added the provisions on examining affiliates to § 481 and the definition of "affiliate" to § 221a. That is so because operating subsidiaries were not authorized until 1966. See *supra*, at 15–16. Over the past four decades, during which operating subsidiaries have emerged as important instrumentalities of national banks, Congress and OCC have indicated no doubt that such subsidiaries are "subject to the same terms and conditions" as national banks themselves.

Second, Watters ignores the distinctions Congress recognized among "affiliates." The NBA broadly defines the term "affiliate" to include "any corporation" controlled by a national bank, including a subsidiary. See 12 U. S. C. § 221a(b). An operating subsidiary is therefore one type of "affiliate." But unlike affiliates that may engage in functions not authorized by the NBA, *e. g.*, financial subsidiaries, an operating subsidiary is tightly tied to its parent by the specification that it may engage only in "the business of banking" as authorized by the Act. § 24a(g)(3)(A); 12 CFR § 5.34(e)(1)

(2006). See also *supra*, at 16–17, and n. 10. Notably, when Congress amended the NBA confirming that operating subsidiaries may "engag[e] solely in activities that national banks are permitted to engage in directly," 12 U. S. C. § 24a(g)(3)(A), it did so in an Act, the GLBA, providing that other affiliates, authorized to engage in nonbanking financial activities, *e. g.*, securities and insurance, are subject to state regulation in connection with those activities. See, *e. g.*, §§ 1843(k), 1844(c)(4). See also 15 U. S. C. § 6701(b) (any person who sells insurance must obtain a state license to do so).[12]

C

Recognizing the necessary consequence of national banks' authority to engage in mortgage lending through an operating subsidiary "subject to the same terms and conditions that govern the conduct of such activities by national banks," 12 U. S. C. § 24a(g)(3)(A), see also § 24 Seventh, OCC promulgated 12 CFR § 7.4006 (2006): "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." See Investment Securities; Bank Activities and Operations; Leasing, 66 Fed. Reg. 34784, 34788 (2001). Watters disputes the authority of OCC to promulgate this regulation and contends that, because preemption is a legal question for determination by courts, § 7.4006 should attract no deference. See also *post*, at 38–43. This argument is beside the point, for under our interpretation of the statute, the level of deference owed to the regulation is an academic question. Section 7.4006

[12] The dissent protests that the GLBA does not itself preempt the Michigan provisions at issue. Cf. *post*, at 36–38. We express no opinion on that matter. Our point is more modest: The GLBA simply demonstrates Congress' formal recognition that national banks have incidental power to do business through operating subsidiaries. See *supra*, at 16–17; cf. *post*, at 30–31.

merely clarifies and confirms what the NBA already conveys: A national bank has the power to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern the national bank itself; that power cannot be significantly impaired or impeded by state law. See, *e. g.*, *Barnett Bank*, 517 U. S., at 33–34; 12 U. S. C. §§24 Seventh, 24a(g)(3)(A), 371.[13]

The NBA is thus properly read by OCC to protect from state hindrance a national bank's engagement in the "business of banking" whether conducted by the bank itself or by an operating subsidiary, empowered to do only what the bank itself could do. See *supra*, at 16–17. The authority to engage in the business of mortgage lending comes from the NBA, §371, as does the authority to conduct business through an operating subsidiary. See §§24 Seventh, 24a(g)(3)(A). That Act vests visitorial oversight in OCC, not state regulators. §484(a). State law (in this case, North Carolina law), all agree, governs incorporation-related issues, such as the formation, dissolution, and internal governance of operating subsidiaries.[14] And the laws of the States in which national banks or their affiliates are located govern matters the NBA does not address. See *supra*, at 11. But state regulators cannot interfere with the "business of banking" by subjecting national banks or their OCC-licensed operating subsidiaries to multiple audits and surveillance under rival oversight regimes.

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[13] Because we hold that the NBA itself—independent of OCC's regulation—preempts the application of the pertinent Michigan laws to national bank operating subsidiaries, we need not consider the dissent's lengthy discourse on the dangers of vesting preemptive authority in administrative agencies. See *post*, at 38–43; cf. *post*, at 43, 44 (maintaining that "[w]hatever the Court says, this is a case about an administrative agency's power to preempt state laws," and accusing the Court of "endors[ing] administrative action whose sole purpose was to preempt state law rather than to implement a statutory command").

[14] Watters does not assert that Wachovia Mortgage is out of compliance with any North Carolina law governing its corporate status.

III

Watters' alternative argument, that 12 CFR § 7.4006 violates the Tenth Amendment to the Constitution, is unavailing. As we have previously explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U. S. 144, 156 (1992). Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses. See *Citizens Bank* v. *Alafabco, Inc.*, 539 U. S. 52, 58 (2003) *(per curiam)*. The Tenth Amendment, therefore, is not implicated here.

* * *

For the reasons stated, the judgment of the Sixth Circuit is

Affirmed.

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

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Congress has enacted no legislation immunizing national bank subsidiaries from compliance with nondiscriminatory state laws regulating the business activities of mortgage brokers and lenders. Nor has it authorized an executive agency to pre-empt such state laws whenever it concludes that they interfere with national bank activities. Notwithstanding the absence of relevant statutory authority, today the Court endorses an agency's incorrect determination that the laws of a sovereign State must yield to federal power. The significant impact of the Court's decision on the federal-state balance and the dual banking system makes it appropriate to set forth in full the reasons for my dissent.

I

The National Bank Act (or NBA), 13 Stat. 99, authorized the incorporation of national banks, § 5, *id.*, at 100, and granted them "all such incidental powers as shall be necessary to carry on the business of banking," § 8, *id.*, at 101, (codified at 12 U. S. C. § 24 Seventh), subject to regulatory oversight by the Comptroller of the Currency, § 54, 13 Stat. 116. To maintain a meaningful role for state legislation and for state corporations that did not engage in core banking activities, Congress circumscribed national bank authority. Notably, national banks were expressly prohibited from making mortgage loans, § 28, *id.*, at 108.[1] Moreover, the shares of national banks, as well their real estate holdings, were subject to nondiscriminatory state taxation, § 41, *id.*, at 111; and while national banks could lend money, state law capped the interest rates they could charge, § 30, *id.*, at 108.

Originally, it was anticipated that "existing banks would surrender their state charters and re-incorporate under the terms of the new law with national charters."[2] That did not happen. Instead, after an initial post-National Bank Act decline, state-chartered institutions thrived.[3] What emerged was the competitive mix of state and national banks known as the dual banking system.

This Court has consistently recognized that because federal law is generally interstitial, national banks must comply

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[1] "There is no more characteristic difference between the state and the national banking laws than the fact that almost without exception, state banks may loan on real estate security, while national banks are prohibited from doing so." G. Barnett, State Banking in the United States Since the Passage of the National Bank Act 50 (1902) (reprint 1983) (hereinafter Barnett).

[2] B. Hammond, Banks and Politics in America: from the Revolution to the Civil War 728 (1957).

[3] *Id.*, at 733. See also Barnett 73–74 (estimating that more than 800 state banks were in operation in 1877, and noting the "remarkable increase in the number of state banks" during the last two decades of the 19th century).

with most of the same rules as their state counterparts. As early as 1870, we articulated the principle that has remained the lodestar of our jurisprudence: that national banks

> "are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. . . . They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. *It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.*" *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 (1870) (emphasis added).[4]

Until today, we have remained faithful to the principle that nondiscriminatory laws of general application that do not "forbid" or "impair significantly" national bank activities should not be pre-empted. See, *e. g.*, *Barnett Bank of Marion Cty., N. A.* v. *Nelson*, 517 U. S. 25, 33 (1996).[5]

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[4] See also *McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896) (explaining that our cases establish "a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States").

[5] See also *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233, 248 (1944) ("This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions"); *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 290 (1896) ("Nothing, of course, in this opinion is intended to deny the operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not

Nor is the Court alone in recognizing the vital role that state legislation plays in the dual banking system. Although the dual banking system's main virtue is its divergent treatment of national and state banks,[6] Congress has consistently recognized that state law must usually govern the activities of both national and state banks for the dual banking system to operate effectively. As early as 1934, Justice Brandeis observed for the Court that this congressional recognition is embodied in a long string of statutes:

> "The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation. In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization. It appears also to have been of some influence in securing the grant in 1913 of the power to loan on mortgage." *Lewis* v. *Fidelity & Deposit Co. of Md.*, 292 U. S. 559, 564–565 (footnotes, with citations to relevant statutes, omitted).[7]

For the same reasons, we observed in *First Nat. Bank in Plant City* v. *Dickinson*, 396 U. S. 122, 133 (1969), that "[t]he policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system." So firmly embedded, in fact, that "the congressional policy of competi-

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conflict with the letter or the general objects and purposes of Congressional legislation").

[6] See Scott, The Dual Banking System: A Model of Competition in Regulation, 30 Stan. L. Rev. 1, 8–13 (1978) (explaining the perceived benefits of the dual banking system).

[7] See also *First Nat. Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U. S. 252, 261 (1966) (observing that in passing the McFadden Act, "Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864").

tive equality with its deference to state standards" is not "open to modification by the Comptroller of the Currency." *Id.*, at 138.

II

Although the dual banking system has remained intact, Congress has radically transformed the national bank system from its Civil War antecedent and brought considerably more federal authority to bear on state-chartered institutions. Yet despite all the changes Congress has made to the national bank system, and despite its exercise of federal power over state banks, it has never pre-empted state laws like those at issue in this case.

Most significantly, in 1913 Congress established the Federal Reserve System to oversee federal monetary policy through its influence over the availability of credit. Federal Reserve Act §§ 2, 9, 38 Stat. 252, 259. The Act required national banks and permitted state banks to become Federal Reserve member banks, and subjected all member banks to Federal Reserve regulations and oversight. *Ibid.* Also of signal importance, after the banking system collapsed during the Great Depression, Congress required all member banks to obtain deposit insurance from the newly established Federal Deposit Insurance Corporation. Banking Act of 1933 (or Glass-Steagall Act), § 8, 48 Stat. 168; see also Banking Act of 1935, 49 Stat. 684. Although both of these steps meant that many state banks were subjected to significant federal regulation,[8] "the state banking system continued along with the national banking system, with no attempt to exercise preemptive federal regulatory authority over the activities of the existing state banks." M. Malloy, Banking and Financial Services Law 48 (2d ed. 2005).

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[8] What has emerged are "two interrelated systems in which most state-chartered banks are subject to varying degrees of federal regulation, and where state laws are made applicable, to a varying extent, to federally-chartered institutions." 1 A. Graham, Banking Law § 1.04, p. 1–12 (Nov. 2006).

In addition to these systemic overhauls, Congress has over time modified the powers of national banks. The changes are too various to recount in detail, but two are of particular importance to this case. First, Congress has gradually relaxed its prohibition on mortgage lending by national banks. In 1913, Congress permitted national banks to make loans secured by farm land, Federal Reserve Act, § 24, 38 Stat. 273, and in succeeding years, their mortgage lending power was enlarged to cover loans on real estate in the vicinity of the bank, Act of Sept. 7, 1916, §24, 39 Stat. 754, and loans "secured by first liens upon forest tracts which are properly managed in all respects," Act of Aug. 15, 1953, ch. 510, 67 Stat. 614. Congress substantially expanded national banks' power to make real estate loans in 1974, see Housing and Community Development Act, Title VII, § 711, 88 Stat. 716, and in 1982 it enacted the broad language, now codified at 12 U. S. C. § 371(a), authorizing national banks to make "loans . . . secured by liens on interests in real estate." Garn-St Germain Depository Institutions Act of 1982, Title IV, § 403, 96 Stat. 1510. While these changes have enabled national banks to engage in more evenhanded competition with state banks, they certainly reflect no purpose to give them any competitive advantage.[9]

Second, Congress has over the years both curtailed and expanded the ability of national banks to affiliate with other companies. In the early part of the century, banks routinely engaged in investment activities and affiliated with companies that did the same. The Glass-Steagall Act put an end to that. "[E]nacted in 1933 to protect bank depositors from any repetition of the widespread bank closings that occurred

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[9] It is noteworthy that the principal cases that the Court cites to support its conclusion that the federal statute itself pre-empts the Michigan laws were decided years before Congress authorized national banks to engage in mortgage lending and years before the Office of the Comptroller of the Currency (OCC) authorized their use of operating subsidiaries. See *ante*, at 11–12, 14.

during the Great Depression," *Board of Governors, FRS* v. *Investment Company Institute*, 450 U. S. 46, 61 (1981), Glass-Steagall prohibited Federal Reserve member banks (both state and national) from affiliating with investment banks.[10] In Congress' view, the affiliates had engaged in speculative activities that in turn contributed to commercial banks' Depression-era failures.[11] It was this focus on the welfare of depositors—as opposed to stockholders—that provided the basis for legislative action designed to ensure bank solvency.

A scant two years later, Congress forbade national banks from owning the shares of any company because of a similar fear that such ownership could undermine the safety and soundness of national banks:[12] "Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by [a national bank] for its own account of *any* shares of stock of *any* corporation." Banking Act of 1935, § 308(b), 49 Stat. 709 (emphasis added). That provision remains on the books today. See 12 U. S. C. § 24 Seventh.

These congressional restrictions did not forbid all affiliations, however, and national banks began experimenting with new corporate forms. One of those forms involved the national bank ownership of "operating subsidiaries." In 1966, the Comptroller of the Currency took the position "that

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[10] In *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971), we set aside a regulation issued by the Comptroller of the Currency authorizing banks to operate collective investment funds because that activity was prohibited by the Glass-Steagall Act. Similarly, in *Securities Industry Assn.* v. *Board of Governors, FRS*, 468 U. S. 137 (1984), the Glass-Steagall Act provided the basis for invalidating a regulation authorizing banks to enter the business of selling third-party commercial paper.

[11] See J. Macey, G. Miller, & R. Carnell, Banking Law and Regulation 21 (3d ed. 2001) (describing "the alleged misdeeds of the large banks' securities affiliates and the ways in which such affiliations could promote unsound lending, irresponsible speculation, and conflicts of interest").

[12] See 31 Fed. Reg. 11459 (1966).

a national bank may acquire and hold the controlling stock interest in a subsidiary operations corporation" so long as that corporation's "functions or activities . . . are limited to one or several of the functions or activities that a national bank is authorized to carry on." 31 Fed. Reg. 11459 (1966). The Comptroller declined to read the categorical prohibition on national bank ownership of stock to foreclose bank ownership of operating subsidiaries, finding authority for this aggressive interpretation of national bank authority in the "incidental powers" provision of 12 U. S. C. § 24 Seventh. See 31 Fed. Reg. 11460.

While Congress eventually restricted some of the new corporate structures,[13] it neither disavowed nor endorsed the Comptroller's position on national bank ownership of operating subsidiaries. Notwithstanding the congressional silence, in 1996 the OCC once again attempted to expand national banks' ownership powers. The agency issued a regulation permitting national bank operating subsidiaries to undertake activities that the bank was *not* allowed to engage in directly. 12 CFR §§ 5.34(d), (f) (1997) (authorizing national banks to "acquire or establish an operating subsidiary to engage in [activities] different from that permissible for the parent national bank," so long as those activities are "part of or incidental to the business of banking, as determined by the Comptroller of the Currency"); see also 61 Fed. Reg. 60342 (1996).

Congress overruled this OCC regulation in 1999 in the Gramm-Leach-Bliley Act (GLBA), 113 Stat. 1338. The GLBA was a seminal piece of banking legislation inasmuch as it repealed the Glass-Steagall Act's ban on affiliations between commercial and investment banks. See § 101, *id.*, at 1341. More relevant to this case, however, the GLBA addressed the powers of national banks to own subsidiary corporations. The Act provided that any national bank subsid-

[13] See Bank Holding Company Act of 1956, 70 Stat. 133; Bank Holding Company Act Amendments of 1970, 84 Stat. 1760.

iary engaging in activities forbidden to the parent bank would be considered a "financial subsidiary," § 121, *id.*, at 1380, and would be subjected to heightened regulatory obligations, see, *e. g.*, 12 U. S. C. § 371c–1(a)(1). The GLBA's definition of "financial subsidiaries" excluded those subsidiaries that "engag[e] solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." § 24a(g)(3).

By negative implication, then, only subsidiaries engaging in purely national bank activities—which the OCC had termed "operating subsidiaries," but which the GLBA never mentions by name—could avoid being subjected to the restrictions that applied to financial subsidiaries. Compare § 371c(b)(2) (exempting subsidiaries from certain regulatory restrictions) with § 371c(e) (clarifying that financial subsidiaries are not to be treated as "subsidiaries"). Taken together, these provisions worked a rejection of the OCC's position that an *operating* subsidiary could engage in activities that national banks could not engage in directly.[14] See § 24a(g)(3). Apart from this implicit rejection of the OCC's 1996 regulation, however, the GLBA does not even mention operating subsidiaries.

In sum, Congress itself has never authorized national banks to use subsidiaries incorporated under state law to perform traditional banking functions. Nor has it authorized the OCC to "license" any state-chartered entity to do so. The fact that it may have acquiesced in the OCC's expansive

[14] While the statutory text provides ample support for this conclusion, it is noteworthy that it was so understood by contemporary commentators. See, *e. g.*, 145 Cong. Rec. 29681 (1999) ("Recently, the Comptroller of the Currency has interpreted section 24 (Seventh) of the National Bank Act to permit national banks to own and control subsidiaries engaged in activities that national banks cannot conduct directly. These decisions and the legal reasoning therein are erroneous and contrary to the law. The [GLBA] overturns these decisions . . . " (statement of Representative Bliley)).

interpretation of its authority is a plainly insufficient basis for finding pre-emption.

III

It is familiar learning that "[t]he purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 516 (1992) (internal quotation marks omitted). In divining that congressional purpose, I would have hoped that the Court would hew both to the NBA's text and to the basic rule, central to our federal system, that "[i]n all pre-emption cases . . . 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) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)). Had it done so, it could have avoided the untenable conclusion that Congress meant the NBA to pre-empt the state laws at issue here.

The NBA in fact evinces quite the opposite congressional purpose. It provides in 12 U. S. C. § 484(a) that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." Although this exemption from state visitorial authority has been in place for more than 140 years, see § 54, 13 Stat. 116 (national banks "shall not be subject to any other visitorial powers than such as are authorized by this act"), it is significant that Congress has never extended 12 U. S. C. § 484(a)'s pre-emptive blanket to cover national bank *subsidiaries*.

This is not, contrary to the Court's suggestion, see *ante*, at 19–20, some kind of oversight. As the complex history of the banking laws demonstrates, Congress has legislated extensively with respect to national bank "affiliates"—an operating subsidiary is one type of affiliate[15]—and has more-

[15] See 12 U. S. C. § 221a(b) (defining affiliates to include "any corporation" that a federal member bank owns or controls).

over given the OCC extensive supervisory powers over those affiliates, see § 481 (providing that a federal examiner "shall have power to make a thorough examination of all the affairs of [a national bank] affiliate, and in doing so he shall have power . . . to make a report of his findings to the Comptroller of the Currency"). That Congress lavished such attention on national bank affiliates and conferred such far-reaching authority on the OCC without ever expanding the scope of § 484(a) speaks volumes about Congress' pre-emptive intent, or rather its lack thereof. Consistent with our presumption against pre-emption—a presumption I do not understand the Court to reject—I would read § 484(a) to reflect Congress' considered judgment not to pre-empt the application of state visitorial laws to national bank "affiliates."

Instead, the Court likens § 484(a) to a congressional afterthought, musing that it merely "[r]ecogniz[es] the burdens and undue duplication state controls could produce." *Ante*, at 14. By that logic, I take it the Court believes that the NBA would impliedly pre-empt all state visitorial laws as applied to national banks *even if § 484(a) did not exist.* That is surprising and unlikely. Not only would it reduce the NBA's express pre-emption provision to so much surplusage, but it would give Congress' silence greater statutory dignity than an express command. Perhaps that explains why none of the four Circuits to have addressed this issue relied on the pre-emptive force of the NBA itself. Each instead asked whether the OCC's regulations pre-empted state laws.[16] Stranger still, the Court's reasoning would suggest

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[16] See *National City Bank of Indiana* v. *Turnbaugh*, 463 F. 3d 325, 331–334 (CA4 2006) (holding that state law conflicted with the OCC regulations, not with the NBA); *Wachovia Bank, N. A.* v. *Burke*, 414 F. 3d 305, 315–316 (CA2 2005) (same); 431 F. 3d 556, 560–563 (CA6 2005) (case below) (same); *Wells Fargo Bank N. A.* v. *Boutris*, 419 F. 3d 949, 962–967 (CA9 2005) (same).

that operating subsidiaries have been exempted from state visitorial authority from the moment the OCC first authorized them in 1966. See 31 Fed. Reg. 11459. Yet if that were true, surely at some point over the last 40 years some national bank would have gone to court to spare its subsidiaries from the yoke of state regulation; national banks are neither heedless of their rights nor shy of litigation. But respondents point us to no such cases that predate the OCC's pre-emption regulations.

The Court licenses itself to ignore § 484(a)'s limits by reasoning that "when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way." *Ante*, at 12. But it intones this "significant impairment" refrain without remembering that it merely provides a useful tool—not the only tool, and not even the best tool—to discover congressional intent. As we explained in *Barnett Bank*, this Court "take[s] the view that *normally* Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." 517 U. S., at 33 (emphasis added). But any assumption about what Congress "normally" wants is of little moment when Congress has said exactly what it wants.

The Court also puts great weight on *Barnett Bank*'s reference to our "history . . . of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.*, at 32. The Court neglects to mention that *Barnett Bank* is quite clear that this interpretive rule applies only when Congress has failed (as it often does) to manifest an explicit pre-emptive intent. *Id.*, at 31. "*In that event*, courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." *Ibid.* (emphasis added). *Barnett Bank*

nowhere holds that we can ignore strong indicia of congressional intent whenever a state law arguably trenches on national bank powers. After all, the case emphasized that the question of pre-emption "is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?" *Id.*, at 30. The answer here is a resounding no.

Even if it were appropriate to delve into the significant impairment question, the history of this very case confirms that neither the Mortgage Brokers, Lenders, and Servicers Licensing Act, Mich. Comp. Laws Ann. § 445.1651 *et seq.* (West 2002 and Supp. 2006), nor the Secondary Mortgage Loan Act, § 493.51 *et seq.* (West 2005), conflicts with "the letter or the general objects and purposes of Congressional legislation." *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 290 (1896). Enacted to protect consumers from mortgage lending abuses, the Acts require mortgage brokers, mortgage servicers, and mortgage lenders to register with the State, §§ 445.1652(1) (West Supp. 2006), 493.52(1) (West 2005), to submit certain financial statements, §§ 445.1657(2) (West 2002), 493.56a(2) (West 2005), and to submit to state visitorial oversight, §§ 445.1661 (West 2002), 493.56b (West 2005). Because the Acts expressly provide that they do not apply to "depository financial institution[s]," § 445.1675(a) (West 2002), neither national nor state banks are covered.[17] The statute therefore covers only nonbank companies incorporated under state law.[18]

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[17] While the Court at one point observes that "the Michigan provisions at issue exempt national banks from coverage," see *ante*, at 13, that is because they are "banks," not because they are "national." See *ante*, at 8 (noting that "Michigan's statutory regime exempts banks, *both national and state*, from state mortgage lending regulation" (emphasis added)).

[18] The Michigan laws focus on consumer protection, whereas the OCC regulations quoted by the Court focus on protection of bank depositors. See *ante*, at 12, n. 4, and 16, n. 8.

Respondent Wachovia Mortgage Corporation has never engaged in the core banking business of accepting deposits. In 1997, when Wachovia Mortgage was first licensed to do business in Michigan, it was owned by a holding company that also owned the respondent Wachovia Bank, N. A. (Neither the holding company nor the bank did business in Michigan.) There is no evidence, and no reason to believe, that compliance with the Michigan statutes imposed any special burdens on Wachovia Mortgage's activities, or that the transfer in 2003 of its ownership from the holding company to the bank required it to make any changes whatsoever in its methods of doing business. Neither before nor after that transfer was there any discernible federal interest in granting the company immunity from regulations that applied evenhandedly to its competitors. The mere fact that its activities may also be performed by its banking parent provides at best a feeble justification for immunizing it from state regulation. And it is a justification that the longstanding congressional "policy of competitive equality" clearly outweighs. See *Plant City*, 396 U. S., at 133.

Again, however, it is beside the point whether in the Court's judgment the Michigan laws will hamper national banks' ability to carry out their banking functions through operating subsidiaries. It is *Congress'* judgment that matters here, and Congress has in the NBA pre-empted only those laws purporting to lodge with state authorities visitorial power over national banks. 12 U. S. C. § 484(a). In my view, the Court's eagerness to infuse congressional silence with pre-emptive force threatens the vitality of most state laws as applied to national banks—a result at odds with the long and unbroken history of dual state and federal authority over national banks, not to mention our federal system of government. It is especially troubling that the Court so blithely pre-empts Michigan laws designed to protect consumers. Consumer protection is quintessentially a "field

which the States have traditionally occupied," *Rice*, 331 U. S., at 230;[19] the Court should therefore have been all the more reluctant to conclude that the "clear and manifest purpose of Congress" was to set aside the laws of a sovereign State, *ibid.*

IV

Respondents maintain that even if the NBA lacks pre-emptive force, the GLBA's use of the phrase "same terms and conditions" reflects a congressional intent to pre-empt state laws as they apply to the mortgage lending activities of operating subsidiaries. See 12 U. S. C. § 24a(g)(3). Indeed, the Court obliquely suggests as much, salting its analysis of the NBA with references to the GLBA. See *ante*, at 18, 19–20. Even a cursory review of the GLBA's text shows that it cannot bear the pre-emptive weight respondents (and perhaps the Court) would assign to it.

The phrase "same terms and conditions" appears in the *definition* of "financial subsidiary," not in a provision of the statute conferring national bank powers. Even there, it serves only to describe what a financial subsidiary is not. See § 24a(g)(3) (defining financial subsidiary as any subsidiary "other than a subsidiary that . . . engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks"). Apart from this slanting reference, the GLBA *never mentions* operating subsidiaries. Far from a demonstration that the "clear and manifest purpose of Congress" was to pre-empt the type of law at issue here, *Rice*, 331 U. S., at 230, the "same terms and conditions" language at most reflects an uncontroversial acknowledgment that operating subsidiaries of national banks are subject to the same federal

[19] See also *General Motors Corp.* v. *Abrams*, 897 F. 2d 34, 41–43 (CA2 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area").

oversight as their national bank parents.[20] It has nothing to do with pre-emption.

Congress in fact disavowed any such pre-emptive intent. Section 104 of the GLBA is titled "Operation of State Law," 113 Stat. 1352, and it devotes more than 3,000 words to explaining which state laws Congress meant the GLBA to pre-empt. Leave aside the oddity of a Congress that addresses pre-emption in exquisite detail in one provision of the GLBA but (according to respondents) uses only four words to express a pre-emptive intent elsewhere in the statute. More importantly, § 104(d)(4) provides that "*[n]o State statute . . . shall be preempted*" by the GLBA unless that statute has a disparate impact on federally chartered depository institutions, "*prevent[s]* a depository institution or affiliate thereof from engaging in activities authorized or permitted by this Act," or "conflict[s] with the intent of this Act generally to permit affiliations that are authorized or permitted by Federal law." *Id.*, at 1357 (emphasis added) (codified at 15 U. S. C. § 6701(d)(4)). No one claims that the Michigan laws at issue here are discriminatory, forbid affiliations, or "prevent" any operating subsidiary from engaging in banking activities. It necessarily follows that the GLBA does not pre-empt them.

Even assuming that the phrase has something to do with pre-emption, it is simply not the case that the nonencroachment of state regulation is a "term and condition" of engagement in the business of banking. As a historical matter, state laws have always applied to national banks and have often encroached on the business of banking. See *National Bank*, 9 Wall., at 362 (observing that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation"). The Court itself acknowledges that state usury, contract, and property law govern the activities of

[20] See 31 Fed. Reg. 11460 (noting that the OCC maintains regulatory oversight of operating subsidiaries).

national banks and their subsidiaries, *ante,* at 11–12, notwithstanding that they vary across "all States in which the banks operate," *ante,* at 13. State law has always provided the legal backdrop against which national banks make real estate loans, and "[t]he fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive." *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 352 (1963).

V

In my view, the most pressing questions in this case are whether Congress has delegated to the Comptroller of the Currency the authority to pre-empt the laws of a sovereign State as they apply to operating subsidiaries, and if so, whether that authority was properly exercised here. See 12 CFR § 7.4006 (2006) ("State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank"). Without directly answering either question, the Court concludes that pre-emption is the "necessary consequence" of various congressional statutes. *Ante*, at 20. Because I read those statutes differently, I must consider (as did the four Circuits to have addressed this issue) whether an administrative agency can assume the power to displace the duly enacted laws of a state legislature.

To begin with, Congress knows how to authorize executive agencies to pre-empt state laws.[21] It has not done so here.

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[21] See, *e. g.*, 47 U. S. C. §§ 253(a), (d) (authorizing the Federal Communications Commission to pre-empt "any [state] statute, regulation, or legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"); 30 U. S. C. § 1254(g) (pre-empting any statute that conflicts with "the purposes and the requirements of this chapter" and permitting the Secretary of the Interior to "set forth any State law or regulation which is preempted and superseded"); 49 U. S. C. § 5125(d) (authorizing the

Nor does the statutory provision authorizing banks to engage in certain lines of business that are "incidental" to their primary business of accepting and managing the funds of depositors expressly or implicitly grant the OCC the power to immunize banks or their subsidiaries from state regulation.[22] See 12 U. S. C. § 24 Seventh. For there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation. The Comptroller may well have the authority to decide whether the activities of a mortgage broker, a real estate broker, or a travel agent should be characterized as "incidental" to banking, and to approve a bank's entry into those businesses, either directly or through its subsidiaries. See, *e. g.*, *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.*, 513 U. S. 251, 258 (1995) (upholding the OCC's interpretation of the "incidental powers" provision to permit national banks to serve as agents in annuity sales). But that lesser power does not imply the far greater power to immunize banks or their subsidiaries from state laws regulating the conduct of their competitors.[23] As we said almost 40 years ago, "the

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Secretary of Transportation to decide whether a state or local statute that conflicts with the regulation of hazardous waste transportation is pre-empted).

[22] Congress did make an indirect reference to regulatory pre-emption in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, § 114, 108 Stat. 2367 (codified at 12 U. S. C. § 43(a)). The Riegle-Neal Act requires the OCC to jump through additional procedural hoops (specifically, notice and comment, even for opinion letters and interpretive rules) before "conclud[ing] that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches." *Ibid.* By its own terms, however, this provision *granted* no pre-emption authority to the OCC.

[23] In a recent adoption of a separate pre-emption regulation, the OCC located the source of its authority to displace state laws in §§ 93a and 371. See 69 Fed. Reg. 1908 (2004). Both provisions are generic authorizations of rulemaking authority, however, and neither says a word about pre-emption. See 12 U. S. C. § 93a ("[T]he Comptroller of the Currency is au-

congressional policy of competitive equality with its deference to state standards" is not "open to modification by the Comptroller of the Currency." *Plant City*, 396 U. S., at 138.[24]

Were I inclined to assume (and I am not) that congressional silence should be read as a conferral of pre-emptive authority, I would not find that the OCC has actually exercised any such authority here. When the agency promulgated 12 CFR § 7.4006, it explained that "[t]he section itself *does not effect preemption of any State law;* it reflects the conclusion we believe a Federal court would reach, even in the absence of the regulation . . . ." 66 Fed. Reg. 34790 (2001) (emphasis added). Taking the OCC at its word, then, § 7.4006 has no pre-emptive force of its own, but merely predicts how a federal court's analysis will proceed.

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thorized to prescribe rules and regulations to carry out the responsibilities of the office"); § 371(a) (authorizing national banks to make real estate loans "subject to . . . such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order"). Needless to say, they provide no textual foundation for the OCC's assertion of pre-emption authority.

[24] This conclusion does not touch our cases holding that a properly promulgated agency regulation can have a pre-emptive *effect* should it conflict with state law. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes"); see also *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 154–159 (1982) (holding that a regulation authorizing federal savings-and-loan associations to include due-on-sale clauses in mortgage contracts conflicted with a state-court doctrine that such clauses were unenforceable); *City of New York* v. *FCC*, 486 U. S. 57, 59, 65–70 (1988) (finding that the FCC's adoption of "regulations that establish technical standards to govern the quality of cable television signals" pre-empted local signal quality standards). My analysis is rather confined to agency regulations (like the one at issue here) that "purpor[t] to settle the scope of federal preemption" and "reflec[t] an agency's effort to transform the preemption question from a judicial inquiry into an administrative *fait accompli.*" See Note, The Unwarranted Regulatory Preemption of Predatory Lending Laws, 79 N. Y. U. L. Rev. 2274, 2289 (2004).

Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance. To be sure, expert agency opinions as to which state laws conflict with a federal statute may be entitled to "some weight," especially when "the subject matter is technical" and "the relevant history and background are complex and extensive." *Geier* v. *American Honda Motor Co.*, 529 U. S. 861, 883 (2000). But "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law." *Id.*, at 908 (STEVENS, J., dissenting).[25] For that reason, when an agency purports to decide the scope of federal pre-emption, a healthy respect for state sovereignty calls for something less than *Chevron* deference. See 529 U. S., at 911–912; see also *Medtronic*, 518 U. S., at 512 (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference").

In any event, neither of the two justifications the OCC advanced when it promulgated 12 CFR § 7.4006 withstand *Chevron* analysis. First, the OCC observed that the GLBA "expressly acknowledged the authority of national banks to own subsidiaries" that conduct national bank activities "'subject to the same terms and conditions that govern the conduct of such activities by national banks.'" 66 Fed. Reg. 34788 (quoting 12 U. S. C. § 24a(g)(3)). The agency also noted that it had folded the "'same terms and conditions'" language into an implementing regulation, 66 Fed. Reg.

[25] See also Mendelson, *Chevron* and Preemption, 102 Mich. L. Rev. 737, 779–790 (2003–2004) (arguing that agencies are generally insensitive to federalism concerns).

34788 (citing 12 CFR § 5.34(e)(3) (2001)). According to the OCC, "[a] fundamental component of these descriptions of the characteristics of operating subsidiaries in GLBA and the OCC's rule is that state laws apply to operating subsidiaries to the same extent as they apply to the parent national bank." 66 Fed. Reg. 34788.

This is incorrect. As explained above, the GLBA's offhand use of the "same terms and conditions" language says nothing about pre-emption. See *supra*, at 36–38. Nor can the OCC's incorporation of that language into a regulation support the agency's position: "Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Gonzales* v. *Oregon*, 546 U. S. 243, 257 (2006). The OCC's argument to the contrary is particularly surprising given that when it promulgated its "same terms and conditions" regulation, it said not one word about pre-emption or the federalism implications of its rule—an inexplicable elision if a "fundamental component" of the phrase is the need to operate unfettered by state oversight. Compare 65 Fed. Reg. 12905–12910 (2000) with Exec. Order No. 13132, §§ 2, 4, 64 Fed. Reg. 43255, 43257 (1999) (requiring agencies to explicitly consider the "federalism implications" of their chosen policies and to hesitate before pre-empting state laws).

Second, the OCC describes operating subsidiaries "as the equivalent of departments or divisions of their parent banks," 66 Fed. Reg. 34788, which, through the operation of 12 U. S. C. § 484(a), would not be subject to state visitorial powers. The OCC claims that national banks might desire to conduct their business through operating subsidiaries for the purposes of "controlling operations costs, improving effectiveness of supervision, more accurate determination of profits, decentralizing management decisions [and] separating particular operations of the bank from other operations." Brief for United States as *Amicus Curiae* 19 (quoting 31

Fed. Reg. 11460). It is obvious, however, that a national bank could realize *all* of those benefits through the straightforward expedient of dissolving the corporation and making it in fact a "department" or a "division" of the parent bank.

Rather, the primary advantage of maintaining an operating subsidiary as a separate corporation is that it shields the national bank from the operating subsidiaries' liabilities. *United States* v. *Bestfoods*, 524 U. S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiary" (internal quotation marks omitted)). For that reason, the OCC's regulation is about far more than mere "corporate structure," *ante*, at 18, or "internal governance," *ante*, at 21, 19 (citing *Wells Fargo Bank N. A.* v. *Boutris*, 419 F. 3d 949, 960 (CA9 2005)); see also *Dole Food Co.* v. *Patrickson*, 538 U. S. 468, 474 (2003) ("In issues of corporate law structure often matters"). It is about whether a *state* corporation can avoid complying with *state* regulations, yet nevertheless take advantage of *state* laws insulating its owners from liability. The federal interest in protecting depositors in national banks from their subsidiaries' liabilities surely does not justify a grant of immunity from laws that apply to competitors. Indeed, the OCC's regulation may drive companies seeking refuge from state regulation into the arms of federal parents, harm those state competitors who are not lucky enough to find a federal benefactor, and hamstring States' ability to regulate the affairs of state corporations. As a result, the OCC's regulation threatens both the dual banking system and the principle of competitive equality that is its cornerstone.

VI

The novelty of today's holding merits a final comment. Whatever the Court says, this is a case about an administrative agency's power to pre-empt state laws. I agree with the Court that the Tenth Amendment does not preclude the

exercise of that power. But the fact that that Amendment was included in the Bill of Rights should nevertheless remind the Court that its ruling affects the allocation of powers among sovereigns. Indeed, the reasons for adopting that Amendment are precisely those that undergird the well-established presumption against pre-emption.

With rare exception, we have found pre-emption only when a federal statute commanded it, see *Cipollone*, 505 U. S., at 517, when a conflict between federal and state law precluded obedience to both sovereigns, see *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when a federal statute so completely occupied a field that it left no room for additional state regulation, see *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 613 (1926). Almost invariably the finding of pre-emption has been based on this Court's interpretation of statutory language or of regulations plainly authorized by Congress. Never before have we endorsed administrative action whose sole purpose was to pre-empt state law rather than to implement a statutory command.

Accordingly, I respectfully dissent.

Syllabus

GLOBAL CROSSING TELECOMMUNICATIONS, INC. *v.* METROPHONES TELECOMMUNICATIONS, INC.

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

No. 05–705. Argued October 10, 2006—Decided April 17, 2007

Under authority of the Communications Act of 1934, the Federal Communications Commission (FCC) regulates interstate telephone communications using a traditional regulatory system similar to what other commissions have applied when regulating other common carriers. Indeed, Congress largely copied language from the earlier Interstate Commerce Act, which authorized federal railroad regulation, when it wrote Communications Act §§ 201(b) and 207, the provisions at issue. Both Acts authorize their respective Commissions to declare any carrier "charge," "regulation," or "practice" in connection with the carrier's services to be "unjust or unreasonable"; declare an "unreasonable," *e. g.*, "charge" to be "unlawful"; authorize an injured person to recover "damages" for an "unlawful" charge or practice; and state that, to do so, the person may bring suit in a "court" "of the United States." Interstate Commerce Act §§ 1, 8, 9; Communications Act §§ 201(b), 206, 207. The underlying regulatory problem here arises at the intersection of traditional regulation and newer, more competitively oriented approaches. Legislation in 1990 required payphone operators to allow payphone users to obtain "free" access to the long-distance carrier of their choice, *i. e.*, access without depositing coins. But recognizing the "free" call would impose a cost upon the payphone operator, Congress required the FCC to promulgate regulations to provide compensation to such operators. Using traditional ratemaking methods, the FCC ordered carriers to reimburse the operators in a specified amount unless a carrier and an operator agreed to a different amount. The FCC subsequently determined that a carrier's refusal to pay such compensation was an "unreasonable practice" and thus unlawful under § 201(b). Respondent payphone operator brought a federal lawsuit, claiming that petitioner long-distance carrier (hereinafter Global Crossing) had violated § 201(b) by failing to pay compensation and that § 207 authorized respondent to sue in federal court. The District Court agreed that Global Crossing's refusal to pay violated § 201(b), thereby permitting respondent to sue under § 207. The Ninth Circuit affirmed.

Held: The FCC's application of § 201(b) to the carrier's refusal to pay compensation is lawful; and, given the linkage with § 207, § 207 authorizes this federal-court lawsuit. Pp. 52–64.

(a) The language of §§ 201(b), 206, and 207 and those sections' history, including that of their predecessors, Interstate Commerce Act §§ 8 and 9, make clear that § 207's purpose is to allow persons injured by § 201(b) violations to bring federal-court damages actions. The difficult question is whether the FCC regulation at issue lawfully implements § 201(b)'s "unreasonable practice" prohibition. Pp. 52–55.

(b) The FCC's § 201(b) "unreasonable practice" determination is reasonable, and thus lawful. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844. It easily fits within the language of the statutory phrase. Moreover, the underlying regulated activity at issue resembles activity long regulated by both transportation and communications agencies. Traditionally, the FCC, exercising its rate-setting authority, has divided revenues from a call among providers of segments of the call. Transportation agencies have similarly divided revenues from a larger transportation service among providers of segments of the service. The payphone operator and long-distance carrier resemble those joint providers of a communication or transportation service. Differences between the present "unreasonable practice" classification and more traditional regulatory subject matter do not require a different outcome. When Congress revised the telecommunications laws in 1996 to enhance the role of competition, creating a system that relies in part upon competition and in part upon the role of tariffs in regulatory supervision, it left § 201(b) in place. In light of the absence of any congressional prohibition, and the similarities with traditional regulatory action, the Court finds nothing unreasonable about the FCC's § 201(b) determination. *United States* v. *Mead Corp.*, 533 U. S. 218, 229. Pp. 55–58.

(c) Additional arguments made by Global Crossing, its supporting *amici*, and the dissents—that § 207 does not authorize actions for violations of regulations promulgated to carry out statutory objectives; that no § 207 action lies for violations of substantive regulations promulgated by the FCC; that §§ 201(a) and (b) concern only practices that harm carrier customers, not carrier suppliers; that the FCC's "unreasonable practice" determination is unlawful because it is inadequately reasoned; and that § 276 prohibits the FCC's § 201(b) classification—are ultimately unpersuasive. Pp. 58–64.

423 F. 3d 1056, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and ALITO, JJ., joined.

SCALIA, J., *post*, p. 67, and THOMAS, J., *post*, p. 74, filed dissenting opinions.

Jeffrey L. Fisher argued the cause for petitioner. With him on the briefs were *Daniel M. Waggoner*, *Kristina Silja Bennard*, and *Michael J. Shortley III*.

Roy T. Englert, Jr., argued the cause for respondent. With him on the briefs were *Donald J. Russell*, *Michael W. Ward*, and *David J. Russell*.

James A. Feldman argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement*, *Deputy Solicitor General Hungar*, *Samuel L. Feder*, and *Joel Marcus*.*

JUSTICE BREYER delivered the opinion of the Court.

The Federal Communications Commission (Commission or FCC) has established rules that require long-distance (and certain other) communications carriers to compensate a payphone operator when a caller uses a payphone to obtain free access to the carrier's lines (by dialing, *e. g.*, a 1–800 number or other access code). The Commission has added that a carrier's refusal to pay the compensation is a "practice . . . that is unjust or unreasonable" within the terms of the Communications Act of 1934, § 201(b), 48 Stat. 1070, 47 U. S. C. § 201(b). Communications Act language links § 201(b) to § 207, which authorizes any person "damaged" by a violation of § 201(b) to bring a lawsuit to recover damages in federal court. And we must here decide whether this linked section, § 207, authorizes a payphone operator to bring a federal-court lawsuit against a recalcitrant carrier that refuses to pay the compensation that the Commission's order says it owes.

In our view, the FCC's application of § 201(b) to the carrier's refusal to pay compensation is a reasonable interpreta-

*Briefs of *amici curiae* urging reversal were filed for AT&T et al. by *Mark L. Evans*, *Aaron M. Panner*, and *Michael E. Glover;* and for Sprint Communications Co. L. P. by *David P. Murray* and *Christopher J. Wright*.

tion of the statute; hence it is lawful. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844, and n. 11 (1984). And, given the linkage with § 207, we also conclude that § 207 authorizes this federal-court lawsuit.

I

A

Because regulatory history helps to illuminate the proper interpretation and application of §§ 201(b) and 207, we begin with that history. When Congress enacted the Communications Act of 1934, it granted the FCC broad authority to regulate interstate telephone communications. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U. S. 355, 360 (1986). The Commission, during the first several decades of its history, used this authority to develop a traditional regulatory system much like the systems other commissions had applied when regulating railroads, public utilities, and other common carriers. A utility or carrier would file with a commission a tariff containing rates, and perhaps other practices, classifications, or regulations in connection with its provision of communications services. The commission would examine the rates, etc., and, after appropriate proceedings, approve them, set them aside, or, sometimes, set forth a substitute rate schedule or list of approved charges, classifications, or practices that the carrier or utility must follow. In doing so, the commission might determine the utility's or carrier's overall costs (including a reasonable profit), allocate costs to particular services, examine whether, and how, individual rates would generate revenue that would help cover those costs, and, if necessary, provide for a division of revenues among several carriers that together provided a single service. See 47 U. S. C. §§ 201(b), 203, 205(a); *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Serv. Comm'n of Mo.*, 262 U. S. 276, 291–295 (1923) (Brandeis, J., concurring in judgment) (telecommunications); *Verizon Communications*

Inc. v. *FCC*, 535 U. S. 467, 478 (2002) (same); *Chicago & North Western R. Co.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 326, 331 (1967) (railroads); *Permian Basin Area Rate Cases*, 390 U. S. 747, 761–765, 806–808 (1968) (natural gas field production).

In authorizing this traditional form of regulation, Congress copied into the 1934 Communications Act language from the earlier Interstate Commerce Act of 1887, 24 Stat. 379, which (as amended) authorized federal railroad regulation. See *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.*, 524 U. S. 214, 222 (1998). Indeed, Congress largely copied §§ 1, 8, and 9 of the Interstate Commerce Act when it wrote the language of Communications Act §§ 201(b) and 207, the sections at issue here. The relevant sections (in both statutes) authorize the Commission to declare any carrier "charge," "regulation," or "practice" in connection with the carrier's services to be "unjust or unreasonable"; they declare an "unreasonable," *e. g.*, "charge" to be "unlawful"; they authorize an injured person to recover "damages" for an "unlawful" charge or practice; and they state that, to do so, the person may bring suit in a "court" "of the United States." Interstate Commerce Act §§ 1, 8, 9, 24 Stat. 379, 382; Communications Act §§ 201(b), 206, 207, 48 Stat. 1070, 1072, 1073, 47 U. S. C. §§ 201(b), 206, 207.

Historically speaking, the Interstate Commerce Act sections changed early, preregulatory common-law rate-supervision procedures. The common law originally permitted a freight shipper to ask a *court* to determine whether a railroad rate was unreasonably high and to award the shipper damages in the form of "reparations." The "new" regulatory law, however, made clear that a commission, not a court, would determine a rate's reasonableness. At the same time, that "new" law permitted a shipper injured by an unreasonable rate to bring a federal lawsuit to collect damages. Interstate Commerce Act §§ 1, 8–9; *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 383–386

(1932); *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436, 440–441 (1907); *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 162 (1922); *Louisville & Nashville R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288, 290–291 (1916); J. Ely, Railroads and American Law 71–72, 226–227 (2001); A. Hoogenboom & O. Hoogenboom, A History of the ICC 61 (1976). The similar language of Communications Act §§ 201(b) and 207 indicates a roughly similar sharing of agency authority with federal courts.

Beginning in the 1970's, the FCC came to believe that communications markets might efficiently support more than one firm and that competition might supplement (or provide a substitute for) traditional regulation. See *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 220–221 (1994). The Commission facilitated entry of new telecommunications carriers into long-distance markets. And in the 1990's, Congress amended the 1934 Act while also enacting new telecommunications statutes, in order to encourage (and sometimes to mandate) new competition. See Telecommunications Act of 1996, 110 Stat. 56, 47 U. S. C. § 609 *et seq.* Neither Congress nor the Commission, however, totally abandoned traditional regulatory requirements. And the new statutes and amendments left many traditional requirements and related statutory provisions, including §§ 201(b) and 207, in place. *E. g.*, *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 975 (2005).

B

The regulatory problem that underlies this lawsuit arises at the intersection of traditional regulation and newer, more competitively oriented approaches. Competing long-distance carriers seek the business of individual local callers, including those who wish to make a long-distance call from a local payphone. A payphone operator, however, controls what is sometimes a necessary channel for the caller to reach the long-distance carrier. And prior to 1990, a payphone op-

erator, exploiting this control, might require a caller to use a long-distance carrier that the operator favored while blocking access to the caller's preferred carrier. Such a practice substituted the operator's choice of carrier for the caller's, and it potentially placed disfavored carriers at a competitive disadvantage. In 1990, Congress enacted special legislation requiring payphone operators to allow a payphone user to obtain "free" access to the carrier of his or her choice, *i. e.*, access from the payphone without depositing coins. Telephone Operator Consumer Services Improvement Act of 1990, 104 Stat. 986, note following 47 U. S. C. § 226. (For ease of exposition, we often use familiar terms such as "long distance" and "free" calls instead of more precise terms such as "interexchange" and "coinless" or "dial-around" calls.)

At the same time, Congress recognized that the "free" call would impose a cost upon the payphone operator; and it consequently required the FCC to "prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call." § 276(b)(1)(A) of the Communications Act of 1934, as added by § 151 of the Telecommunications Act of 1996, 110 Stat. 106, codified at 47 U. S. C. § 276(b)(1)(A).

The FCC then considered the compensation problem. Using traditional ratemaking methods, it found that the (fixed and incremental) costs of a "free" call from a payphone to, say, a long-distance carrier warranted reimbursement of (at the time relevant to this litigation) $0.24 per call. The FCC ordered carriers to reimburse the payphone operators in this amount unless a carrier and an operator agreed upon a different amount. 47 CFR § 64.1300(d) (2005). At the same time, it left the carriers free to pass the cost along to their customers, the payphone callers. Thus, in a typical "free" call, the carrier will bill the caller and then must share the revenue the carrier receives—to the tune of $0.24 per call—with the payphone operator that has, together with the car-

rier, furnished a communications service to the caller. The FCC subsequently determined that a carrier's refusal to pay the compensation ordered amounts to an "unreasonable practice" within the terms of § 201(b). (We shall refer to these regulations as the Compensation Order and the 2003 Payphone Order, respectively. See Appendix A, *infra*, for full citations.) See generally P. Huber, M. Kellogg, & J. Thorne, Federal Telecommunications Law § 8.6.3, pp. 710–713 (2d ed. 1999) (hereinafter Huber). That determination, it believed, would permit a payphone operator to bring a federal-court lawsuit under § 207 to collect the compensation owed. 2003 Payphone Order, 18 FCC Rcd. 19975, 19990, ¶ 32.

C

In 2003, respondent, Metrophones Telecommunications, Inc., a payphone operator, brought this federal-court lawsuit against Global Crossing Telecommunications, Inc., a long-distance carrier. Metrophones sought compensation that it said Global Crossing owed it under the FCC's Compensation Order, 14 FCC Rcd. 2545 (1999). Insofar as is relevant here, Metrophones claimed that Global Crossing's refusal to pay amounted to a violation of § 201(b), thereby permitting Metrophones to sue in federal court, under § 207, for the compensation owed. The District Court agreed. 423 F. 3d 1056, 1061 (CA9 2005). The Ninth Circuit affirmed the District Court's determination. *Ibid.* We granted certiorari to determine whether § 207 authorizes the lawsuit.

II

A

Section 207 says that "[a]ny person claiming to be damaged by any common carrier . . . may bring suit" against the carrier "in any district court of the United States" for "recovery of the *damages* for which such common carrier *may be liable* under the provisions of this chapter." 47 U. S. C. § 207 (emphasis added). This language makes clear that the lawsuit

is proper *if* the FCC could properly hold that a carrier's failure to pay compensation is an "unreasonable practice" deemed "unlawful" under § 201(b). That is because the immediately preceding section, § 206, says that a common carrier is "*liable*" for "*damages* sustained in consequence of" the carrier's doing "*any act, matter, or thing in this chapter* prohibited or *declared to be unlawful.*" And § 201(b) declares "*unlawful*" any common-carrier "charge, *practice,* classification, or regulation *that is unjust or unreasonable.*" (See Appendix B, *infra,* for full text; emphasis added throughout.)

The history of these sections—including that of their predecessors, §§ 8 and 9 of the Interstate Commerce Act—simply reinforces the language, making clear the purpose of § 207 is to allow persons injured by § 201(b) violations to bring federal-court damages actions. See, *e. g., Arizona Grocery Co.,* 284 U. S., at 384–385 (Interstate Commerce Act §§ 8–9); Part I–A, *supra.* History also makes clear that the FCC has long implemented § 201(b) through the issuance of rules and regulations. This is obviously so when the rules take the form of FCC approval or prescription for the future of rates that exclusively are "reasonable." See 47 U. S. C. § 205 (authorizing the FCC to prescribe reasonable rates and practices in order to preclude rates or practices that violate § 201(b)); 5 U. S. C. § 551(4) ("'rule' . . . includes the approval or prescription for the future of rates . . . or practices"). It is also so when the FCC has set forth rules that, for example, require certain accounting methods or insist upon certain carrier practices, while (as here) prohibiting others as unjust or unreasonable under § 201(b). See, *e. g.* (to name a few), *Verizon Tel. Cos.* v. *FCC,* 453 F. 3d 487, 494 (CADC 2006) (rates unreasonable (and hence unlawful) if not adjusted pursuant to accounting rules ordered in FCC regulations); *Cable & Wireless P. L. C.* v. *FCC,* 166 F. 3d 1224, 1231 (CADC 1999) (failure to follow Commission-ordered settlement practices unreasonable); *MCI Telecommunications Corp.* v. *FCC,*

59 F. 3d 1407, 1414 (CADC 1995) (violation of rate-of-return prescription unlawful); *In re NOS Communications, Inc.*, 16 FCC Rcd. 8133, 8136, ¶ 6 (2001) (deceptive marketing an unreasonable practice); *In re Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd. 22983, 23000, ¶ 35 (2000) (entering into exclusive contracts with commercial building owners an unreasonable practice).

Insofar as the statute's language is concerned, to violate a regulation that lawfully implements § 201(b)'s requirements *is* to violate the statute. See, *e. g.*, *MCI Telecommunications Corp.*, 59 F. 3d, at 1414 ("We have repeatedly held that a rate-of-return prescription has the force of law and that the Commission may therefore treat a violation of the prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates, *see* 47 U. S. C. § 201(b)"); cf. *Alexander* v. *Sandoval*, 532 U. S. 275, 284 (2001) (it is "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute"). That is why private litigants have long assumed that they may, as the statute says, bring an action under § 207 for violation of a rule or regulation that lawfully implements § 201(b). See, *e. g.*, *Oh* v. *AT&T Corp.*, 76 F. Supp. 2d 551, 556 (NJ 1999) (assuming validity of § 207 suit alleging violation of § 201(b) in carrier's failure to provide services listed in FCC-approved tariff); *Southwestern Bell Tel. Co.* v. *Allnet Communications Servs., Inc.*, 789 F. Supp. 302, 304–306 (ED Mo. 1992) (assuming validity of § 207 suit to enforce FCC's determination of reasonable practices related to payment of access charges by long-distance carrier to local exchange carrier); cf., *e. g.*, *Chicago & North Western Transp. Co.* v. *Atchison, T. & S. F. R. Co.*, 609 F. 2d 1221, 1224–1225 (CA7 1979) (same in respect to Interstate Commerce Act equivalents of §§ 201(b), 207).

The difficult question, then, is not whether § 207 covers actions that complain of a violation of § 201(b) as lawfully implemented by an FCC regulation. It plainly does. It re-

mains for us to decide whether the particular FCC regulation before us lawfully implements § 201(b)'s "unreasonable practice" prohibition. We now turn to that question.

B

In our view the FCC's § 201(b) "unreasonable practice" determination is a reasonable one; hence it is lawful. See *Chevron U. S. A. Inc.*, 467 U. S., at 843–844. The determination easily fits within the language of the statutory phrase. That is to say, in ordinary English, one can call a refusal to pay Commission-ordered compensation despite having received a benefit from the payphone operator a "practic[e] . . . in connection with [furnishing a] communication service . . . that is . . . unreasonable." The service that the payphone operator provides constitutes an integral part of the total long-distance service the payphone operator and the long-distance carrier together provide to the caller, with respect to the carriage of his or her particular call. The carrier's refusal to divide the revenues it receives from the caller with its collaborator, the payphone operator, despite the FCC's regulation requiring it to do so, can reasonably be called a "practice" "in connection with" the provision of that service that is "unreasonable." Cf. *post*, p. 74 (THOMAS, J., dissenting).

Moreover, the underlying regulated activity at issue here *resembles* activity that both transportation and communications agencies have long regulated. Here the agency has determined through traditional regulatory methods the cost of carrying a portion (the payphone portion) of a call that begins with a caller and proceeds through the payphone, attached wires, local communications loops, and long-distance lines to a distant call recipient. The agency allocates costs among the joint providers of the communications service and requires downstream carriers, in effect, to pay an appropriate share of revenues to upstream payphone operators. Traditionally, the FCC has determined costs of

some segments of a call while requiring providers of other segments to divide related revenues. See, *e. g.*, *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 148–151 (1930) (communications). And traditionally, transportation agencies have determined costs of providing some segments of a larger transportation service (for example, the cost of providing the San Francisco–Ogden segment of a San Francisco–New York shipment) while requiring providers of other segments to divide revenues. See, *e. g.*, *New England Divisions Case*, 261 U. S. 184 (1923); *Chicago & North Western R. Co.*, 387 U. S. 326; cf. *Cable & Wireless P. L. C.*, 166 F. 3d, at 1231. In all instances an agency allocates costs and provides for a related sharing of revenues.

In these more traditional instances, transportation carriers and communications firms entitled to revenues under rate divisions or cost allocations might bring lawsuits under § 207, or the equivalent sections of the Interstate Commerce Act, and obtain compensation or damages. See, *e. g.*, *Allnet Communication Serv., Inc.* v. *National Exch. Carrier Assn., Inc.*, 965 F. 2d 1118, 1122 (CADC 1992) (§ 207); *Southwestern Bell Tel. Co.*, *supra*, at 305 (same); *Chicago & North Western Transp. Co.*, *supra*, at 1224–1225 (Interstate Commerce Act equivalent of § 207). Again, the similarities support the reasonableness of an agency's bringing about a similar result here. We do not suggest that the FCC is required to find carriers' failures to divide revenues to be § 201(b) violations in every instance. Cf. *U. S. Telepacific Corp.* v. *Tel-America of Salt Lake City, Inc.*, 19 FCC Rcd. 24552, 24555–24556, and n. 27 (2004) (citing cases). Nor do we suggest that every violation of FCC regulations is an unjust and unreasonable practice. Here there is an explicit statutory scheme, and compensation of payphone operators is necessary to the proper implementation of that scheme. Under these circumstances, the FCC's finding that the failure to follow the order is an unreasonable practice is well within its authority.

There are, of course, differences between the present "unreasonable practice" classification and the similar more traditional regulatory subject matter we have just described. For one thing, the connection between payphone operators and long-distance carriers is not a traditional "through route" between carriers. See § 201(a). For another, as Global Crossing's *amici* point out, the word "practice" in § 201(b) has traditionally applied to a carrier practice that (unlike the present one) is the subject of a carrier tariff—*i. e.*, a carrier agency filing that sets forth the carrier's rates, classifications, and practices. Brief for AT&T et al. as *Amici Curiae* 8–11. We concede the differences. Indeed, traditionally, the filing of tariffs was "the centerpiece" of the "[Communications] Act's regulatory scheme." *MCI Telecommunications Corp.*, 512 U. S., at 220. But we do not concede that these differences require a different outcome. Statutory changes enhancing the role of competition have radically reduced the role that tariffs play in regulatory supervision of what is now a mixed communications system—a system that relies in part upon competition and in part upon more traditional regulation. Yet when Congress rewrote the law to bring about these changes, it nonetheless left § 201(b) in place. That fact indicates that the statute permits, indeed it suggests that Congress likely expected, the FCC to pour new substantive wine into its old regulatory bottles. See Policy and Rules Concerning the Interstate, Interexchange Marketplace, 12 FCC Rcd. 15014, 15057, ¶ 77 (1997) (despite the absence of tariffs, FCC's § 201 enforcement obligations have not diminished); *Boomer* v. *AT&T Corp.*, 309 F. 3d 404, 422 (CA7 2002) (same). And this circumstance, by indicating that Congress did not *forbid* the agency to apply § 201(b) differently in the changed regulatory environment, is sufficient to convince us that the FCC's determination is lawful.

That is because we have made clear that where "Congress would expect the agency to be able to speak with the force

of law when it addresses ambiguity in the statute or fills a space in the enacted law," a court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation" (or the manner in which it fills the "gap") is "reasonable." *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001); *National Cable & Telecommunications Assn.*, 545 U. S., at 980; *Chevron U. S. A. Inc.*, 467 U. S., at 843–844. Congress, in § 201(b), delegated to the agency authority to "fill" a "gap," *i. e.*, to apply § 201 through regulations and orders with the force of law. *National Cable & Telecommunications Assn.*, *supra*, at 980–981. The circumstances mentioned above make clear the absence of any relevant congressional prohibition. And, in light of the traditional regulatory similarities that we have discussed, we can find nothing unreasonable about the FCC's § 201(b) determination.

C

Global Crossing, its supporting *amici*, and the dissents make several additional but ultimately unpersuasive arguments. First, Global Crossing claims that § 207 authorizes only actions "seeking damages for *statutory* violations" and not for "violations merely of *regulations* promulgated to carry out statutory objectives." Brief for Petitioner 12 (emphasis in original). The lawsuit before us, however, "seek[s] damages for [a] *statutory* violatio[n]," namely, a violation of § 201(b)'s prohibition of an "unreasonable practice." As we have pointed out, *supra*, at 53–54, § 201(b)'s prohibitions have long been thought to extend to rates that diverge from FCC prescriptions, as well as rates or practices that are "unreasonable" in light of their failure to reflect rules embodied in an agency regulation. We have found no limitation of the kind Global Crossing suggests.

Global Crossing seeks to draw support from *Alexander* v. *Sandoval*, 532 U. S. 275 (2001), and *Adams Fruit Co.* v. *Bar-*

rett, 494 U. S. 638 (1990), which, Global Crossing says, hold that an agency cannot determine through regulation when a private party may bring a federal court action. Those cases do involve private actions, but they do not support Global Crossing. The cases involve different statutes and different regulations, and the Court made clear in each of those cases that its holding relied on the specific statute before it. In *Sandoval*, *supra*, at 288–289, the Court found that an implied right of action to enforce one statutory provision, 42 U. S. C. § 2000d, did not extend to regulations implementing another, § 2000d–1. In contrast, here we are addressing the FCC's reasonable interpretation of ambiguous language in a substantive statutory provision, 47 U. S. C. § 201(b), which Congress expressly linked to the right of action provided in § 207. Nothing in *Sandoval* requires us to limit our deference to the FCC's reasonable interpretation of § 201(b); to the contrary, as we noted in *Sandoval*, it is "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U. S., at 284. In *Adams Fruit Co.*, *supra*, at 646–647, we rejected an agency interpretation of the worker-protection statute at issue as contrary to "the plain meaning of the statute's language." Given the differences in statutory language, context, and history, those two cases are simply beside the point.

Our analysis does not change in this case simply because the practice deemed unreasonable (and hence unlawful) in the 2003 Payphone Order is in violation of an FCC regulation adopted under authority of a separate statutory section, § 276. The FCC here, acting under the authority of § 276, has prescribed a particular rate (and a division of revenues) applicable to a portion of a long-distance service, and it has ordered carriers to reimburse payphone operators for the

relevant portion of the service they jointly provide. But the conclusion that it is "unreasonable" to fail so to reimburse is not a § 276 conclusion; it is a § 201(b) conclusion. And courts have treated a carrier's failure to follow closely analogous agency rate and rate-division determinations as we treat the matter at issue here. That is to say, the FCC properly implements § 201(b) when it reasonably finds that the failure to follow a Commission, *e. g.*, rate or rate-division determination made under a *different* statutory provision is unjust or unreasonable under § 201(b). See, *e. g.*, *MCI Telecommunications Corp.*, 59 F. 3d, at 1414 (failure to follow a rate promulgated under § 205 properly considered unreasonable under § 201(b)); see also *Baltimore & O. R. Co.* v. *Alabama Great Southern R. Co.*, 506 F. 2d 1265, 1270 (CADC 1974) (statutory obligation to provide reasonable rate divisions is "implemented by orders of the ICC" issued pursuant to a *separate* statutory provision). Moreover, in resting our conclusion upon the analogy with rate setting and rate divisions, the traditional, historical subject matter of § 201(b), we avoid authorizing the FCC to turn §§ 201(b) and 207 into a backdoor remedy for violation of FCC regulations.

Second, JUSTICE SCALIA, dissenting, says that the "only serious issue presented by this case [is] whether a practice that is *not* in and of itself unjust or unreasonable can be rendered such (and thus rendered in violation of the Act itself) because it violates a substantive regulation of the Commission." *Post*, at 68. He answers this question "no," because, in his view, a "violation of a substantive regulation promulgated by the Commission is not a violation of the Act, and thus does not give rise to a private cause of action." *Post*, at 69. We cannot accept either JUSTICE SCALIA's statement of the "serious issue" or his answer.

We do not accept his statement of the issue because whether the practice is "in and of itself" unreasonable is irrelevant. The FCC has authoritatively ruled that carriers

must compensate payphone operators. The only practice before us, then, and the only one we consider, is the carrier's violation of that FCC regulation requiring the carrier to pay the payphone operator a fair portion of the total cost of carrying a call that they jointly carried—each supplying a partial portion of the total carriage. A practice of violating the FCC's order to pay a fair share would seem fairly characterized in ordinary English as an "unjust practice," so why should the FCC not call it the same under § 201(b)?

Nor can we agree with JUSTICE SCALIA's claim that a "violation of a *substantive regulation* promulgated by the Commission is not a violation of" § 201(b) of the Act when, as here, the Commission has explicitly and reasonably ruled that the particular regulatory violation *does* violate § 201(b). (Emphasis added.) And what has the substantive/interpretive distinction that JUSTICE SCALIA emphasizes, *ibid.*, to do with the matter? There is certainly no reference to this distinction in § 201(b); the text does not suggest that, of all violations of regulations, only violations of *interpretive* regulations can amount to unjust or unreasonable practices. Why believe that Congress, which scarcely knew of this distinction a century ago before the blossoming of administrative law, would care which kind of regulation was at issue? And even if this distinction were relevant, the FCC has long set forth what we now would call "substantive" (or "legislative") rules under § 205. Cf. 1 R. Pierce, Administrative Law Treatise § 6.4, p. 325 (4th ed. 2002); *post*, at 70. And violations of those substantive § 205 regulations have clearly been deemed violations of § 201(b). *E. g., MCI Telecommunications Corp.*, 59 F. 3d, at 1414. Conversely, we have found no case at all in which a private plaintiff was kept out of federal court because the § 201(b) violation it challenged took the form of a "substantive regulation" rather than an "interpretive regulation." Insofar as JUSTICE SCALIA uses adjectives such as "traditional" or "textually based" to de-

scribe his distinctions, *post,* at 71, and "novel" or "absurd" to describe ours, *post,* at 72, 68, we would simply note our disagreement.

We concede that JUSTICE SCALIA cites three sources in support of his theory. See *post,* at 69–70. But, in our view, those sources offer him no support. None of those sources involved an FCC application of, or an FCC interpretation of, the section at issue here, namely, § 201(b). Nor did any involve a regulation—substantive or interpretive—promulgated subsequent to the authority of § 201(b). Thus none is relevant to the case at hand. See *APCC Servs., Inc.* v. *Sprint Communications Co.*, 418 F. 3d 1238, 1247 (CADC 2005) *(per curiam)* ("There was no authoritative interpretation of § 201(b) in this case"), cert. pending, No. 05–766;* *Greene* v. *Sprint Communications Co.*, 340 F. 3d 1047, 1052 (CA9 2003) (violation of substantive regulation does not violate § 276; silent as to § 201(b)). The single judge who thought that the FCC had authoritatively interpreted § 201(b) (as has occurred in the case before us) would have reached the same conclusion that we do. *APCC Servs., Inc., supra,* at 1254 (D. H. Ginsburg, C. J., dissenting) (finding a private cause of action, because there *was* "clearly an authoritative interpretation of § 201(b)" that deemed the practice in question unlawful). See also Huber § 3.14.3, p. 317 (no discussion of § 201(b)).

Third, JUSTICE THOMAS (who also does not adopt JUSTICE SCALIA's arguments) disagrees with the FCC's interpretation of the term "practice." He, along with Global Crossing, claims instead that §§ 201(a) and (b) concern only practices that harm carrier *customers,* not carrier *suppliers.* *Post,* at 67–70 (SCALIA, J., dissenting); Brief for Petitioner 37–38. But that is not what those sections say. Nor does history offer this position significant support. A violation of a regulation or order dividing rates among railroads, for example, would

*[REPORTER'S NOTE: For the April 23, 2007, order granting certiorari, vacating the judgment, and remanding *APCC Servs.*, see *post,* p. 901.]

likely have harmed another carrier, not a shipper. See, *e. g.*, *Chicago & North Western Transp. Co.*, 609 F. 2d, at 1225, 1226 ("Act . . . provides for the regulation of inter-carrier relations as a part of its general rate policy"). Once one takes account of this fact, it seems reasonable, not unreasonable, to include as a § 201(b) (and § 207) beneficiary a firm that performs services roughly analogous to the transportation of one segment of a longer call. We are not here dealing with a firm that supplies office supplies or manual labor. Cf., *e. g.*, *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 257 (1931) ("practice" in § 1 of the Interstate Commerce Act does not encompass employment decisions). The long-distance carrier ordered by the FCC to compensate the payphone operator is so ordered in its role as a provider of communications services, not as a consumer of office supplies or the like. It is precisely because the carrier and the payphone operator *jointly* provide a communications service to the caller that the carrier is ordered to share with the payphone operator the revenue that only the carrier is permitted to demand from the caller. Cf. *Cable & Wireless P. L. C.*, 166 F. 3d, at 1231 (finding that § 201(b) enables the Commission to regulate not "only the terms on which U. S. carriers offer telecommunication services to the public," but also "the prices U. S. carriers pay" to foreign carriers providing the foreign segment of an international call).

Fourth, Global Crossing argues that the FCC's "unreasonable practice" determination is unlawful because it is inadequately reasoned. We concede that the FCC's initial opinion simply states that the carrier's practice is unreasonable under § 201(b). But the context and cross-referenced opinions, 2003 Payphone Order, 18 FCC Rcd., at 19990, ¶ 32 (citing *American Public Communications Council* v. *FCC*, 215 F. 3d 51, 56 (CADC 2000)), make the FCC's rationale obvious, namely, that in light of the history that we set forth *supra*, at 53–54, it is unreasonable for a carrier to violate the FCC's

mandate that it pay compensation. See also *In re APCC Servs., Inc.* v. *NetworkIP, LLC*, 21 FCC Rcd. 10488, 10493–10495, ¶¶ 13–16 (2006) (spelling out the reasoning).

Fifth, Global Crossing argues that a different statutory provision, § 276, see *supra*, at 51, prohibits the FCC's § 201(b) classification. Brief for Petitioner 26–28. But § 276 simply requires the FCC to "take all actions necessary . . . to prescribe regulations that . . . establish a per call compensation plan to ensure" that payphone operators "are fairly compensated." 47 U. S. C. § 276(b)(1). It nowhere forbids the FCC to rely on § 201(b). Rather, by helping to secure enforcement of the mandated regulations the FCC furthers basic § 276 purposes.

Finally, Global Crossing seeks to rest its claim of a § 276 prohibition upon the fact that § 276 requires regulations that secure compensation for "every completed *intrastate,*" as well as every "*interstate,*" payphone-related call, while § 201(b) (referring to § 201(a)) extends only to "*interstate or foreign*" communication. Brief for Petitioner 37. But Global Crossing makes too much of too little. We can assume (for argument's sake) that § 201(b) may consequently apply only to a *portion* of the Compensation Order's requirements. But cf., *e. g.*, *Louisiana Pub. Serv. Comm'n*, 476 U. S., at 375, n. 4 (suggesting approval of FCC authority where it is "*not* possible to separate the interstate and the intrastate components"). But even if that is so (and we repeat that we do not decide this question), the FCC's classification will help to achieve a substantial portion of its § 276 compensatory mission. And we cannot imagine why Congress would have (implicitly in this § 276 language) wished to prohibit the FCC from concluding that an interstate half loaf is better than none.

For these reasons, the judgment of the Ninth Circuit is affirmed.

It is so ordered.

APPENDIXES TO OPINION OF THE COURT

A

In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 14 FCC Rcd. 2545, 2631–2632, ¶¶ 190–191 (1999) (Compensation Order).

In re the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 18 FCC Rcd. 19975, 19990, ¶ 32 (2003) (2003 Payphone Order).

B

Communications Act § 201:

> "(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.
>
> "(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided*

further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." 47 U. S. C. § 201.

Communications Act § 206:

"In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." 47 U. S. C. § 206.

Communications Act § 207:

"Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the

> damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies." 47 U. S. C. § 207.

JUSTICE SCALIA, dissenting.

Section 276(b)(1)(A) of the Communications Act of 1934, as added by the Telecommunications Act of 1996, instructed the Federal Communications Commission (FCC or Commission) to issue regulations establishing a plan to compensate payphone operators, leaving it up to the FCC to prescribe who should pay and how much. Pursuant to that authority, the FCC promulgated a substantive regulation that required carriers to compensate payphone operators at a rate of 24 cents per call (the payphone-compensation regulation). The FCC subsequently declared a carrier's failure to comply with the payphone-compensation regulation to be unlawful under § 201(b) of the Act (which prohibits certain "unjust or unreasonable" practices) and privately actionable under § 206 of the Act (which establishes a private cause of action for violations of the Act). Today's judgment can be defended only by accepting either of two propositions with respect to these laws: (1) that a carrier's failure to pay the prescribed compensation, in and of itself and apart from the Commission's payphone-compensation regulation, is an unjust or unreasonable practice in violation of § 201(b); or (2) that a carrier's failure to pay the prescribed compensation is an "unjust or unreasonable" practice under § 201(b) because it violates the Commission's payphone-compensation regulation.

The Court coyly avoids rejecting the first proposition. But make no mistake: that proposition is utterly implausible, which is perhaps why it is nowhere to be found in the FCC's opinion. The unjustness or unreasonableness in this case, if any, consists precisely of violating the FCC's payphone-

compensation regulation.[1] Absent that regulation, it would be neither unjust nor unreasonable for a carrier to decline to act as collection agent for payphone companies. The person using the services of the payphone company to obtain access to the carrier's network is not the carrier but the caller. It is absurd to suggest some natural obligation on the part of the carrier to identify payphone use, bill its customer for that use, and forward the proceeds to the payphone company. As a regulatory command, that makes sense (though the free-rider problem might have been solved in some other fashion); but, absent the Commission's substantive regulation, it would be in no way unjust or unreasonable for the carrier to do nothing. Indeed, if a carrier's failure to pay payphone compensation had been unjust or unreasonable in its own right, the Commission's payphone-compensation regulation would have been unnecessary, and the payphone companies could have sued directly for violation of § 201(b).

The only serious issue presented by this case relates to the second proposition: whether a practice that is *not* in and of itself unjust or unreasonable can be rendered such (and thus rendered in violation of the Act itself) because it violates a substantive regulation of the Commission. Today's opinion seems to answer that question in the affirmative, at least with respect to the particular regulation at issue here.

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[1] See *In re the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd. 19975, 19990, ¶ 32 (2003) ("[F]ailure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment . . . constitutes . . . an unjust and unreasonable practice in violation of section 201(b)"); *In re APCC Servs., Inc.* v. *NetworkIP, LLC*, 21 FCC Rcd. 10488, 10493, ¶ 15 (2006) ("[F]ailure to pay payphone compensation rises to the level of being 'unjust and unreasonable' " because it is "a direct violation of Commission rules"); *id.*, at 10493, ¶ 15, and n. 46 ("The fact that a failure to pay payphone compensation directly violates Commission rules specifically requiring such payment distinguishes this situation from other situations where the Commission has repeatedly declined to entertain 'collection actions' ").

That conclusion, however, conflicts with the Communications Act's carefully delineated remedial scheme. The Act draws a clear distinction between private actions to enforce *interpretive regulations* (by which I mean regulations that reasonably and authoritatively construe the statute itself) and private actions to enforce *substantive regulations* (by which I mean regulations promulgated pursuant to an express delegation of authority to impose freestanding legal obligations beyond those created by the statute itself). Section 206 of the Act establishes a private cause of action for violations of the Act itself—and violation of an FCC regulation authoritatively interpreting the Act *is* a violation of the Act itself. (As the Court explains, when it comes to regulations that "reasonabl[y] [and] authoritatively construe the statute itself," *Alexander* v. *Sandoval*, 532 U. S. 275, 284 (2001), "it is 'meaningless to talk about a separate cause of action to enforce the regulations apart from the statute.'" *Ante*, at 54 (quoting *Sandoval*, *supra*, at 284).) On the other hand, violation of a substantive regulation promulgated by the Commission is not a violation of the Act, and thus does not give rise to a private cause of action under § 206. See, *e. g.*, *APCC Servs., Inc.* v. *Sprint Communications Co.*, 418 F. 3d 1238, 1247 (CADC 2005) *(per curiam)*, cert. pending, No. 05–766; *Greene* v. *Sprint Communications Co.*, 340 F. 3d 1047, 1052 (CA9 2003), cert. denied, 541 U. S. 988 (2004); P. Huber, M. Kellogg, & J. Thorne, Federal Telecommunications Law § 3.14.3 (2d ed. 1999).[2] That is why Congress

[2] The Court asserts that "[n]one of th[ese] [cases] involved an FCC application of, or an FCC interpretation of, the section at issue here, namely, § 201(b)[,] [n]or did any involve a regulation—substantive or interpretive—promulgated subsequent to the authority of § 201(b)." *Ante*, at 62. I agree. They involved *the payphone-compensation regulation*, which was not promulgated pursuant to § 201(b), but pursuant to § 276. The relevant point is that violations of substantive regulations are *not* directly actionable under § 206.

[REPORTER'S NOTE: For the April 23, 2007, order granting certiorari, vacating the judgment, and remanding *APCC Servs.*, see *post*, p. 901.]

has separately created private rights of action for violation of *certain* substantive regulations. See, *e. g.*, 47 U. S. C. § 227(b)(3) (violation of substantive regulations prescribed under § 227(b) (2000 ed. and Supp. III)); § 227(c)(5) (violation of substantive regulations prescribed under § 227(c)). These do not include the payphone-compensation regulation authorized by § 276(b).

There is no doubt that interpretive rules can be issued pursuant to § 201(b)—that is, rules which specify that certain practices are in and of themselves "unjust or unreasonable." Orders issued under § 205 of the Act, see *ante*, at 60, which authorizes the FCC, *upon finding that a practice will be unjust and unreasonable*, to order the carrier to adopt a just and reasonable practice in its place, similarly implement the statute's proscription against unjust or unreasonable practices. But, as explained above, the payphone-compensation regulation does not implement § 201(b) and is not predicated on a finding of what would be unjust and unreasonable absent the regulation.

The Court naively describes the question posed by this case as follows: Since "[a] practice of violating the FCC's order to pay a fair share would seem fairly characterized in ordinary English as an 'unjust practice,' . . . why should the FCC not call it the same under § 201(b)?" *Ante*, at 61. There are at least three reasons why it is not as simple as that. (1) There has been no FCC "order" in the ordinary sense, see 5 U. S. C. § 551(6), but only an FCC regulation.[3] That is to say, the FCC has never determined that petitioner is in violation of its regulation and ordered compliance. Rather, respondent has alleged such a violation and has

[3] The Court's departure from ordinary usage is made possible by the fact that "[t]he FCC commonly adopts rules in opinions called 'orders.'" *New England Tel. & Tel. Co.* v. *Public Util. Comm'n of Me.*, 742 F. 2d 1, 8–9 (CA1 1984) (Breyer, J.). If there had been violation of an FCC order in this case, a private action would have been available under § 407 of the Act.

brought that allegation directly to District Court without prior agency adjudication. (2) The "practice of violating" virtually any FCC regulation can be characterized ("in ordinary English") as an "unjust practice"—or if not that, then an "unreasonable practice"—so that *all* FCC regulations become subject to private damages actions. Thus, the traditional (and textually based) distinction between private enforceability of interpretive rules and private nonenforceability of substantive rules is effectively destroyed. And (3) it is not up to the FCC to "call it" an unjust practice or not. If it were, agency discretion might limit the regulations available for harassing litigation by telecommunications competitors. In fact, however, the practice of violating one or another substantive rule either *is* or *is not* an unjust or unreasonable practice under § 201(b). The Commission is entitled to *Chevron* deference with respect to that determination at the margins, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), but it will always remain within the power of private parties to go directly to court, asserting that a particular violation of a substantive rule is ("in ordinary English") "unjust" or "unreasonable" and hence provides the basis for suit under § 201(b).

The Court asks (more naively still) "what has the substantive/interpretive distinction that [this dissent] emphasizes to do with the matter? There is certainly no reference to this distinction in § 201(b) . . . . Why believe that Congress, which scarcely knew of this distinction a century ago before the blossoming of administrative law, would care which kind of regulation was at issue?" *Ante*, at 61 (citation omitted). The answer to these questions is obvious. Section 206 (which was enacted at the same time as § 201(b), see 48 Stat. 1070, 1072) does not *explicitly* refer to the distinction between interpretive and substantive regulations. And yet the Court acknowledges that, while a violation of an *interpretive* regulation is actionable under § 206 (as a violation of

the statute itself), a violation of a *substantive* regulation is not. (Were this not true, the Court's lengthy discussion of § 201(b) would be wholly unnecessary because violation of the payphone-compensation regulation would be directly actionable under § 206.) The Court evidently believes that Congress went out of its way to exclude from § 206 private actions that did not charge violation of the Act itself (or regulations that authoritatively interpret the Act) but was perfectly willing to have those very same private actions brought in through the back door of § 201(b) as an "interpretation" of "unjust or unreasonable practice." It does not take familiarity with "the blossoming of administrative law" to perceive that this would be nonsensical.[4]

Seemingly aware that it is in danger of rendering the limitation upon § 206 a nullity, the Court seeks to limit its novel approval of private actions for violation of substantive rules to substantive rules that are "*analog[ous] with rate setting and rate divisions, the traditional, historical subject matter of § 201(b),*" *ante,* at 60 (emphasis added). There is absolutely no basis in the statute for this distinction (nor is it anywhere to be found in the FCC's opinion). As I have described earlier, interpretive regulations are privately enforceable because to violate them *is* to violate the Act, within the meaning of the private-suit provision of § 206. That a substantive regulation is *analogous* to traditional interpretive regulations, in the sense of dealing with subjects that those regulations have traditionally addressed, is supremely

[4] The Court further asserts that "the FCC has long set forth what we now would call 'substantive' (or 'legislative') rules under § 205," "violations of [which] . . . have clearly been deemed violations of § 201(b)," *ante,* at 61. The § 205 orders to which the Court refers are not substantive in the relevant sense because *they interpret § 201(b)'s prohibition against unjust and unreasonable rates or practices.* See *ante,* at 53 (§ 205 "authoriz[es] the FCC to prescribe reasonable rates and practices in order to preclude rates or practices that violate § 201(b)"). The payphone-compensation regulation, by contrast, does not interpret § 201(b) or any other statutory provision.

irrelevant to whether violation of the substantive regulation *is* a violation of the Act—which is the only pertinent inquiry. The only thing to be said for the Court's inventive distinction is that it enables its holding to stand without massive damage to the statutory scheme. Better an irrational limitation, I suppose, than no limitation at all; even though it is unclear how restrictive that limitation will turn out to be. What other substantive regulations are out there, one wonders, that can be regarded as "analogous" to actions the Commission has traditionally taken through interpretive regulations under § 201(b)?

It is difficult to comprehend what public good the Court thinks it is achieving by its introduction of an unprincipled exception into what has hitherto been a clearly understood statutory scheme. Even without the availability of private remedies, the payphone-compensation regulation would hardly go unenforced. The Commission is authorized to impose civil forfeiture penalties of up to $100,000 per violation (or per day, for continuing violations) against common carriers that "willfully or repeatedly fai[l] to comply with . . . any rule, regulation, or order issued by the Commission." 47 U. S. C. § 503(b)(1)(B). And the Commission can even place enforcement in private hands by issuing a privately enforceable order forbidding continued violation. See §§ 154(i), 276(b)(1)(A), 407. Such an order, however, would require a prior Commission adjudication that the regulation had been violated, thus leaving that determination in the hands of the agency rather than a court, and preventing the unjustified private suits that today's decision allows.

I would hold that a private action to enforce an FCC regulation under §§ 201(b) and 206 does not lie unless the regulated practice is "unjust or unreasonable" *in its own right* and apart from the fact that a substantive regulation of the Commission has prohibited it. As the practice regulated by the payphone-compensation regulation does not plausibly fit

that description, I would reverse the judgment of the Court of Appeals.

JUSTICE THOMAS, dissenting.

The Court holds that failure to pay a payphone operator for coinless calls is an "unjust or unreasonable" "practice" under 47 U. S. C. § 201(b). Properly understood, however, § 201 does not reach the conduct at issue here. Failing to pay is not a "practice" under § 201 because that section regulates the activities of telecommunications firms in their role as *providers* of telecommunications services. As such, § 201(b) does not reach the behavior of telecommunication firms in other aspects of their business. I respectfully dissent.

I

The meaning of § 201(b) of the Communications Act of 1934 becomes clear when read, as it should be, as a part of the entirety of § 201. Subsection (a) sets out the duties and broad discretionary powers of a common carrier:

> "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and . . . to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."

Immediately following that description of duties and powers, subsection (b) requires:

> "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . ."

The "charges, practices, classifications, and regulations" referred to in subsection (b) are those "establish[ed]" under subsection (a). Having given common carriers discretionary power to set charges and establish regulations in subsection (a), Congress required in subsection (b) that the exercise of this power be "just and reasonable." Thus, unless failing to pay a payphone operator arises from one of the duties under subsection (a), it is not a "practice" within the meaning of subsection (b).

Subsection (a) prescribes a carrier's duty to render service either to customers ("furnish[ing] . . . communication service") or to other carriers (*e. g.*, "establish[ing] physical connections"); it does not set out duties related to the receipt of service from suppliers. Consequently, given the relationship between subsections (a) and (b), subsection (b) covers only those "practices" connected with the *provision* of service to customers or other carriers. The Court embraced this critical limitation in *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249 (1931), which held that the term "practice" means a "'practice' in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers." *Id.*, at 257. In *Norwood*, the Court interpreted language from the Interstate Commerce Act (as amended by the Mann-Elkins Act) that Congress just three years later copied into the Communications Act. 283 U. S., at 253; see § 7 of the Mann-Elkins Act of 1910, 36 Stat. 546. In passing the Communications Act, Congress may "be presumed to have had knowledge" and to have approved of the Court's interpretation in *Norwood*. See *Lorillard* v. *Pons*, 434 U. S. 575, 581 (1978). As a result, the Supreme Court's contemporaneous interpretation of "practice" should bear heavily on our analysis.

Other terms in § 201 support using *Norwood*'s restrictive interpretation of "practice." A word "is known by the company it keeps," and one should not "ascrib[e] to one word a meaning so broad that it is inconsistent with its accompany-

ing words." *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 575 (1995). Of the quartet "charges, practices, classifications, and regulations," the terms "charges," "classifications," and "regulations" could apply only to the party "furnish[ing]" service. "[C]harges" refers to the charges for physical connections and through routes. 47 U. S. C. §§ 201(a), 202(b). "[R]egulations" relates to the operation of through routes. § 201(a). "[C]lassifications" refers to different sorts of communications that carry different charges. § 201(b). These three terms involve either setting rules for the provision of service or setting rates for that provision. In keeping with the meaning of these terms, the term "practices" must refer to only those practices "in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers." *Norwood, supra,* at 257.

The statutory provisions surrounding § 201 confirm this interpretation. Section 203 requires that "[e]very common carrier . . . shall . . . file with the Commission . . . schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges." See also §§ 204–205 (also using the phrase "charge, classification, regulation, or practice" in the tariff context). The "charges" referred to are those related to a carrier's own services. § 203 ("charges for itself and its connecting carriers"). The "classifications, practices, and regulations" are also limited to a carrier's own services. *Ibid.* (applying only to practices "affecting such charges"). In this context, "practices" must mean only those "in connection with the fixing of rates to be charged." *Norwood,* 283 U. S., at 257. Section 202—outside of the tariff context—also supports this limitation. It forbids discrimination "in charges, practices, classifications, regulations, facilities, or services." Discrimination occurs with respect to a carrier's provision of service—not its purchasing of services from others. I am unaware of any context in which §§ 202–205 were

applied to conduct relating to the service that another party provided to a telecommunications carrier.

In this case, Global Crossing has not provided any service to Metrophones. Rather, Global Crossing has failed to pay for a service that Metrophones supplied. The failure to pay a supplier is not in any sense a "'practice' in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers." *Id.*, at 257. Accordingly, Global Crossing has not engaged in a practice under subsection (b) because the failure to pay has not come in connection with its provision of service or setting of rates within the meaning of subsection (a). On this understanding of § 201, Global Crossing's failure to pay Metrophones is not a statutory violation. All that remains is a regulatory violation, which does not provide Metrophones a private right of action under § 207.[1]

II

The majority suggests that deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), compels its conclusion that a carrier's refusal to pay a payphone operator is unreasonable. But "unjust or unreasonable" is a statutory term, § 201(b), and a court may not, in the name of deference, abdicate its responsibility to interpret a statute. Under *Chevron*, an agency is due no deference until the court analyzes the statute and determines that Congress did not speak directly to the issue under consideration:

> "The judiciary is the final authority on issues of statutory construction and must reject administrative con-

[1] Other enforcement mechanisms exist to redress Global Crossing's failure to pay. The Federal Communications Commission (FCC) has the power to impose fines under 47 U. S. C. §§ 503(b)(1)(B) and (2)(B). In addition, the FCC may have the authority to create an administrative right of action under § 276(b)(1) (giving the FCC power to "take all actions necessary" to "establish a per call compensation plan" that ensures "all payphone service providers are fairly compensated").

> structions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.*, at 843, n. 9.

The majority spends one short paragraph analyzing the relevant provisions of the Communications Act to determine whether a refusal to pay is an "'unjust or unreasonable'" "'practice.'" *Ante*, at 53. Its entire statutory analysis is essentially encompassed in a single sentence in that paragraph: "That is to say, in ordinary English, one can call a refusal to pay Commission-ordered compensation despite having received a benefit from the payphone operator a 'practice . . . in connection with [furnishing a] communication service . . . that is . . . unreasonable.'" *Ante*, at 55 (omissions and modifications in original). This analysis ignores the interaction between §201(a) and §201(b), *supra*, at 74–75; it ignores the three terms surrounding the word "practice" and the context those terms provide, *supra*, at 76; it ignores the use of the term "practice" in nearby statutory provisions, such as §§202–205, *supra*, at 76–77; and it ignores the understanding of the term "practice" at the time Congress enacted the Communications Act, *supra*, at 75.

After breezing by the text of the statutory provisions at issue, the majority cites lower court cases to claim that "the underlying regulated activity at issue here *resembles* activity that both transportation and communications agencies have long regulated." *Ante*, at 55. It argues that these cases demonstrate that "communications firms entitled to revenues under rate divisions or cost allocations might bring lawsuits under §207 . . . and obtain compensation or damages." *Ante*, at 56 (citing *Allnet Communication Serv., Inc.* v. *National Exch. Carrier Assn., Inc.*, 965 F. 2d 1118 (CADC 1992), and *Southwestern Bell Tel. Co.* v. *Allnet Communications Servs., Inc.*, 789 F. Supp. 302 (ED Mo. 1992)). But in both cases, the only issue before the court was whether the

lawsuit should be dismissed because the FCC had primary jurisdiction; and in both cases, the answer was yes. *Allnet*, *supra*, at 1120–1123; *Southwestern Bell*, *supra*, at 304–306. The Court's reliance on these cases is thus entirely misplaced because both courts found they lacked jurisdiction; the cases do not address § 201 at all—the interpretation of which is the sole question in this case; and both cases assume without deciding that § 207 applies, thus not grappling with the point for which the majority claims its support.[2]

III

Finally, independent of the FCC's interpretation of the language "unjust or unreasonable" "practice," the FCC's interpretation is unreasonable because it regulates both interstate and intrastate calls. The unjust-and-unreasonable requirement of § 201(b) applies only to "practices . . . in connection with such communication service," and the term "such communication service" refers to "*interstate* or foreign communication by wire or radio" in § 201(a) (emphasis added). Disregarding this limitation, the FCC has applied its rule to both interstate and intrastate calls. 47 CFR § 64.1300 (2005). In light of the fact that the statute explicitly limits "unjust or unreasonable" "practices" to those involving "interstate or foreign communication," the FCC's application of § 201(b) to intrastate calls is plainly an unreasonable interpretation of the statute. To make matters worse, the FCC has not even bothered to explain its clear misinterpretation. See *In re Pay Telephone Reclassi-*

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[2] The majority's citation to *Chicago & North Western Transp. Co.* v. *Atchison, T. & S. F. R. Co.*, 609 F. 2d 1221 (CA7 1979), is similarly misplaced. There, the Court of Appeals interpreted the meaning of the statutory requirement to "'establish just, reasonable, and equitable divisions'" under the Interstate Commerce Act. *Id.*, at 1224. It is difficult to understand why the Seventh Circuit's interpretation of different statutory language is relevant to the question we face in this case.

fication and Compensation Provisions of the Telecommunications Act of 1996, 18 FCC Rcd. 19975 (2003).

The majority avoids directly addressing this argument by stating there is no reason "to prohibit the FCC from concluding that an interstate half loaf is better than none." *Ante*, at 64. But if the FCC's rule is unreasonable, Metrophones should not be able to recover for intrastate calls in a suit under § 207. Because intrastate calls cannot be the subject of an "unjust or unreasonable" practice under § 201, there is no private right of action to recover for them, and the Court should cut off that half of the loaf. By sidestepping this issue, the majority gives the lower court no guidance about how to handle intrastate calls on remand.

IV

Because the majority allows the FCC to interpret the Communications Act in a way that contradicts the unambiguous text, I respectfully dissent.

Syllabus

ZUNI PUBLIC SCHOOL DISTRICT NO. 89 ET AL. *v.* DEPARTMENT OF EDUCATION ET AL.

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

No. 05–1508. Argued January 10, 2007—Decided April 17, 2007

The Federal Impact Aid Program provides financial assistance to local school districts whose ability to finance public school education is adversely affected by a federal presence. The statute prohibits a State from offsetting this federal aid by reducing state aid to a local district. To avoid unreasonably interfering with a state program that seeks to equalize per-pupil expenditures, the statute contains an exception permitting a State to reduce its own local funding on account of the federal aid where the Secretary of Education finds that the state program "equalizes expenditures" among local school districts. 20 U. S. C. § 7709(b)(1). The Secretary is required to use a formula that compares the local school district with the greatest per-pupil expenditures in a State to the school district with the smallest per-pupil expenditures. If the former does not exceed the latter by more than 25 percent, the state program qualifies as one that "equalizes expenditures." In making this determination, the Secretary must, *inter alia*, "disregard [school districts] with per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures in the State." § 7709(b)(2)(B)(i). Regulations first promulgated 30 years ago provide that the Secretary will first create a list of school districts ranked in order of per-pupil expenditure; then identify the relevant percentile cutoff point on that list based on a specific (95th or 5th) percentile of *student population*—essentially identifying those districts whose students account for the 5 percent of the State's total student population that lies at both the high and low ends of the spending distribution; and finally compare the highest spending and lowest spending of the remaining school districts to see whether they satisfy the statute's requirement that the disparity between them not exceed 25 percent.

Using this formula, Department of Education officials ranked New Mexico's 89 local school districts in order of per-pupil spending for fiscal year 1998, excluding 17 schools at the top because they contained (cumulatively) less than 5 percent of the student population and an additional 6 districts at the bottom. The remaining 66 districts accounted for approximately 90 percent of the State's student population. Because the

disparity between the highest and lowest of the remaining districts was less than 25 percent, the State's program "equalize[d] expenditures," and the State could offset federal impact aid by reducing its aid to individual districts. Seeking further review, petitioner school districts (Zuni) claimed that the calculations were correct under the regulations, but that the regulations were inconsistent with the authorizing statute because the Department must calculate the 95th and 5th percentile cutoffs based solely on the number of school districts without considering the number of pupils in those districts. A Department Administrative Law Judge and the Secretary both rejected this challenge, and the en banc Tenth Circuit ultimately affirmed.

Held: The statute permits the Secretary to identify the school districts that should be "disregard[ed]" by looking to the *number of the district's pupils* as well as to the size of the district's expenditures per pupil. Pp. 89–100.

(a) The "disregard" instruction's history and purpose indicate that the Secretary's calculation formula is a reasonable method that carries out Congress' likely intent in enacting the statutory provision. For one thing, that method is the kind of highly technical, specialized interstitial matter that Congress does not decide itself, but delegates to specialized agencies to decide. For another, the statute's history strongly supports the Secretary. The present statutory language originated in draft legislation sent by the Secretary himself, which Congress adopted without comment or clarification. No one at the time—no Member of Congress, no Department of Education official, no school district or State—expressed the view that this statutory language was intended to require, or did require, the Secretary to change the Department's system of calculation, a system that the Department and school districts across the Nation had followed for nearly 20 years. Finally, the purpose of the disregard instruction, which is evident in the language of the present statute, is to exclude statistical outliers. Viewed in terms of this purpose, the Secretary's calculation method is reasonable, while the reasonableness of Zuni's proposed method is more doubtful as the then-Commissioner of Education explained when he considered the matter in 1976. Pp. 89–93.

(b) The Secretary's method falls within the scope of the statute's plain language. Neither the legislative history nor the reasonableness of the Secretary's method would be determinative if the statute's plain language unambiguously indicated Congress' intent to foreclose the Secretary's interpretation. See *Chevron U. S. A. Inc.* v. *Natural Resources*

Syllabus

Defense Council, Inc., 467 U. S. 837, 842–843. That is not the case here. Section 7709(b)(2)(B)(i)'s phrase "*above the 95th percentile . . . of . . . [per-pupil] expenditures*" (emphasis added) limits the Secretary to calculation methods involving per-pupil expenditures. It does not tell the Secretary which of several possible methods the Department must use, nor rule out the Secretary's present formula, which distributes districts in accordance with per-pupil expenditures, while essentially weighting each district to reflect the number of pupils it contains. This interpretation is supported by dictionary definitions of "percentile," and by the fact that Congress, in other statutes, has clarified the matter at issue to avoid comparable ambiguity. Moreover, "[a]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context." *Brown* v. *Gardner*, 513 U. S. 115, 118. Context here indicates that both students and school districts are of concern to the statute, and, thus, the disregard instruction can include within its scope the distribution of a ranked population consisting of pupils (or of school districts weighted by pupils), not just a ranked distribution of unweighted school districts alone. Finally, this Court is reassured by the fact that no group of statisticians, nor any individual statistician, has said directly in briefs, or indirectly through citation, that the language in question cannot be read the way it is interpreted here. Pp. 93–100.

437 F. 3d 1289, affirmed.

BREYER, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, GINSBURG, and ALITO, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 104. KENNEDY, J., filed a concurring opinion, in which ALITO, J., joined, *post*, p. 107. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, and in which SOUTER, J., joined as to Part I, *post*, p. 108. SOUTER, J., filed a dissenting opinion, *post*, p. 123.

Ronald J. VanAmberg argued the cause for petitioners. With him on the briefs were *C. Bryant Rogers* and *George W. Kozeliski.*

Sri Srinivasan argued the cause for the federal respondent. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Kneedler*, *Peter R. Maier*, *Kent D. Talbert*, and *Stephen H. Freid.*

Leigh M. Manasevit, Special Assistant Attorney General of New Mexico, argued the cause for the state respondent. With him on the brief was *Willie R. Brown.**

JUSTICE BREYER delivered the opinion of the Court.

A federal statute sets forth a method that the Secretary of Education is to use when determining whether a State's public school funding program "equalizes expenditures" throughout the State. The statute instructs the Secretary to calculate the disparity in per-pupil expenditures among local school districts in the State. But, when doing so, the Secretary is to "disregard" school districts "*with per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures . . . in the State.*" 20 U. S. C. § 7709(b)(2)(B)(i) (emphasis added).

The question before us is whether the emphasized statutory language permits the Secretary to identify the school districts that should be "disregard[ed]" by looking to the *number of the district's pupils* as well as to the size of the district's expenditures per pupil. We conclude that it does.

I

A

The federal Impact Aid Act, 108 Stat. 3749, as amended, 20 U. S. C. § 7701 *et seq.*, provides financial assistance to local school districts whose ability to finance public school education is adversely affected by a federal presence. Federal aid is available to districts, for example, where a significant amount of federal land is exempt from local property taxes, or where the federal presence is responsible for an increase in school-age children (say, of armed forces personnel) whom

*Briefs of *amici curiae* were filed for the State of Alaska by *Craig J. Tillery*, Acting Attorney General, and *Kathleen Strasbaugh*, Assistant Attorney General; and for New Mexico Public School Districts by *Thomas C. Bird*.

local schools must educate. See § 7701 (2000 ed. and Supp. IV). The statute typically prohibits a State from offsetting this federal aid by reducing its own state aid to the local district. If applied without exceptions, however, this prohibition might unreasonably interfere with a state program that seeks to equalize per-pupil expenditures throughout the State, for instance, by preventing the state program from taking account of a significant source of federal funding that some local school districts receive. The statute consequently contains an exception that permits a State to compensate for federal impact aid where "the Secretary [of Education] determine[s] and certifies . . . that the State has in effect a program of State aid that *equalizes* expenditures for free public education among local [school districts] in the State." § 7709(b)(1) (2000 ed., Supp. IV) (emphasis added).

The statute sets out a formula that the Secretary of Education must use to determine whether a state aid program satisfies the federal "equaliz[ation]" requirement. The formula instructs the Secretary to compare the local school district with the greatest per-pupil expenditures to the school district with the smallest per-pupil expenditures to see whether the former exceeds the latter by more than 25 percent. So long as it does not, the state aid program qualifies as a program that "equalizes expenditures." More specifically the statute provides that "a program of state aid" qualifies, *i. e.*, it "equalizes expenditures" among local school districts if,

> "in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by [the local school district] with the highest such per-pupil expenditures . . . did not exceed the amount of such per-pupil expenditures made by [the local school district] with the lowest such expenditures . . . by more than 25 percent." § 7709(b)(2)(A) (2000 ed.).

The statutory provision goes on to set forth what we shall call the "disregard" instruction. It states that, when "making" this "determination," the "*Secretary shall . . . disregard [school districts] with per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures.*" § 7709(b)(2)(B)(i) (emphasis added). It adds that the Secretary shall further

> "take into account the extent to which [the state program reflects the special additional costs that some school districts must bear when they are] geographically isolated [or when they provide education for] particular types of students, such as children with disabilities." § 7709(b)(2)(B)(ii).

B

This case requires us to decide whether the Secretary's present calculation method is consistent with the federal statute's "disregard" instruction. The method at issue is contained in a set of regulations that the Secretary first promulgated 30 years ago. Those regulations essentially state the following:

When determining whether a state aid program "equalizes expenditures" (thereby permitting the State to reduce its own local funding on account of federal impact aid), the Secretary will first create a list of school districts ranked in order of per-pupil expenditure. The Secretary will then identify the relevant percentile cutoff point on that list on the basis of a specific (95th or 5th) percentile of *student population*—essentially identifying those districts whose students account for the 5 percent of the State's total student population that lies at both the high and low ends of the spending distribution. Finally the Secretary will compare the highest spending and lowest spending school districts of those that remain to see whether they satisfy the statute's requirement that the disparity between them not exceed 25 percent.

The regulations set forth this calculation method as follows:

> "[D]eterminations of disparity in current expenditures . . . per-pupil are made by—
>
> "(i) Ranking all [of the State's school districts] on the basis of current expenditures . . . per pupil [in the relevant statutorily determined year];
>
> "(ii) Identifying those [school districts] that fall at the 95th and 5th percentiles of the total number of pupils in attendance [at all the State's school districts taken together]; and
>
> "(iii) Subtracting the lower current expenditure . . . per pupil figure from the higher for those [school districts] identified in paragraph (ii) and dividing the difference by the lower figure." 34 CFR pt. 222, subpt. K, App., ¶ 1 (2006).

The regulations also provide an illustration of how to perform the calculation:

> "In State X, after ranking all [school districts] in order of the expenditures per pupil for the [statutorily determined] fiscal year in question, it is ascertained by counting the number of pupils in attendance in those [school districts] in ascending order of expenditure that the 5th percentile of student population is reached at [school district A] with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at [school district B] with a per pupil expenditure of $1,000. The percentage disparity between the 95th percentile and the 5th percentile [school districts] is 22 percent ($1000 – $820 = $180/$820)." *Ibid.*

Because 22 percent is less than the statutory "25 percent" requirement, the state program in the example qualifies as a program that "equalizes expenditures."

C

This case concerns the Department of Education's application of the Secretary's regulations to New Mexico's local district aid program in respect to fiscal year 2000. As the regulations require, Department officials listed each of New Mexico's 89 local school districts in order of per-pupil spending for fiscal year 1998. (The calculation in New Mexico's case was performed, as the statute allows, on the basis of per-pupil *revenues,* rather than per-pupil *expenditures.* See 20 U. S. C. § 7709(b)(2)(A). See also Appendix B, *infra.* For ease of reference we nevertheless refer, in respect to New Mexico's figures and throughout the opinion, only to "per-pupil expenditures.") After ranking the districts, Department officials excluded 17 school districts at the top of the list because those districts contained (cumulatively) less than 5 percent of the student population; for the same reason, they excluded an additional 6 school districts at the bottom of the list.

The remaining 66 districts accounted for approximately 90 percent of the State's student population. Of those, the highest ranked district spent $3,259 per student; the lowest ranked district spent $2,848 per student. The difference, $411, was less than 25 percent of the lowest per-pupil figure, namely, $2,848. Hence, the officials found that New Mexico's local aid program qualifies as a program that "equalizes expenditures." New Mexico was therefore free to offset federal impact aid to individual districts by reducing state aid to those districts.

Two of New Mexico's public school districts, Zuni Public School District and Gallup-McKinley County Public School District (whom we shall collectively call Zuni), sought further agency review of these findings. Zuni conceded that the Department's calculations were correct in terms of the Department's own regulations. Zuni argued, however, that the regulations themselves are inconsistent with the authorizing statute. That statute, in its view, requires the Depart-

ment to calculate the 95th and 5th percentile cutoffs solely on the basis of the number of school districts (ranked by their per-pupil expenditures), without any consideration of the number of pupils in those districts. If calculated as Zuni urges, only 10 districts (accounting for less than 2 percent of all students) would have been identified as the outliers that the statute instructs the Secretary to disregard. The difference, as a result, between the highest and lowest per-pupil expenditures of the remaining districts (26.9 percent) would exceed 25 percent. Consequently, the statute would forbid New Mexico to take account of federal impact aid as it decides how to equalize school funding across the State. See N. M. Stat. Ann. §22–8–1 *et seq.* (2006).

A Department of Education Administrative Law Judge rejected Zuni's challenge to the regulations. The Secretary of Education did the same. Zuni sought review of the Secretary's decision in the Court of Appeals for the Tenth Circuit. 393 F. 3d 1158 (2004). Initially, a Tenth Circuit panel affirmed the Secretary's determination by a split vote (2 to 1). Subsequently, the full Court of Appeals vacated the panel's decision and heard the matter en banc. The 12-member en banc court affirmed the Secretary but by an evenly divided court (6 to 6). 437 F. 3d 1289 (2006) *(per curiam).* Zuni sought certiorari. We agreed to decide the matter.

II

A

Zuni's strongest argument rests upon the literal language of the statute. Zuni concedes, as it must, that if the language of the statute is open or ambiguous—that is, if Congress left a "gap" for the agency to fill—then we must uphold the Secretary's interpretation as long as it is reasonable. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). See also *Christensen* v. *Harris County,* 529 U. S. 576, 589, n. (SCALIA, J., concurring in part and concurring in judgment). For pur-

poses of exposition, we depart from a normal order of discussion, namely, an order that first considers Zuni's statutory language argument. See *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (2002). Instead, because of the technical nature of the language in question, we shall first examine the provision's background and basic purposes. That discussion will illuminate our subsequent analysis in Part II–B, *infra.* It will also reveal why Zuni concentrates its argument upon language alone.

Considerations other than language provide us with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us and that the Secretary's chosen method is a reasonable one. For one thing, the matter at issue—*i. e.*, the calculation method for determining whether a state aid program "equalizes expenditures"—is the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide. See *United States* v. *Mead Corp.*, 533 U. S. 218, 234 (2001); cf. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *Christensen, supra,* at 589, n. (opinion of SCALIA, J.).

For another thing, the history of the statute strongly supports the Secretary. Congress first enacted an impact aid "equalization" exception in 1974. The exception originally provided that the "ter[m] . . . 'equaliz[ing] expenditures' . . . shall be defined by the [Secretary]." 20 U. S. C. § 240(d)(2)(B) (1970 ed., Supp. IV). Soon thereafter, in 1976, the Secretary promulgated the regulation here at issue defining the term "equalizing expenditures" in the manner now before us. See Part I–B, *supra.* As far as we can tell, no Member of Congress has ever criticized the method the 1976 regulation sets forth nor suggested at any time that it be revised or reconsidered.

The present statutory language originated in draft legislation that the Secretary himself sent to Congress in 1994.

With one minor change (irrelevant to the present calculation controversy), Congress adopted that language without comment or clarification. No one at the time—no Member of Congress, no Department of Education official, no school district or State—expressed the view that this statutory language (which, after all, was supplied by the Secretary) was intended to require, or did require, the Secretary to change the Department's system of calculation, a system that the Department and school districts across the Nation had followed for nearly 20 years, without (as far as we are told) any adverse effect.

Finally, viewed in terms of the purpose of the statute's disregard instruction, the Secretary's calculation method is reasonable, while the reasonableness of a method based upon the number of districts alone (Zuni's proposed method) is more doubtful. When the Secretary (then Commissioner) of Education considered the matter in 1976, he explained why that is so.

Initially the Secretary pointed out that the "exclusion of the upper and bottom 5 percentile school districts is based upon the accepted principle of statistical evaluation that such percentiles usually represent *unique* or *noncharacteristic* situations." 41 Fed. Reg. 26320 (1976) (emphasis added). That purpose, a purpose to exclude statistical outliers, is evident in the language of the present statute. The provision uses the technical term "percentile"; it refers to cutoff numbers ("95th" and "5th") often associated with scientific calculations; and it directly precedes another statutory provision that tells the Secretary to account for those districts, from among the middle 5th to 95th percentile districts, that remain "noncharacteristic" in respect to geography or the presence of special students (such as disabled students). See 20 U. S. C. §§ 7709(b)(2)(B)(i)–(ii) (2000 ed.).

The Secretary added that under the regulation's calculation system the "percentiles" would be "determined on the basis of numbers of pupils and not on the basis of numbers

of districts." 41 Fed. Reg. 26324. He said that to base "an exclusion on numbers of districts" alone "would act to apply the disparity standard in an unfair and inconsistent manner among States." *Ibid.* He then elaborated upon his concerns:

> "The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics." *Ibid.*

To understand the Secretary's first problem, consider an exaggerated example, say, a State with 80 school districts of unequal size. Suppose 8 of the districts include urban areas and together account for 70 percent of the State's students, while the remaining 72 districts include primarily rural areas and together account for 30 percent of the State's students. If the State's greatest funding disparities are among the 8 urban districts, Zuni's calculation method (which looks only at the number of districts and ignores their size) would require the Secretary to disregard the system's 8 largest districts (*i. e.*, 10 percent of the number 80) even though those 8 districts (because they together contain 70 percent of the State's pupils) are typical of, indeed characterize, the State's public school system. It would require the Secretary instead to measure the system's expenditure equality by looking only to noncharacteristic districts that are not representative of the system as a whole, indeed districts accounting for only 30 percent of the State's pupils. Thus, according to Zuni's method, the Secretary would have to certify a state aid program as one that "equalizes expenditures"

even if there were gross disparities in per-pupil expenditures among urban districts accounting for 70 percent of the State's students. By way of contrast, the Secretary's method, by taking into account a district's size as well as its expenditures, would avoid a calculation that would produce results so contrary to the statute's objective.

To understand the Secretary's second problem consider this very case. New Mexico's 89 school districts vary significantly in respect to the number of pupils each contains. Zuni's calculation system nonetheless forbids the Secretary to discount more than 10 districts—10 percent of the total number of districts (rounded up). But these districts taken together account for only 1.8 percent of the State's pupils. To eliminate only those districts, instead of eliminating districts that together account for 10 percent of the State's pupils, risks resting the "disregard" calculation upon a few particularly extreme noncharacteristic districts, yet again contrary to the statute's intent.

Thus, the history and purpose of the disregard instruction indicate that the Secretary's calculation formula is a reasonable method that carries out Congress' likely intent in enacting the statutory provision before us.

B

But what of the provision's literal language? The matter is important, for normally neither the legislative history nor the reasonableness of the Secretary's method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary's interpretation. And Zuni argues that the Secretary's formula could not possibly effectuate Congress' intent since the statute's language literally forbids the Secretary to use such a method. Under this Court's precedents, if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis. See *Chevron*, 467 U. S., at 842–843. A customs

statute that imposes a tariff on "clothing" does not impose a tariff on automobiles, no matter how strong the policy arguments for treating the two kinds of goods alike. But we disagree with Zuni's conclusion, for we believe that the Secretary's method falls within the scope of the statute's plain language.

That language says that, when the Secretary compares (for a specified fiscal year) "the amount of per-pupil expenditures made by" (1) the highest-per-pupil-expenditure district and (2) the lowest-per-pupil-expenditure district, "the Secretary shall . . . disregard" local school districts "with per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures in the State." 20 U. S. C. §§ 7709(b)(2)(A), (B)(i). The word "such" refers to "per-pupil expenditures" (or more precisely to "per-pupil expenditures" in the test year specified by the statute). The question then is whether the phrase "*above the 95th percentile . . . of . . . [per pupil] expenditures*" permits the Secretary to calculate percentiles by (1) ranking local districts, (2) noting the student population of each district, and (3) determining the cutoff point on the basis of districts containing 95 percent (or 5 percent) of the State's students.

Our answer is that this phrase, taken with absolute literalness, limits the Secretary to calculation methods that involve "per-pupil expenditures." But it does not tell the Secretary which of several different possible methods the Department must use. Nor does it rule out the present formula, which distributes districts in accordance with per-pupil expenditures, while essentially weighting each district to reflect the number of pupils it contains.

Because the statute uses technical language (*e. g.*, "percentile") and seeks a technical purpose (eliminating uncharacteristic, or outlier, districts), we have examined dictionary definitions of the term "percentile." See 41 Fed. Reg. 26320 (Congress intended measurements based upon an "accepted principle of *statistical* evaluation" (emphasis added)).

Those definitions make clear that "percentile" refers to a division of a distribution of *some* population into 100 parts. Thus, Webster's Third New International Dictionary 1675 (1961) (Webster's Third) defines "percentile" as "the value of the statistical variable that marks the boundary between any two consecutive intervals in a distribution of 100 intervals each containing one percent of the total population." A standard economics dictionary gives a similar definition for "percentiles":

> "The values separating hundredth parts of a distribution, arranged in order of size. The 99th percentile of the income distribution, for example, is the income level such that only one per cent of the population have larger incomes." J. Black, A Dictionary of Economics 348–349 (2d ed. 2002).

A dictionary of mathematics states: "The n-th percentile is the value $X_{n/100}$ such that n per cent of the population is less than or equal to $X_{n/100}$." It adds that "[t]he terms can be modified, though not always very satisfactorily, to be applicable to a discrete random variable or to a large sample ranked in ascending order." C. Clapham & J. Nicholson, The Concise Oxford Dictionary of Mathematics 378–379 (3d ed. 2005) (emphasis deleted). The American Heritage Science Dictionary 468 (2005) explains that a percentile is "[a]ny of the 100 equal parts into which the range of the values of a set of data can be divided in order to show the distribution of those values." And Merriam-Webster's Medical Desk Dictionary 612 (2002) describes percentile as "a value on a scale of one hundred that indicates the percent of a distribution that is equal to or below it."

These definitions, mainstream and technical, all indicate that, in order to identify the relevant percentile cutoffs, the Secretary must construct a distribution of values. That distribution will consist of a "population" ranked according to a characteristic. That characteristic takes on a "value" for

each member of the relevant population. The statute's instruction to identify the 95th and 5th "percentile of such expenditures" makes clear that the relevant *characteristic* for ranking purposes is per-pupil expenditure during a particular year. But the statute does not specify precisely what *population* is to be "distributed" (*i. e.*, ranked according to the population's corresponding values for the relevant characteristic). Nor does it set forth various details as to how precisely the distribution is to be constructed (as long as it is ranked according to the specified characteristic).

But why is Congress' silence in respect to these matters significant? Are there several *different* populations, relevant here, that one might rank according to "per-pupil expenditures" (and thereby determine in several *different* ways a cutoff point such that "*n* percent of [that] population" falls, say, below the percentile cutoff)? We are not experts in statistics, but a statistician is not needed to see what the dictionary does not say. No dictionary definition we have found suggests that there is any *single* logical, mathematical, or statistical link between, on the one hand, the characterizing data (used for ranking purposes) and, on the other hand, the nature of the relevant population or how that population might be weighted for purposes of determining a percentile cutoff.

Here, the Secretary has distributed districts, ranked them according to per-pupil expenditure, but compared only those that account for 90 percent of the State's pupils. Thus, the Secretary has used—as her predecessors had done for a quarter century before her—the State's *students* as the relevant population for calculating the specified percentiles. Another Secretary might have distributed districts, ranked them by per-pupil expenditure, and made no reference to the number of pupils (a method that satisfies the statute's *language* but threatens the problems the Secretary long ago identified, see 41 Fed. Reg. 26324; *supra,* at 91–93). A third Secretary might have distributed districts, ranked them by

per-pupil expenditure, but compared only those that account for 90 percent of total pupil expenditures in the State. A fourth Secretary might have distributed districts, ranked them by per-pupil expenditure, but calculated the 95th and 5th percentile cutoffs using the per-pupil expenditures of all the individual *schools* in the State. See 41 Fed. Reg. 26324 (considering this system of calculation). A fifth Secretary might have distributed districts, ranked them by per-pupil expenditure, but accounted in his disparity calculation for the sometimes significant differences in per-pupil spending at different grade levels. See 34 CFR § 222.162(b)(1) (2006) (authorizing such a system); *id.*, pt. 222, subpt. K, App. See also Appendix B, *infra.*

Each of these methods amounts to a different way of determining which districts fall between the 5th and 95th "percentile of per-pupil expenditures." For purposes of that calculation, they each adopt different populations—students, districts, schools, and grade levels. Yet, linguistically speaking, one may attribute the characteristic of per-pupil expenditure to each member of any such population (though the values of that characteristic may be more or less readily available depending on the chosen population, see 41 Fed. Reg. 26324). Hence, the statute's literal language covers any or all of these methods. That language alone does not tell us (or the Secretary of Education), however, which method to use.

JUSTICE SCALIA's claim that this interpretation "defies any semblance of normal English" depends upon its own definition of the word "per." That word, according to the dissent, "connotes . . . a single average figure assigned to a unit the composite members of which are individual pupils." *Post*, at 113 (emphasis deleted). In fact, the word "per" simply means "[f]or each" or "for every." Black's Law Dictionary 1171 (8th ed. 1999); see Webster's Third 1674. Thus, nothing in the English language prohibits the Secretary from considering expenditures *for each* individual pupil in a district when

instructed to look at a district's "per-pupil expenditures." The remainder of the dissent's argument, colorful language to the side, rests upon a reading of the statutory language that ignores its basic purpose and history.

We find additional evidence for our understanding of the language in the fact that Congress, in other statutes, has clarified the matter here at issue thereby avoiding comparable ambiguity. For example, in a different education-related statute, Congress refers to "the school at the 20th percentile in the State, *based on enrollment*, among all schools *ranked by the percentage of students at the proficient level.*" 20 U. S. C. § 6311(b)(2)(E)(ii) (2000 ed., Supp. IV) (emphasis added). In another statute fixing charges for physicians services, Congress specified that the maximum charge "shall be the 50th percentile of the customary charges for the service *(weighted by the frequency of the service)* performed by nonparticipating physicians in the locality during the [prior] 12-month period." 42 U. S. C. § 1395u(j)(1)(C)(v) (2000 ed.) (emphasis added). In these statutes Congress indicated with greater specificity how a percentile should be determined by stating precisely not only which data values are of interest, but also (in the first) the population that is to be distributed and (in the second) the weightings needed to make the calculation meaningful and to avoid counterproductive results. In the statute at issue here, however, Congress used more general language (drafted by the Secretary himself), which leaves the Secretary with the authority to resolve such subsidiary matters at the administrative level.

We also find support for our view of the language in the more general circumstance that statutory "[a]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context." *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994). See also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132–133 (2000) ("[m]eaning—*or ambiguity*—of certain words or phrases may only become evident

when placed in context" (emphasis added)). That may be so even if statutory language is highly technical. After all, the scope of what seems a precise technical chess instruction, such as "you must place the queen next to the king," varies with context, depending, for example, upon whether the instructor is telling a beginner how to set up the board or telling an advanced player how to checkmate an opponent. The dictionary acknowledges that, when interpreting technical statistical language, the purpose of the exercise matters, for it says that "quantile," "percentile," "quartile," and "decile" are "terms [that] can be modified, though not always very satisfactorily, to be applicable to . . . a large sample ranked in ascending order." Oxford Dictionary of Mathematics, at 378–379.

Thus, an instruction to "identify schools with average scholastic aptitude test scores below the 5th percentile of such scores" may vary as to the population to be distributed, depending upon whether the context is one of providing additional counseling and support to *students* at low-performing schools (in which case the relevant population would likely consist of students), or one of identifying unsuccessful learning protocols at low-performing schools (in which case the appropriate population may well be the schools themselves). Context here tells us that the instruction to identify school districts with "per-pupil expenditures" above the 95th percentile "of such expenditures" is similarly ambiguous, because both students and school districts are of concern to the statute. Accordingly, the disregard instruction can include within its scope the distribution of a ranked population that consists of pupils (or of school districts weighted by pupils) and not just a ranked distribution of unweighted school districts alone.

Finally, we draw reassurance from the fact that no group of statisticians, nor any individual statistician, has told us directly in briefs, or indirectly through citation, that the lan-

guage before us cannot be read as we have read it. This circumstance is significant, for the statutory language is technical, and we are not statisticians. And the views of experts (or their absence) might help us understand (though not control our determination of) what Congress had in mind.

The upshot is that the language of the statute is broad enough to permit the Secretary's reading. That fact requires us to look beyond the language to determine whether the Secretary's interpretation is a reasonable, hence permissible, implementation of the statute. See *Chevron*, 467 U. S., at 842–843. For the reasons set forth in Part II–A, *supra*, we conclude that the Secretary's reading is a reasonable reading. We consequently find the Secretary's method of calculation lawful.

The judgment of the Tenth Circuit is affirmed.

It is so ordered.

APPENDIXES TO OPINION OF THE COURT

A

We set out the relevant statutory provisions and accompanying regulations in full. The reader will note that in the text of our opinion, for purposes of exposition, we use the term "local school districts" where the statute refers to "local educational agencies." We also disregard the statute's frequent references to local "revenues" because those references do not raise any additional considerations germane to this case.

Impact Aid Program, 20 U. S. C. § 7709 (2000 ed. and Supp. IV) (state consideration of payments in providing state aid):

> "(a) General prohibition
>
> "Except as provided in subsection (b) of this section, a State may not—
>
> "(1) consider payments under this subchapter in determining for any fiscal year—

"(A) the eligibility of a local educational agency for State aid for free public education; or

"(B) the amount of such aid; or

"(2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

"(b) State equalization plans

"(1) In general

"A State may reduce State aid to a local educational agency that receives a payment under section 7702 or 7703(b) of this title (except the amount calculated in excess of 1.0 under section 7703(a)(2)(B) of this title and, with respect to a local educational agency that receives a payment under section 7703(b)(2) of this title, the amount in excess of the amount that the agency would receive if the agency were deemed to be an agency eligible to receive a payment under section 7703(b)(1) of this title and not section 7703(b)(2) of this title) for any fiscal year if the Secretary determines, and certifies under subsection (c)(3)(A) of this section, that the State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State.

"(2) Computation

"(A) In general

"For purposes of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed

the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

"(B) Other factors

"In making a determination under this subsection, the Secretary shall—

"(i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State; and

"(ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities."

B

34 CFR §222.162 (2006) (What disparity standard must a State meet in order to be certified, and how are disparities in current expenditures or revenues per pupil measured?):

"(a) *Percentage disparity limitation.* The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

"(b)(1) *Weighted average disparity for different grade level groups.* If a State requests it, the Secretary

will make separate disparity computations for different groups of LEAs in the State that have similar grade levels of instruction.

"(2) In those cases, the weighted average disparity for all groups, based on the proportionate number of pupils in each group, may not be more than the percentage provided in paragraph (a) of this section. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart.

"(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

"(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State."

34 CFR pt. 222, subpt. K, App. (2006) (Methods of Calculations for Treatment of Impact Aid Payments Under State Equalization Programs):

"The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this subpart. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these calculations.

"1. *Determinations of disparity standard compliance under § 222.162(b)(1).*

"(a) The determinations of disparity in current expenditures or revenue per pupil are made by—

"(i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or

revenue per pupil for the second preceding fiscal year before the year of determination;

"(ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and

"(iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

. . . . .

"(b) In cases under § 222.162(b), where separate computations are made for different groups of LEAs, the disparity percentage for each group is obtained in the manner described in paragraph (a) above. Then the weighted average disparity percentage for the State as a whole is determined by—

"(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

"(ii) Summing the figures obtained in paragraph (b)(i); and

"(iii) Dividing the sum obtained in paragraph (b)(ii) by the total number of pupils for all the groups.

EXAMPLE

Group 1 (grades 1–6), 80,000 pupils×18%	=	14,400
Group 2 (grades 7–12), 100,000 pupils×22%	=	22,000
Group 3 (grades 1–12), 20,000 pupils×35%	=	7,000
Total 200,000 pupils		43,400
43,400/200,000=21.70% Disparity		

„

JUSTICE STEVENS, concurring.

In his oft-cited opinion for the Court in *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 571 (1982), then-Justice Rehnquist wisely acknowledged that "in rare cases the lit-

eral application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling." And in *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 242 (1989), the Court began its analysis of the question of statutory construction by restating the proposition that "[i]n such cases, the intention of the drafters, rather than the strict language, controls." JUSTICE SCALIA provided the decisive fifth vote for the majority in that case.

Today he correctly observes that a judicial decision that departs from statutory text may represent "policy-driven interpretation." *Post*, at 109 (dissenting opinion). As long as that driving policy is faithful to the intent of Congress (or, as in this case, aims only to give effect to such intent)—which it must be if it is to override a strict interpretation of the text—the decision is also a correct performance of the judicial function. JUSTICE SCALIA's argument today rests on the incorrect premise that every policy-driven interpretation implements a judge's personal view of sound policy, rather than a faithful attempt to carry out the will of the legislature. Quite the contrary is true of the work of the judges with whom I have worked for many years. If we presume that our judges are intellectually honest—as I do—there is no reason to fear "policy-driven interpretation[s]" of Acts of Congress.

In *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984), we acknowledged that when "the intent of Congress is clear [from the statutory text], that is the end of the matter." But we also made quite clear that "administrative constructions which are contrary to clear congressional intent" must be rejected. *Id.*, at 843, n. 9. In that unanimous opinion, we explained:

> "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Ibid.*

Analysis of legislative history is, of course, a traditional tool of statutory construction.[1] There is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue.

As the Court's opinion demonstrates, this is a quintessential example of a case in which the statutory text was obviously enacted to adopt the rule that the Secretary administered both before and after the enactment of the rather confusing language found in 20 U. S. C. § 7709(b)(2)(B)(i). See *ante*, at 90–91. That text is sufficiently ambiguous to justify the Court's exegesis, but my own vote is the product of a more direct route to the Court's patently correct conclusion. This happens to be a case in which the legislative history is pellucidly clear and the statutory text is difficult to fathom.[2] Moreover, it is a case in which I cannot imagine anyone accusing any Member of the Court of voting one way or the other because of that Justice's own policy preferences.

Given the clarity of the evidence of Congress' "intention on the precise question at issue," I would affirm the judgment of the Court of Appeals even if I thought that petitioners' lit-

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[1] See, *e. g.*, *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 610, n. 4 (1991); *Steelworkers* v. *Weber*, 443 U. S. 193, 230–253 (1979) (Rehnquist, J., dissenting).

[2] Contrary to JUSTICE SCALIA, I find it far more likely that the Congress that voted "without comment or clarification," *ante*, at 91 (majority opinion), to adopt the 1994 statutory language relied on the endorsement of its sponsors, who introduced the legislation "on behalf of the administration," see 139 Cong. Rec. 23416 (1993) (remarks of Sen. Kennedy) and *id.*, at 23514 (remarks of Sen. Jeffords), and the fact that such language was drafted and proposed by the U. S. Department of Education, rather than a parsing of its obscure statutory text.

Moreover, I assume that, regardless of the statutory language's supposed clarity, any competent counsel challenging the validity of a presumptively valid federal regulation would examine the legislative history of its authorizing statute before filing suit.

eral reading of the statutory text was correct.[3] The only "policy" by which I have been driven is that which this Court has endorsed on repeated occasions regarding the importance of remaining faithful to Congress' intent.

JUSTICE KENNEDY, with whom JUSTICE ALITO joins, concurring.

The district courts and courts of appeals, as well as this Court, should follow the framework set forth in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), even when departure from that framework might serve purposes of exposition. When considering an administrative agency's interpretation of a statute, a court first determines "whether Congress has directly spoken to the precise question at issue." *Id.*, at 842. If so, "that is the end of the matter." *Ibid.* Only if "Congress has not directly addressed the precise question at issue" should a court consider "whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843.

In this case, the Court is correct to find that the plain language of the statute is ambiguous. It is proper, therefore, to invoke *Chevron*'s rule of deference. The opinion of the Court, however, inverts *Chevron*'s logical progression. Were the inversion to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes. It is our obligation to set a good example; and so, in my view, it would have been preferable, and more faithful to *Chevron*, to arrange the opinion differently. Still, we must give deference to the author of an opinion in matters of exposition; and because the point does not affect the outcome, I join the Court's opinion.

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[3] See *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers").

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE SOUTER joins as to Part I, dissenting.

In *Church of the Holy Trinity* v. *United States*, 143 U. S. 457 (1892), this Court conceded that a church's act of contracting with a prospective rector fell within the plain meaning of a federal labor statute, but nevertheless did not apply the statute to the church: "It is a familiar rule," the Court pronounced, "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.*, at 459. That is a judge-empowering proposition if there ever was one, and in the century since, the Court has wisely retreated from it, in words if not always in actions. But today *Church of the Holy Trinity* arises, Phoenix-like, from the ashes. The Court's contrary assertions aside, today's decision is nothing other than the elevation of judge-supposed legislative intent over clear statutory text. The plain language of the federal Impact Aid statute clearly and unambiguously forecloses the Secretary of Education's preferred methodology for determining whether a State's school-funding system is equalized. Her selection of that methodology is therefore entitled to zero deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

I

The very structure of the Court's opinion provides an obvious clue as to what is afoot. The opinion purports to place a premium on the plain text of the Impact Aid statute, *ante*, at 93–94, but it first takes us instead on a roundabout tour of "[c]onsiderations *other* than language," *ante*, at 90 (emphasis added)—page after page of unenacted congressional intent and judicially perceived statutory purpose, Part II–A, *ante*. Only after we are shown "why Zuni concentrates its argument upon language alone," *ante*, at 90 (impliedly a shameful practice, or at least indication of a feeble case), are we in-

formed how the statute's plain text does not unambiguously *preclude* the interpretation the Court thinks best. Part II–B, *ante* (beginning "But what of the provision's literal language? The matter is important . . . "). This is a most suspicious order of proceeding, since our case law is full of statements such as "We begin, as always, with the language of the statute," *Duncan* v. *Walker*, 533 U. S. 167, 172 (2001), and replete with the affirmation that, when "[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history," *United States* v. *Gonzales*, 520 U. S. 1, 6 (1997). Nor is this cart-before-the-horse approach justified by the Court's excuse that the statute before us is, after all, a technical one, *ante*, at 90. This Court, charged with interpreting, among other things, the Internal Revenue Code, the Employee Retirement Income Security Act of 1974, and the Clean Air Act, confronts technical language all the time, but we never see fit to pronounce upon what we think Congress *meant* a statute to say, and what we think sound policy would *counsel* it to say, before considering what it *does* say. As almost a majority of today's majority worries, "[w]ere the inversion [of inquiry] to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes." *Ante*, at 107 (KENNEDY, J., joined by ALITO, J., concurring). True enough—except I see no reason to wait for the distortion to become systemic before concluding that that is precisely what is happening in the present case. For some, policy-driven interpretation is apparently just fine. See *ante*, at 105 (STEVENS, J., concurring). But for everyone else, let us return to Statutory Interpretation 101.

We must begin, as we always do, with the text. See, *e. g.*, *Gonzales*, *supra*, at 4. Under the federal Impact Aid program, 20 U. S. C. § 7701 *et seq.* (2000 ed. and Supp. IV), States distributing state aid to local school districts (referred to in

the statute as "local educational agencies," or "LEAs"[1]) may not take into account the amount of federal Impact Aid that its LEAs receive. See § 7709(a). But the statute makes an exception if the Secretary of Education certifies that a State "has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State." § 7709(b)(1) (2000 ed., Supp. IV). Congress has specified a formula for the Secretary to use when making this equalization determination:

> "[A] program of State aid equalizes expenditures among local educational agencies if . . . the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent." § 7709(b)(2)(A).

The Secretary is further instructed, however, that when making this determination, she shall "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." § 7709(b)(2)(B)(i). It is this latter subsection which concerns us here.

The casual observer will notice that the Secretary's implementing regulations do not look much like the statute. The regulations first require the Secretary to rank all of the LEAs in a State (New Mexico has 89) according to their per-pupil expenditures or revenues. 34 CFR pt. 222, subpt. K, App., ¶ (1)(a)(i) (2006). So far so good. But critically here,

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[1] The Court's opinion has replaced the phrase "'local educational agencies'" with "'local school districts.'" See *ante*, at 100. While I have no objection to that terminology, I will instead use "local educational agencies" and "LEAs."

the Secretary must then "[i]dentif[y] those LEAs . . . that fall at the 95th and 5th percentiles *of the total number of pupils in attendance* in the schools of those LEAs." *Id.*, ¶ (1)(a)(ii) (emphasis added). Finally, the Secretary compares the per-pupil figures of *those two* LEAs for the purpose of assessing whether a State exceeds the 25% disparity measure. *Id.*, ¶ (1)(a)(iii). The majority concludes that this method of calculation, with its focus on student population, is a permissible interpretation of the statute.

It most assuredly is not. To understand why, one first must look beyond the smokescreen that the Court lays down with its repeated apologies for inexperience in statistics, and its endless recitation of technical mathematical definitions of the word "percentile." See, *e. g.*, *ante*, at 95 ("'The n-th percentile is the value $X_{n/100}$ such that n per cent of the population is less than or equal to $X_{n/100}$'" (quoting C. Clapham & J. Nicholson, The Concise Oxford Dictionary of Mathematics 378 (3d ed. 2005))). This case is not a scary math problem; it is a straightforward matter of statutory interpretation. And we do not need the Court's hypothetical cadre of number-crunching *amici*, *ante*, at 99–100, to guide our way.

There is no dispute that for purposes relevant here "'percentile' refers to a division of a distribution of *some* population into 100 parts.'" *Ante*, at 95. And there is further no dispute that the statute concerns the percentile of "per-pupil expenditures or revenues," for that is what the word "such" refers to. See 20 U. S. C. § 7709(b)(2)(B)(i) (Secretary shall "disregard local educational agencies with *per-pupil expenditures or revenues* above the 95th percentile or below the 5th percentile of *such* expenditures or revenues in the State" (emphasis added)). The question is: Whose per-pupil expenditures or revenues? Or, in the Court's terminology, what "population" is assigned the "characteristic" "per-pupil expenditure" or revenue? *Ante*, at 95–96. At first blush, second blush, or twenty-second blush, the answer is abundantly clear: local educational agencies. The statute re-

quires the Secretary to "disregard local educational agencies with" certain per-pupil figures above or below specified percentiles of those per-pupil figures. § 7709(b)(2)(B)(i). The attribute "per-pupil expenditur[e] or revenu[e]" is assigned to LEAs—there is no mention of student population whatsoever. And thus under the statute, "per-pupil expenditures or revenues" are to be arrayed using a population consisting of LEAs, so that percentiles are determined from a list of (in New Mexico) 89 per-pupil expenditures or revenues representing the 89 LEAs in the State. It is just that simple.

The Court makes little effort to defend the regulations as they are written. Instead, relying on a made-for-litigation theory that bears almost no relationship to the regulations themselves, the Court believes it has found a way to shoehorn those regulations into the statute. The Impact Aid statute is ambiguous, the Court says, because it "does not specify precisely what *population* is to be 'distributed' (*i. e.*, ranked according to the population's corresponding values for the relevant characteristic)." *Ante*, at 96. Thus the Court finds that it is permissible for the Secretary to attribute the characteristic "per-pupil expenditure or revenue" to pupils, with the result that the Secretary may "us[e] . . . the State's *students* as the relevant population for calculating the specified percentiles." *Ibid.* Under that interpretation, as the State manages to explain with a straight face, "[i]n New Mexico, during the time at issue, there were approximately 317,777 pupils in the [S]tate and thus there were 317,777 per-pupil revenues in the [S]tate." Brief for Respondent New Mexico Public Education Department 37; see also *id.*, at 36 ("Each and every student in an LEA and in a [S]tate may be treated as having his or her own 'per-pupil' expenditure or revenue amount"). The Court consequently concludes that "linguistically speaking, one may attribute the characteristic of per-pupil expenditure to each [student]." *Ante*, at 97.

The sheer applesauce of this statutory interpretation should be obvious. It is of course true that every student in New Mexico causes an expenditure or produces a revenue that his LEA either enjoys (in the case of revenues) or is responsible for (in the case of expenditures). But it simply defies any semblance of normal English usage to say that every pupil has a "*per-pupil* expenditure or revenue." The word "per" *connotes* that the expenditure or revenue is a single average figure assigned to a unit the *composite members of which* are individual pupils. And the only such unit mentioned in the statute is the local educational agency.[2] See 20 U. S. C. § 7709(b)(2)(B)(i). It is simply irrelevant that "[n]o dictionary definition . . . suggests that there is any *single* logical, mathematical, or statistical link between [per-pupil expenditures or revenues] and . . . the nature of the relevant population." *Ante,* at 96. Of course there is not. It is the *text* at issue which must identify the relevant population, and it does so here quite unambiguously: "*local educational agencies* with per-pupil expenditures or revenues." § 7709(b)(2)(B)(i) (emphasis added). That same phrase shows the utter irrelevance of the Court's excursus upon the meaning of the word "per." See *ante,* at 97. It does indeed mean " 'for each, or 'for every' "—and when it is contained in a clause that reads "local educational agencies with per-pupil expenditures or revenues" it refers to (and can only refer to) the average expenditure or revenue "for each" or "for every" student out of the total expenditures or revenues of the LEA.

[2] The Court maintains that the phrase "per-pupil expenditures" or revenues may also be attributed to schools or grade levels. *Ante,* at 97. Standing alone and abstracted from the rest of the statute, indeed it may. But not when it appears in the phrase "*local educational agencies* with *per-pupil expenditures or revenues.*" (Emphasis added.) In any case, the fact that "per-pupil expenditures or revenues" *could* be applied to composite entities other than LEAs does not establish that speaking of the "per-pupil expenditure or revenue" of an individual student makes any sense (it does not).

The violence done to this statute would be severe enough if the Secretary *used* the actual expenditure or revenue for each individual pupil. But in fact the Secretary determines the per-pupil expenditure or revenue for each individual student by (guess what) *computing the per-pupil expenditure or revenue of each LEA!* As the New Mexico brief explains:

> "[A] per-pupil expenditure or revenue is an average number. It is not the amount actually spent on any given pupil, an amount which would be impossible to calculate in any meaningful way. It is roughly the total amount expended by an LEA divided by the number of pupils in that LEA." Brief for Respondent New Mexico Public Education Department 36.

The Secretary thus assigns an artificial number to each student that corresponds exactly to *his LEA's* per-pupil expenditure or revenue. In other words, at the end of the day the Secretary herself acknowledges that "per-pupil expenditures or revenues" pertains to LEAs, and not students. And she is interpreting "per-pupil expenditure or revenue" *not* as the Court suggests (an amount attributable to each student), but rather *as I suggest* (an average amount for the pupils in a particular LEA). But she then proceeds to take a step not at all permitted by the statutory formula—in effect applying "per-pupil expenditure or revenue" a *second* time (this time according to the Court's fanciful interpretation of "per-pupil") in order to reach the result she desires. Of course, if the Secretary did apply the "per-pupil expenditure or revenue" only once, arraying students by their actual expenditures or revenues, her entire system would collapse. Students from the same LEA, rather than appearing on the list with the same per-pupil figure, would be located at various points on the spectrum. And so long as an LEA had at least one student above the 95th or below the 5th percentile of pupil "per-pupil expenditures or revenues," that LEA would

have to be excluded from the disparity analysis. The result would be a serious distortion of the disparity determination, excluding many more LEAs (in fact, perhaps all of them) from the disparity calculation. This would render the 25% disparity measure in § 7709(b)(2)(A) all but meaningless.

The Court makes one final attempt to rescue the Secretary's interpretation, appealing to "statutory context." "Context here tells us," it says, "that the instruction to identify school districts with 'per-pupil expenditures' above the 95th percentile 'of such expenditures' is . . . ambiguous, because both students and school districts are of concern to the statute." *Ante,* at 99. This is a complete non sequitur. Of course students are a concern to a statute dealing with school funding. But that does not create any ambiguity with respect to whether, under this statute, pupils can reasonably be said to have their own "per-pupil expenditures or revenues." It is simply irrational to say that the clear dispositions of a statute with regard to the entities that it regulates (here LEAs) are rendered ambiguous when those entities contain subunits that are the ultimate beneficiaries of the regulation (here students). Such a principle of interpretation—if it could be called that—would inject ambiguity into many statutes indeed.

The Court's reliance on statutory context is all the more puzzling since the context obviously favors petitioners. "The focus [of the Impact Aid statute] is upon LEAs, not upon the number of pupils." 393 F. 3d 1158, 1172 (CA10 2004) (O'Brien, J., dissenting), opinion vacated, 437 F. 3d 1289, 1290 (2006) (en banc) *(per curiam).* In fact, the provisions at issue here make not the slightest mention of students. That is both sensible and predictable, since the Impact Aid program's equalization formula is designed to address funding disparities between *LEAs,* not between *students.* See 20 U. S. C. § 7709(b)(2)(A) (referring to "a program of State aid [that] equalizes expenditures among local educational agencies"); see also § 7709(d)(1). Indeed,

the whole point of the equalization determination is to figure out whether States may reduce state aid to *LEAs*. See § 7709(a).

In sum, the plain language of the Impact Aid statute compels the conclusion that the Secretary's method of calculation is ultra vires. Employing the formula that the statute requires, New Mexico is not equalized. *Ante*, at 89.

II

How then, if the text is so clear, are respondents managing to win this case? The answer can only be the return of that miraculous redeemer of lost causes, *Church of the Holy Trinity*. In order to contort the statute's language beyond recognition, the Court must believe Congress's intent so crystalline, the spirit of its legislation so glowingly bright, that the statutory text should simply not be read to say what it says. See Part II–A, *ante*. JUSTICE STEVENS is quite candid on the point: He is willing to contradict the text. See *ante*, at 106–107 (concurring opinion).[3] But JUSTICE STEVENS' candor should not make his philosophy seem unassuming. He maintains that it is "a correct performance of the judicial function" to "override a strict interpretation of the text" so long as policy-driven interpretation "is faithful to the intent of Congress." *Ante*, at 105. But once one departs from "strict interpretation of the text" (by which JUS-

[3] Like JUSTICE STEVENS, respondents themselves were aboveboard when they litigated this case at the administrative level. After hearing argument from the Department of Education, the Administrative Law Judge (ALJ) protested: "The problem is I don't see the ambiguity of the statute." App. 29. To this the Department's counsel responded: "The only way I can do that is by reference to the statutory purpose." *Ibid.* Later in the hearing, the ALJ similarly asked the State of New Mexico how its interpretation was consistent with the statute. The State answered: "Literally, on the face of the words, perhaps not, probably not." *Id.*, at 53. Despite his misgivings, the ALJ ultimately decided that he did not possess the authority to invalidate the regulations. App. to Pet. for Cert. 38a, 51a.

TICE STEVENS means the actual meaning of the text) fidelity to the intent of Congress is a chancy thing. The only thing we know for certain both Houses of Congress (and the President, if he signed the legislation) agreed upon is the text. Legislative history can never produce a "pellucidly clear" picture, *ante*, at 106 (STEVENS, J., concurring), of what a law was "intended" to mean, for the simple reason that it is never voted upon—or ordinarily even seen or heard—by the "intending" lawgiving entity, which consists of both Houses of Congress and the President (if he did not veto the bill). See U. S. Const., Art. I, §§ 1, 7. Thus, what judges believe Congress "meant" (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, *i. e.*, should have meant. In *Church of the Holy Trinity*, every Justice on this Court disregarded the plain language of a statute that forbade the hiring of a clergyman from abroad because, after all (they thought), "this is a Christian nation," 143 U. S., at 471, so Congress could not have meant what it said. Is there any reason to believe that those Justices were lacking that "intellectua[l] honest[y]" that JUSTICE STEVENS "presume[s]" all our judges possess, *ante*, at 105? Intellectual honesty does not exclude a blinding intellectual bias. And even if it did, the system of judicial amendatory veto over texts duly adopted by Congress bears no resemblance to the system of lawmaking set forth in our Constitution.

JUSTICE STEVENS takes comfort in the fact that this is a case in which he "cannot imagine anyone accusing any Member of the Court of voting one way or the other because of that Justice's own policy preferences." *Ante*, at 106. I can readily imagine it, given that the Court's opinion begins with a lengthy description of why the system its judgment approves is the *better* one. But even assuming that, in this rare case, the Justices' departure from the enacted law has nothing to do with their policy view that it is a bad law, nothing in JUSTICE STEVENS' separate opinion limits his ap-

proach to such rarities. Why should we suppose that in matters more likely to arouse the judicial libido—voting rights, antidiscrimination laws, or environmental protection, to name only a few—a judge in the School of Textual Subversion would not find it convenient (yea, *righteous!*) to assume that Congress *must* have meant, not what it said, but what he knows to be best?

Lest there be any confusion on the point, I must discuss briefly the two cases JUSTICE STEVENS puts forward, *ante*, at 104–105, as demonstrating this Court's recent endorsement of his unorthodox views. They demonstrate just the opposite. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564 (1982), involved a maritime statute that required the master of a vessel to furnish unpaid wages to a seaman within a specified period after the seaman's discharge, and further provided that a master who failed to do so without sufficient cause "'shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed.'" *Id.*, at 570 (quoting 46 U. S. C. § 596 (1976 ed.)). We explained that "Congress intended the statute to mean exactly what its plain language says," 458 U. S., at 574, and held that the seaman was entitled to double wages for every day during which payment was delayed, even for the period in which he had obtained alternative employment. The result was that the seaman would receive approximately $300,000 for his master's improper withholding of $412.50, *id.*, at 575, even though "[i]t [was] probably true that Congress did not precisely envision the grossness of the difference . . . between the actual wages withheld and the amount of the award required by the statute," *id.*, at 576. We suggested in dicta that there might be a "rare cas[e]" in which the Court could relax its steadfastness to statutory text, *id.*, at 571, but if *Griffin* itself did not qualify, it is hard to imagine what would. The principle JUSTICE STEVENS would ascribe to *Griffin* is in fact the one he advocated in dissent. "[T]his is one of the cases in which the exercise of judgment dictates

a departure from the literal text in order to be faithful to the legislative will." *Id.*, at 586 (STEVENS, J., dissenting).

The second case JUSTICE STEVENS relies upon, *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235 (1989), is equally inapt. The Court's opinion there (unlike the one here) explained that our analysis "must begin . . . with the language of the statute itself," and concluded that that was "also where the inquiry should end, for where . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *Id.*, at 241 (quoting *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917)). My "fifth vote" in *Ron Pair* was thus only "decisive," *ante*, at 105 (STEVENS, J., concurring), in reaffirming this Court's adherence to statutory text, decisively preventing it from falling off the precipice it plunges over today.

Contrary to the Court and JUSTICE STEVENS, I do not believe that what we are sure the Legislature *meant* to say can trump what it *did* say. Citizens arrange their affairs not on the basis of their legislators' unexpressed intent, but on the basis of the law as it is written and promulgated. I think it terribly unfair to expect that the two rural school districts that are petitioners here should have pored over some 30 years of regulatory history to divine Congress's "real" objective (and with it the "real" intent that a majority of Justices would find honest and true). To be governed by legislated text rather than legislators' intentions is what it means to be "a Government of laws, not of men." And in the last analysis the opposite approach is no more beneficial to the governors than it is to the governed. By "depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning," we deprive Congress of "a sure means by which it may work the people's will." *Chisom* v. *Roemer*, 501 U. S. 380, 417 (1991) (SCALIA, J., dissenting).

I do not purport to know what Congress thought it was doing when it amended the Impact Aid program in 1994.

But even indulging JUSTICE STEVENS' erroneous premise that there exists a "legislative intent" separate and apart from the statutory text, *ante,* at 105 (concurring opinion), I do not see how the Court can possibly say, with any measure of confidence, that Congress wished one thing rather than another. There is ample evidence, for example, that at the time it amended the Impact Aid statute, Congress knew exactly how to incorporate student population into a disparity calculation. Most prominently, in the *very same* Act that added § 7709(b)(2)(B)(i) to the Impact Aid program, Congress established the Education Finance Incentive Program, known as EFIG. See Improving America's Schools Act of 1994, 108 Stat. 3575. That statute allocates grants to States based in part on an "equity factor" which requires a disparity calculation similar to that in the Impact Aid statute. See 20 U. S. C. § 6337(b)(1)(A) (2000 ed., Supp. IV). In EFIG, however, Congress specifically required the Secretary to take student population into account: "[T]he Secretary shall weigh the variation between per-pupil expenditures in each local educational agency . . . *according to the number of pupils served by the local educational agency.*" § 6337(b)(3)(A)(ii)(II) (emphasis added); see also Brief for Federal Respondent 28–29. And there is more. In EFIG, Congress *expressly provided* that a State would be accorded a favorable "equity factor" rating if it was considered equalized under the Secretary's *Impact Aid regulations.* See § 6337(b)(3)(B) (2000 ed., Supp. IV). Congress thus explicitly incorporated the Impact Aid regulations into EFIG, but did no such thing with respect to the Impact Aid statute itself. All this on the very same day.

Nor do I see any significance in the fact that no legislator in 1994 expressed the view that § 7709(b)(2)(B)(i) was designed to upend the Secretary's equalization formula. *Ante,* at 91 (majority opinion). It is quite plausible—indeed, eminently plausible—that the Members of Congress took the

plain meaning of the language *which the Secretary himself had proposed* to be what the Secretary himself had previously been doing. It is bad enough for this Court to consider legislative materials beyond the statutory text in aid of resolving ambiguity, but it is truly unreasonable to *require* such extratextual evidence as a precondition for enforcing an *unambiguous* congressional mandate. See *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U. S. 50, 73–74 (2004) (SCALIA, J., dissenting). The Court points to the fact that "no Member of Congress has ever criticized the method the [Secretary's] regulation[s] sets forth." *Ante*, at 90. But can it really be that this case turns, in the Court's view, on whether a freshman Congressman from New Mexico gave a floor speech that only late-night C–SPAN junkies would witness? The only fair inference from Congress's silence is that Congress had nothing further to say, its statutory text doing all of the talking.

Finally, the Court expresses its belief that Congress must have intended to adopt the Secretary's pre-1994 disparity test because that test is the more reasonable one, better able to account for States with small numbers of large LEAs, or large numbers of small ones. See *ante*, at 91–93. This, to tell the truth, is the core of the opinion. As I have suggested, it is no accident that the countertextual legislative intent judges perceive *invariably* accords with what judges think best. It seems to me, however, that this Court is no more capable of saying with certainty what is best in this area than it is of saying with certainty (apart from the text) what Congress intended. There is good reason to be concerned—in the implementation of a statute that makes a limited exception for States that have "in effect a program of State aid that equalizes expenditures for free public education *among local educational agencies*," 20 U. S. C. § 7709(b)(1) (2000 ed., Supp. IV) (emphasis added)—that the Secretary's methodology eliminates from the disparity calcu-

lation *too many LEAs*. In the certification at issue in this very case, the Secretary excluded 23 of New Mexico's 89 LEAs, approximately 26%. Is this Court such an expert in school finance that it can affirm the desirability of excluding one in four of New Mexico's LEAs from consideration?

As for the Secretary's concerns about the discrepancy between large and small LEAs, does the Court have any basis for its apparent confidence that other parts of the Impact Aid statute do not adequately address the problem? Immediately after setting forth the 95th and 5th percentile cutoffs, § 7709(b)(2)(B)(i), the statute instructs the Secretary to "take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities." § 7709(b)(2)(B)(ii). Respondents do not explain why the Secretary could not use § 7709(b)(2)(B)(ii) to temper any unintended effects of § 7709(b)(2)(B)(i). Respondents further maintain that States could take advantage of the statute's plain meaning by subdividing their LEAs. But again, the statute itself contains a remedy. Under § 7713(9)(B)(ii), "[t]he term 'local educational agency' does not include any agency or school authority that the Secretary determines on a case-by-case basis . . . is not constituted or reconstituted for legitimate educational purposes."

* * *

The only sure indication of what Congress intended is what Congress enacted; and even if there is a difference between the two, the rule of law demands that the latter prevail. This case will live with *Church of the Holy Trinity* as an exemplar of judicial disregard of crystal-clear text. We must interpret the law as Congress has written it, not as we would wish it to be. I would reverse the judgment of the Court of Appeals.

JUSTICE SOUTER, dissenting.

I agree with the Court that Congress probably intended, or at least understood, that the Secretary would continue to follow the methodology devised prior to passage of the current statute in 1994, see *ante*, at 90–91. But for reasons set out in JUSTICE SCALIA's dissent, I find the statutory language unambiguous and inapt to authorize that methodology, and I therefore join Part I of his dissenting opinion.

Syllabus

GONZALES, ATTORNEY GENERAL *v.* CARHART ET AL.

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

No. 05–380. Argued November 8, 2006—Decided April 18, 2007*

Following this Court's *Stenberg* v. *Carhart*, 530 U. S. 914, decision that Nebraska's "partial birth abortion" statute violated the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, and *Roe* v. *Wade*, 410 U. S. 113, Congress passed the Partial-Birth Abortion Ban Act of 2003 (Act) to proscribe a particular method of ending fetal life in the later stages of pregnancy. The Act does not regulate the most common abortion procedures used in the first trimester of pregnancy, when the vast majority of abortions take place. In the usual second-trimester procedure, "dilation and evacuation" (D&E), the doctor dilates the cervix and then inserts surgical instruments into the uterus and maneuvers them to grab the fetus and pull it back through the cervix and vagina. The fetus is usually ripped apart as it is removed, and the doctor may take 10 to 15 passes to remove it in its entirety. The procedure that prompted the federal Act and various state statutes, including Nebraska's, is a variation of the standard D&E, and is herein referred to as "intact D&E." The main difference between the two procedures is that in intact D&E a doctor extracts the fetus intact or largely intact with only a few passes, pulling out its entire body instead of ripping it apart. In order to allow the head to pass through the cervix, the doctor typically pierces or crushes the skull.

The Act responded to *Stenberg* in two ways. First, Congress found that unlike this Court in *Stenberg*, it was not required to accept the District Court's factual findings, and that there was a moral, medical, and ethical consensus that partial-birth abortion is a gruesome and inhumane procedure that is never medically necessary and should be prohibited. Second, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*. Among other things, the Act prohibits "knowingly perform[ing] a partial-birth abortion . . . that is [not] necessary to save the life of a mother," 18 U. S. C. § 1531(a). It defines

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*Together with No. 05–1382, *Gonzales, Attorney General* v. *Planned Parenthood Federation of America, Inc., et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

Syllabus

"partial-birth abortion," § 1531(b)(1), as a procedure in which the doctor: "(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the [mother's] body . . . , or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the [mother's] body . . . , for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus"; and "(B) performs the overt act, other than completion of delivery, that kills the fetus."

In No. 05–380, respondent abortion doctors challenged the Act's constitutionality on its face, and the Federal District Court granted a permanent injunction prohibiting petitioner Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. The court found the Act unconstitutional because it (1) lacked an exception allowing the prohibited procedure where necessary for the mother's health and (2) covered not merely intact D&E but also other D&Es. Affirming, the Eighth Circuit found that a lack of consensus existed in the medical community as to the banned procedure's necessity, and thus *Stenberg* required legislatures to err on the side of protecting women's health by including a health exception. In No. 05–1382, respondent abortion advocacy groups brought suit challenging the Act. The District Court enjoined the Attorney General from enforcing the Act, concluding it was unconstitutional on its face because it (1) unduly burdened a woman's ability to choose a second-trimester abortion, (2) was too vague, and (3) lacked a health exception as required by *Stenberg*. The Ninth Circuit agreed and affirmed.

Held: Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. Pp. 145–168.

1. The *Casey* Court reaffirmed what it termed *Roe*'s three-part "essential holding": First, a woman has the right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State. Second, the State has the power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering the woman's life or health. And third, the State has legitimate interests from the pregnancy's outset in protecting the health of the woman and the life of the fetus that may become a child. 505 U. S., at 846. Though all three are implicated here, it is the third that requires the most extended discussion. In deciding whether the Act furthers the Government's legitimate interest in protecting fetal life, the Court assumes, *inter alia*, that an undue burden on the previability abortion

right exists if a regulation's "purpose or effect is to place a substantial obstacle in the [woman's] path," *id.*, at 878, but that "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose," *id.*, at 877. *Casey* struck a balance that was central to its holding, and the Court applies *Casey*'s standard here. A central premise of *Casey*'s joint opinion—that the government has a legitimate, substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments below. Pp. 145–146.

2. The Act, on its face, is not void for vagueness and does not impose an undue burden from any overbreadth. Pp. 146–156.

(a) The Act's text demonstrates that it regulates and proscribes performing the intact D&E procedure. First, since the doctor must "vaginally delive[r] a living fetus," § 1531(b)(1)(A), the Act does not restrict abortions involving delivery of an expired fetus or those not involving vaginal delivery, *e. g.*, hysterotomy or hysterectomy. And it applies both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism within the womb, whether or not it is viable outside the womb. Second, because the Act requires the living fetus to be delivered to a specific anatomical landmark depending on the fetus' presentation, *ibid.*, an abortion not involving such partial delivery is permitted. Third, because the doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered fetus," § 1531(b)(1)(B), the "overt act" must be separate from delivery. It must also occur after delivery to an anatomical landmark, since killing "the partially delivered" fetus, when read in context, refers to a fetus that has been so delivered, *ibid.* Fourth, given the Act's scienter requirements, delivery of a living fetus past an anatomical landmark by accident or inadvertence is not a crime because it is not "deliberat[e] and intentiona[l]," § 1531(b)(1)(A). Nor is such a delivery prohibited if the fetus has not been delivered "for the purpose of performing an overt act that the [doctor] knows will kill [it]." *Ibid.* Pp. 146–148.

(b) The Act is not unconstitutionally vague on its face. It satisfies both requirements of the void-for-vagueness doctrine. First, it provides doctors "of ordinary intelligence a reasonable opportunity to know what is prohibited," *Grayned* v. *City of Rockford*, 408 U. S. 104, 108, setting forth "relatively clear guidelines as to prohibited conduct" and providing "objective criteria" to evaluate whether a doctor has performed a prohibited procedure, *Posters 'N' Things, Ltd.* v. *United States*,

511 U. S. 513, 525–526. Second, it does not encourage arbitrary or discriminatory enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 357. Its anatomical landmarks "establish minimal guidelines to govern law enforcement," *Smith* v. *Goguen*, 415 U. S. 566, 574, and its scienter requirements narrow the scope of its prohibition and limit prosecutorial discretion, see *Kolender*, *supra*, at 358. Respondents' arbitrary enforcement arguments, furthermore, are somewhat speculative, since this is a preenforcement challenge. Pp. 148–150.

(c) The Court rejects respondents' argument that the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. Pp. 150–156.

(i) The Act's text discloses that it prohibits a doctor from intentionally performing an intact D&E. Its dual prohibitions correspond with the steps generally undertaken in this procedure: The doctor (1) delivers the fetus until its head lodges in the cervix, usually past the anatomical landmark for a breech presentation, see § 1531(b)(1)(A), and (2) proceeds to the overt act of piercing or crushing the fetal skull after the partial delivery, see § 1531(b)(1)(B). The Act's scienter requirements limit its reach to those physicians who carry out the intact D&E, with the intent to undertake both steps at the outset. The Act excludes most D&Es in which the doctor intends to remove the fetus in pieces from the outset. This interpretation is confirmed by comparing the Act with the Nebraska statute in *Stenberg*. There, the Court concluded that the statute encompassed D&E, which "often involve[s] a physician pulling a 'substantial portion' of a still living fetus . . . , say, an arm or leg, into the vagina prior to the death of the fetus," 530 U. S., at 939, and rejected the Nebraska Attorney General's limiting interpretation that the statute's reference to a "procedure" that "'kill[s] the unborn child'" was to a distinct procedure, not to the abortion procedure as a whole, *id.*, at 943. It is apparent Congress responded to these concerns because the Act adopts the phrase "delivers a living fetus," 18 U. S. C. § 1531(b)(1)(A), instead of "'delivering . . . a living unborn child, or a substantial portion thereof,'" 530 U. S., at 938, thereby targeting extraction of an entire fetus rather than removal of fetal pieces; identifies specific anatomical landmarks to which the fetus must be partially delivered, § 1531(b)(1)(A), thereby clarifying that the removal of a small portion of the fetus is not prohibited; requires the fetus to be delivered so that it is partially "outside the [mother's] body," *ibid.*, thereby establishing that delivering a substantial portion of the fetus into the vagina would not subject a doctor to criminal sanctions; and adds the overt-act requirement, § 1531(b)(1), thereby making the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General

advanced). Finally, the canon of constitutional avoidance, see, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575, extinguishes any lingering doubt. Interpreting the Act not to prohibit standard D&E is the most reasonable reading and understanding of its terms. Pp. 150–154.

(ii) Respondents' contrary arguments are unavailing. The contention that any D&E may result in the delivery of a living fetus beyond the Act's anatomical landmarks because doctors cannot predict the amount the cervix will dilate before the procedure does not take account of the Act's intent requirements, which preclude liability for an accidental intact D&E. The evidence supports the legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance, belying any claim that a standard D&E cannot be performed without intending or foreseeing an intact D&E. That many doctors begin every D&E with the objective of removing the fetus as intact as possible based on their belief that this is safer does not prove, as respondents suggest, that every D&E might violate the Act, thereby imposing an undue burden. It demonstrates only that those doctors must adjust their conduct to the law by not attempting to deliver the fetus to an anatomical landmark. Respondents have not shown that requiring doctors to intend dismemberment before such a delivery will prohibit the vast majority of D&E abortions. Pp. 154–156.

3. The Act, measured by its text in this facial attack, does not impose a "substantial obstacle" to late-term, but previability, abortions, as prohibited by the *Casey* plurality, 505 U. S., at 878. Pp. 156–167.

(a) The contention that the Act's congressional purpose was to create such an obstacle is rejected. The Act's stated purposes are protecting innocent human life from a brutal and inhumane procedure and protecting the medical community's ethics and reputation. The government undoubtedly "has an interest in protecting the integrity and ethics of the medical profession." *Washington* v. *Glucksberg*, 521 U. S. 702, 731. Moreover, *Casey* reaffirmed that the government may use its voice and its regulatory authority to show its profound respect for the life within the woman. See, *e. g.*, 505 U. S., at 873. The Act's ban on abortions involving partial delivery of a living fetus furthers the Government's objectives. Congress determined that such abortions are similar to the killing of a newborn infant. This Court has confirmed the validity of drawing boundaries to prevent practices that extinguish life and are close to actions that are condemned. *Glucksberg*, *supra*, at 732–735, and n. 23. The Act also recognizes that respect for human life finds an ultimate expression in a mother's love for her child. Whether to have an abortion requires a difficult and painful moral decision, *Casey*,

505 U. S., at 852–853, which some women come to regret. In a decision so fraught with emotional consequence, some doctors may prefer not to disclose precise details of the abortion procedure to be used. It is, however, precisely this lack of information that is of legitimate concern to the State. *Id.*, at 873. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion. The objection that the Act accomplishes little because the standard D&E is in some respects as brutal, if not more, than intact D&E is unpersuasive. It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, undermines the public's perception of the doctor's appropriate role during delivery, and perverts the birth process. Pp. 156–160.

(b) The Act's failure to allow the banned procedure's use where "'necessary, in appropriate medical judgment, for the preservation of the [mother's] health,'" *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 327–328, does not have the effect of imposing an unconstitutional burden on the abortion right. The Court assumes the Act's prohibition would be unconstitutional, under controlling precedents, if it "subject[ed] [women] to significant health risks." *Id.*, at 328. Whether the Act creates such risks was, however, a contested factual question below: The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their positions. The Court's precedents instruct that the Act can survive facial attack when this medical uncertainty persists. See, *e. g.*, *Kansas* v. *Hendricks*, 521 U. S. 346, 360, n. 3. This traditional rule is consistent with *Casey*, which confirms both that the State has an interest in promoting respect for human life at all stages in the pregnancy, and that abortion doctors should be treated the same as other doctors. Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. Other considerations also support the Court's conclusion, including the fact that safe alternatives to the prohibited procedure, such as D&E, are available. In addition, if intact D&E is truly necessary in some circumstances, a prior injection to kill the fetus allows a doctor to perform the procedure, given that the Act's prohibition only applies to the delivery of "a living fetus," 18 U. S. C. § 1531(b)(1)(A). *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 77–79, distinguished. The Court rejects certain of the parties' arguments. On the one hand, the Attorney General's contention that the Act should be upheld based on the congressional findings alone fails because some of the Act's recitations are factually

incorrect, and some of the important findings have been superseded. Also unavailing, however, is respondents' contention that an abortion regulation must contain a health exception if "substantial medical authority supports the proposition that banning a particular procedure could endanger women's health," *Stenberg*, 530 U. S., at 938. Interpreting *Stenberg* as leaving no margin for legislative error in the face of medical uncertainty is too exacting a standard. Marginal safety considerations, including the balance of risks, are within the legislative competence where, as here, the regulation is rational and pursues legitimate ends, and standard, safe medical options are available. Pp. 161–167.

4. These facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. Cf. *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n*, 546 U. S. 410, 412. This is the proper manner to protect the woman's health if it can be shown that in discrete and well-defined instances a condition has or is likely to occur in which the procedure prohibited by the Act must be used. No as-applied challenge need be brought if the Act's prohibition threatens a woman's life, because the Act already contains a life exception. 18 U. S. C. § 1531(a). Pp. 167–168.

No. 05–380, 413 F. 3d 791; No. 05–1382, 435 F. 3d 1163, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 168. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 169.

Solicitor General Clement argued the cause for petitioner in both cases. With him on the briefs were *Assistant Attorney General Keisler*, *Deputy Solicitor General Garre*, *Deputy Assistant Attorney General Katsas*, *Kannon K. Shanmugam*, *Marleigh D. Dover*, and *Catherine Y. Hancock*.

Priscilla J. Smith argued the cause for respondents in No. 05–380. With her on the brief were *Janet Crepps*, *Nan E. Strauss*, *Sanford M. Cohen*, and *Jerry M. Hug*. *Eve C. Gartner* argued the cause for Planned Parenthood respondents in No. 05–1382. With her on the brief were *Roger K. Evans*, *Helene T. Krasnoff*, and *Beth H. Parker*. *Dennis J.*

Counsel

Herrera, *Therese M. Stewart*, and *Kathleen S. Morris* filed a brief for respondent City and County of San Francisco in No. 05–1382.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Association of Pro Life Obstetricians and Gynecologists et al. by *Clarke D. Forsythe* and *Denise M. Burke;* for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Walter M. Weber*, *Thomas P. Monaghan*, *John P. Tuskey*, *Laura B. Hernandez*, and *Shannon D. Woodruff;* for the National Legal Foundation by *Barry C. Hodge;* for the Right to Life Advocates, Inc., by *Richard W. Schmude;* for the Thomas More Society, Inc., by *Paul Benjamin Linton* and *Thomas Brejcha;* and for Jill Stanek et al. by *Mathew D. Staver*, *Anita L. Staver*, *Erik W. Stanley*, *Rena M. Lindevaldsen*, and *Mary E. McAlister*.

Briefs of *amici curiae* urging reversal in No. 05–380 were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Barry R. McBee*, First Assistant Attorney General, *Edward D. Burbach*, Deputy Attorney General, *R. Ted Cruz*, Solicitor General, and *Joel L. Thollander*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Mike Beebe* of Arkansas, *Charles J. Crist, Jr.*, of Florida, *Steve Carter* of Indiana, *Jeremiah W. (Jay) Nixon* of Missouri, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, and *Robert F. McDonnell* of Virginia; for the Family Research Council et al. by *William L. Saunders;* for the Foundation for Moral Law, Inc., by *Benjamin D. DuPré* and *Gregory M. Jones;* for the Horatio R. Storer Foundation, Inc., by *James Bopp, Jr.*, *Thomas J. Marzen*, and *Richard E. Coleson;* for Judicial Watch, Inc., by *Meredith L. Di Liberto;* for the Pro-Life Legal Defense Fund et al. by *Dwight G. Duncan*, *Philip D. Moran*, *Gregory S. Baylor*, and *Steven H. Aden;* for the Thomas More Law Center et al. by *Edward L. White III;* for the United States Conference of Catholic Bishops et al. by *Mark E. Chopko* and *Michael F. Moses;* for the United States Justice Foundation et al. by *D. Colette Wilson* and *Gary G. Kreep;* for Gianna Jessen et al. by *Kelly Shackelford;* for Congressman Ron Paul et al. by *Teresa Stanton Collett;* for Margie Riley et al. by *James Joseph Lynch, Jr.;* and for John M. Thorp, Jr., M. D., et al. by *Nikolas T. Nikas* and *James L. Hirsen*.

Briefs of *amici curiae* urging reversal in No. 05–1382 were filed for the Christian Legal Society et al. by *Richard W. Garnett*, *Gregory S. Baylor*, and *Steven H. Aden;* for the Christian Medical and Dental Associations

JUSTICE KENNEDY delivered the opinion of the Court.

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003 (Act), 18 U. S. C. § 1531 (2000 ed., Supp. IV), a federal statute regulating abortion procedures. In recitations preceding its operative provisions the Act refers to the Court's opinion in *Stenberg* v.

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et al. by *Ms. Collett;* for Matercare International et al. by *Mr. Nikas*, *Dorinda C. Bordlee*, and *Mr. Hirsen;* and for Professor Hadley Arkes et al. by *John C. Eastman* and *Edwin Meese III*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the American College of Obstetricians and Gynecologists by *Caroline M. Brown;* for the Institute for Reproductive Health Access et al. by *J. Peter Coll, Jr.*, and *Linda A. Rosenthal;* for the National Women's Law Center et al. by *Elizabeth B. McCallum*, *Marcia D. Greenberger*, *Dina R. Lassow*, and *Gretchen Borchelt;* for the Religious Coalition for Reproductive Choice et al. by *Karen L. Hagberg;* for 52 Members of Congress by *Claude G. Szyfer;* and for Former Federal Prosecutors by *Maria T. Vullo*.

Briefs of *amici curiae* urging affirmance in No. 05–380 were filed for the Cato Institute by *Jonathan D. Hacker;* and for Stephen Chasen, M. D., et al. by *Talcott Camp*, *Brigitte Amiri*, *Elisabeth Ryden Benjamin*, *A. Stephen Hut*, *Kimberly Parker*, and *Lorie A. Chaiten*.

Briefs of *amici curiae* urging affirmance in No. 05–1382 were filed for the American Civil Liberties Union et al. by *Mr. Camp*, *Steven R. Shapiro*, *Louise Melling*, *Ms. Amiri*, and *Ms. Benjamin;* for the American Medical Women's Association et al. by *Ms. Chaiten*, *Carter G. Phillips*, *Eamon P. Joyce*, and *Robert N. Hochman;* for the California Medical Association by *Alan B. Morrison*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Amy Howe*, and *Kevin K. Russell;* and for the NARAL Pro-Choice America Foundation et al. by *Andrew T. Karron* and *Cathleen M. Mahoney*.

Briefs of *amici curiae* were filed in both cases for Constitutional Law Professors by *Kathryn M. Davis;* and for Statisticians by *Molly S. Boast* and *Christian R. Everdell*.

Briefs of *amici curiae* were filed in No. 05–380 for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly;* for the Rutherford Institute by *John W. Whitehead;* and for Sandra Cano et al. by *Linda Boston Schlueter*, *Allan E. Parker, Jr.*, and *Richard Clayton Trotter*.

Briefs of *amici curiae* were filed in No. 05–1382 for Faith and Action et al. by *Bernard P. Reese, Jr.;* and for Legal Defense for Unborn Children by *Alan Ernest*.

Carhart, 530 U. S. 914 (2000), which also addressed the subject of abortion procedures used in the later stages of pregnancy. Compared to the state statute at issue in *Stenberg*, the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage. We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it.

In No. 05–380 *(Carhart)* respondents are LeRoy Carhart, William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar, doctors who perform second-trimester abortions. These doctors filed their complaint against the Attorney General of the United States in the United States District Court for the District of Nebraska. They challenged the constitutionality of the Act and sought a permanent injunction against its enforcement. *Carhart* v. *Ashcroft*, 331 F. Supp. 2d 805 (2004). In 2004, after a 2-week trial, the District Court granted a permanent injunction that prohibited the Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. *Id.*, at 1048. The Court of Appeals for the Eighth Circuit affirmed. 413 F. 3d 791 (2005). We granted certiorari. 546 U. S. 1169 (2006).

In No. 05–1382 *(Planned Parenthood)* respondents are Planned Parenthood Federation of America, Inc., Planned Parenthood Golden Gate, and the City and County of San Francisco. The Planned Parenthood entities sought to enjoin enforcement of the Act in a suit filed in the United States District Court for the Northern District of California. *Planned Parenthood Federation of Am.* v. *Ashcroft*, 320 F. Supp. 2d 957 (2004). The City and County of San Francisco intervened as a plaintiff. In 2004, the District Court held a trial spanning a period just short of three weeks, and it, too, enjoined the Attorney General from enforcing the Act. *Id.*, at 1035. The Court of Appeals for the Ninth Circuit affirmed. 435 F. 3d 1163 (2006). We granted certiorari. 547 U. S. 1205 (2006).

I

A

The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg*, to discuss abortion procedures in some detail. Three United States District Courts heard extensive evidence describing the procedures. In addition to the two courts involved in the instant cases the District Court for the Southern District of New York also considered the constitutionality of the Act. *National Abortion Federation* v. *Ashcroft*, 330 F. Supp. 2d 436 (2004). It found the Act unconstitutional, *id.*, at 493, and the Court of Appeals for the Second Circuit affirmed, *National Abortion Federation* v. *Gonzales*, 437 F. 3d 278 (2006). The three District Courts relied on similar medical evidence; indeed, much of the evidence submitted to the *Carhart* court previously had been submitted to the other two courts. 331 F. Supp. 2d, at 809–810. We refer to the District Courts' exhaustive opinions in our own discussion of abortion procedures.

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. *Planned Parenthood*, *supra*, at 960, and n. 4; App. in No. 05–1382, pp. 45–48. The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU–486), to terminate the pregnancy. *National Abortion Federation*, *supra*, at 464, n. 20. The Act does not regulate these procedures.

Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D&E" is the usual abortion method in this trimester. *Planned Parenthood*, *supra*, at 960–961. Although individual techniques for performing D&E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. *National Abortion Federation*, *supra*, at 465; App. in No. 05–1382, at 61. The steps taken to cause dilation differ by physician and gestational age of the fetus. See, *e. g.*, *Carhart*, *supra*, at 852, 856, 859, 862–865, 868, 870, 873–874, 876–877, 880, 883, 886. A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less. *National Abortion Federation*, *supra*, at 464–465; *Planned Parenthood*, *supra*, at 961.

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of

evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed. See, *e. g.*, *National Abortion Federation*, *supra*, at 465; *Planned Parenthood*, 320 F. Supp. 2d, at 962.

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit. *Carhart*, *supra*, at 907–912; *National Abortion Federation*, *supra*, at 474–475.

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D&E. See M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), 1 Appellant's App. in No. 04–3379 (CA8), p. 109 (hereinafter Dilation and Extraction). The medical community has not reached unanimity on the appropriate name for this D&E variation. It has been referred to as "intact D&E," "dilation and extraction" (D&X), and "intact D&X." *National Abortion Federation*, *supra*, at 440, n. 2; see also F. Cunningham et al., Williams Obstetrics 243 (22d ed. 2005) (identifying the procedure as D&X); Danforth's Obstetrics and Gynecology 567 (J. Scott, R. Gibbs, B. Karlan, & A. Haney eds. 9th ed. 2003) (identifying the procedure as intact D&X); M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield, A Clinician's Guide to Medical and Surgical

Abortion 136 (1999) (identifying the procedure as intact D&E). For discussion purposes this D&E variation will be referred to as intact D&E. The main difference between the two procedures is that in intact D&E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D&Es are performed in this manner.

Intact D&E, like regular D&E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree. This approach has been called "serial" dilation. *Carhart*, 331 F. Supp. 2d, at 856, 870, 873; *Planned Parenthood*, *supra*, at 965. Doctors who attempt at the outset to perform intact D&E may dilate for two full days or use up to 25 osmotic dilators. See, *e. g.*, Dilation and Extraction 110; *Carhart*, *supra*, at 865, 868, 876, 886.

In an intact D&E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. One doctor, for example, testified:

> "If I know I have good dilation and I reach in and the fetus starts to come out and I think I can accomplish it, the abortion with an intact delivery, then I use my forceps a little bit differently. I don't close them quite so much, and I just gently draw the tissue out attempting to have an intact delivery, if possible." App. in No. 05–1382, at 74.

Rotating the fetus as it is being pulled decreases the odds of dismemberment. *Carhart*, *supra*, at 868–869; App. in No. 05–380, pp. 40–41; 5 Appellant's App. in No. 04–3379 (CA8), at 1469. A doctor also "may use forceps to grasp a fetal part, pull it down, and re-grasp the fetus at a higher level—sometimes using both his hand and a forceps—to exert traction to retrieve the fetus intact until the head is lodged in the [cervix]." *Carhart*, *supra*, at 886–887.

Intact D&E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. Dilation and Extraction 110–111. In the usual intact D&E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass. See, *e. g., ibid.;* App. in No. 05–380, at 577; App. in No. 05–1382, at 74, 282. Haskell explained the next step as follows:

> "'At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).
>
> "'While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.
>
> "'[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
>
> "'The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.'" H. R. Rep. No. 108–58, p. 3 (2003).

This is an abortion doctor's clinical description. Here is another description from a nurse who witnessed the same method performed on a 26-week fetus and who testified before the Senate Judiciary Committee:

> "'Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—every-

thing but the head. The doctor kept the head right inside the uterus. . . .

"'The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

"'The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp. . . .

"'He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used.'" *Ibid.*

Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation. *Planned Parenthood*, 320 F. Supp. 2d, at 965. Another doctor, for example, squeezes the skull after it has been pierced "so that enough brain tissue exudes to allow the head to pass through." App. in No. 05–380, at 41; see also *Carhart,* 331 F. Supp. 2d, at 866–867, 874. Still other physicians reach into the cervix with their forceps and crush the fetus' skull. *Id.*, at 858, 881. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it. *Id.*, at 864, 878; see also *Planned Parenthood*, *supra*, at 965.

Some doctors performing an intact D&E attempt to remove the fetus without collapsing the skull. See *Carhart*, *supra*, at 866, 869. Yet one doctor would not allow delivery of a live fetus younger than 24 weeks because "the objective of [his] procedure is to perform an abortion," not a birth. App. in No. 05–1382, at 408–409. The doctor thus answered in the affirmative when asked whether he would "hold the fetus' head on the internal side of the [cervix] in order to

collapse the skull" and kill the fetus before it is born. *Id.*, at 409; see also *Carhart*, *supra*, at 862, 878. Another doctor testified he crushes a fetus' skull not only to reduce its size but also to ensure the fetus is dead before it is removed. For the staff to have to deal with a fetus that has "some viability to it, some movement of limbs," according to this doctor, "[is] always a difficult situation." App. in No. 05–380, at 94; see *Carhart*, *supra*, at 858.

D&E and intact D&E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D&E should occur in a hospital, can last as little as 6 hours but can take longer than 48. It accounts for about 5 percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about 0.07 percent of second-trimester abortions. *National Abortion Federation*, 330 F. Supp. 2d, at 467; *Planned Parenthood*, *supra*, at 962–963.

B

After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on " 'partial birth abortion' " proliferated. By the time of the *Stenberg* decision, about 30 States had enacted bans designed to prohibit the procedure. 530 U. S., at 995–996, and nn. 12–13 (THOMAS, J., dissenting); see also H. R. Rep. No. 108–58, at 4–5. In 1996, Congress also acted to ban partial-birth abortion. President Clinton vetoed the congressional legis-

lation, and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in *Stenberg*, Congress passed the Act at issue here. H. R. Rep. No. 108–58, at 12–14. On November 5, 2003, President Bush signed the Act into law. It was to take effect the following day. 18 U. S. C. § 1531(a) (2000 ed., Supp. IV).

The Act responded to *Stenberg* in two ways. First, Congress made factual findings. Congress determined that this Court in *Stenberg* "was required to accept the very questionable findings issued by the district court judge," § 2(7), 117 Stat. 1202, notes following 18 U. S. C. § 1531 (2000 ed., Supp. IV), p. 768, ¶ (7) (hereinafter Congressional Findings), but that Congress was "not bound to accept the same factual findings," *id.*, ¶ (8). Congress found, among other things, that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." *Id.*, ¶ (1).

Second, and more relevant here, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*. See 530 U. S., at 921–922 (quoting Neb. Rev. Stat. Ann. §§ 28–328(1), 28–326(9) (Supp. 1999)). The operative provisions of the Act provide in relevant part:

> "(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

"(b) As used in this section—

"(1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion—

"(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

"(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

"(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: *Provided, however,* That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

. . . . .

"(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

"(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the

trial for not more than 30 days to permit such a hearing to take place.

"(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section." 18 U. S. C. § 1531 (2000 ed., Supp. IV).

The Act also includes a provision authorizing civil actions that is not of relevance here. § 1531(c).

C

The District Court in *Carhart* concluded the Act was unconstitutional for two reasons. First, it determined the Act was unconstitutional because it lacked an exception allowing the procedure where necessary for the health of the mother. 331 F. Supp. 2d, at 1004–1030. Second, the District Court found the Act deficient because it covered not merely intact D&E but also certain other D&Es. *Id.*, at 1030–1037.

The Court of Appeals for the Eighth Circuit addressed only the lack of a health exception. 413 F. 3d, at 803–804. The court began its analysis with what it saw as the appropriate question—"whether 'substantial medical authority' supports the medical necessity of the banned procedure." *Id.*, at 796 (quoting *Stenberg*, *supra*, at 938). This was the proper framework, according to the Court of Appeals, because "when a lack of consensus exists in the medical community, the Constitution requires legislatures to err on the side of protecting women's health by including a health exception." 413 F. 3d, at 796. The court rejected the Attorney General's attempt to demonstrate changed evidentiary circumstances since *Stenberg* and considered itself bound by *Stenberg*'s conclusion that a health exception was required. 413 F. 3d, at 803 (explaining "[t]he record in [the] case and the record in *Stenberg* [were] similar in all significant respects"). It invalidated the Act. *Ibid.*

D

The District Court in *Planned Parenthood* concluded the Act was unconstitutional "because it (1) pose[d] an undue burden on a woman's ability to choose a second trimester abortion; (2) [was] unconstitutionally vague; and (3) require[d] a health exception as set forth by . . . *Stenberg.*" 320 F. Supp. 2d, at 1034–1035.

The Court of Appeals for the Ninth Circuit agreed. Like the Court of Appeals for the Eighth Circuit, it concluded the absence of a health exception rendered the Act unconstitutional. The court interpreted *Stenberg* to require a health exception unless "there is *consensus in the medical community* that the banned procedure is never medically necessary to preserve the health of women." 435 F. 3d, at 1173. Even after applying a deferential standard of review to Congress' factual findings, the Court of Appeals determined "substantial disagreement exists in the medical community regarding whether" the procedures prohibited by the Act are ever necessary to preserve a woman's health. *Id.*, at 1175–1176.

The Court of Appeals concluded further that the Act placed an undue burden on a woman's ability to obtain a second-trimester abortion. The court found the textual differences between the Act and the Nebraska statute struck down in *Stenberg* insufficient to distinguish D&E and intact D&E. 435 F. 3d, at 1178–1180. As a result, according to the Court of Appeals, the Act imposed an undue burden because it prohibited D&E. *Id.*, at 1180–1181.

Finally, the Court of Appeals found the Act void for vagueness. *Id.*, at 1181. Abortion doctors testified they were uncertain which procedures the Act made criminal. The court thus concluded the Act did not offer physicians clear warning of its regulatory reach. *Id.*, at 1181–1184. Resting on its understanding of the remedial framework established by this Court in *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–330 (2006), the Court of Appeals held

the Act was unconstitutional on its face and should be permanently enjoined. 435 F. 3d, at 1184–1191.

II

The principles set forth in the joint opinion in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), did not find support from all those who join the instant opinion. See *id.*, at 979–1002 (SCALIA, J., joined by THOMAS, J., *inter alios*, concurring in judgment in part and dissenting in part). Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

Casey involved a challenge to *Roe* v. *Wade*, 410 U. S. 113 (1973). The opinion contains this summary:

> "It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each." 505 U. S., at 846 (opinion of the Court).

Though all three holdings are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.

To implement its holding, *Casey* rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted. 505 U. S., at 875–876, 878 (plurality opinion). On this point *Casey* overruled the holdings in two cases because they undervalued the State's interest in potential life. See *id.*, at 881–883 (joint opinion) (overruling *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986), and *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983)).

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." 505 U. S., at 879 (plurality opinion). It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.*, at 878. On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.*, at 877. *Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

III

We begin with a determination of the Act's operation and effect. A straightforward reading of the Act's text demonstrates its purpose and the scope of its provisions: It regu-

lates and proscribes, with exceptions or qualifications to be discussed, performing the intact D&E procedure.

Respondents agree the Act encompasses intact D&E, but they contend its additional reach is both unclear and excessive. Respondents assert that, at the least, the Act is void for vagueness because its scope is indefinite. In the alternative, respondents argue the Act's text proscribes all D&Es. Because D&E is the most common second-trimester abortion method, respondents suggest the Act imposes an undue burden. In this litigation the Attorney General does not dispute that the Act would impose an undue burden if it covered standard D&E.

We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face.

A

The Act punishes "knowingly perform[ing]" a "partial-birth abortion." § 1531(a) (2000 ed., Supp. IV). It defines the unlawful abortion in explicit terms. § 1531(b)(1).

First, the person performing the abortion must "vaginally delive[r] a living fetus." § 1531(b)(1)(A). The Act does not restrict an abortion procedure involving the delivery of an expired fetus. The Act, furthermore, is inapplicable to abortions that do not involve vaginal delivery (for instance, hysterotomy or hysterectomy). The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. See, *e. g.*, *Planned Parenthood*, 320 F. Supp. 2d, at 971–972. We do not understand this point to be contested by the parties.

Second, the Act's definition of partial-birth abortion requires the fetus to be delivered "until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part

of the fetal trunk past the navel is outside the body of the mother." § 1531(b)(1)(A). The Attorney General concedes, and we agree, that if an abortion procedure does not involve the delivery of a living fetus to one of these "anatomical 'landmarks' "—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply. Brief for Petitioner in No. 05–380, p. 46.

Third, to fall within the Act, a doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered living fetus." § 1531(b)(1)(B). For purposes of criminal liability, the overt act causing the fetus' death must be separate from delivery. And the overt act must occur after the delivery to an anatomical landmark. This is because the Act proscribes killing "the partially delivered" fetus, which, when read in context, refers to a fetus that has been delivered to an anatomical landmark. *Ibid.*

Fourth, the Act contains scienter requirements concerning all the actions involved in the prohibited abortion. To begin with, the physician must have "deliberately and intentionally" delivered the fetus to one of the Act's anatomical landmarks. § 1531(b)(1)(A). If a living fetus is delivered past the critical point by accident or inadvertence, the Act is inapplicable. In addition, the fetus must have been delivered "for the purpose of performing an overt act that the [doctor] knows will kill [it]." *Ibid.* If either intent is absent, no crime has occurred. This follows from the general principle that where scienter is required no crime is committed absent the requisite state of mind. See generally 1 W. LaFave, Substantive Criminal Law § 5.1 (2d ed. 2003) (hereinafter LaFave); 1 C. Torcia, Wharton's Criminal Law § 27 (15th ed. 1993).

B

Respondents contend the language described above is indeterminate, and they thus argue the Act is unconstitutionally vague on its face. "As generally stated, the void-for-

vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983); *Posters 'N' Things, Ltd.* v. *United States*, 511 U. S. 513, 525 (1994). The Act satisfies both requirements.

The Act provides doctors "of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972). Indeed, it sets forth "relatively clear guidelines as to prohibited conduct" and provides "objective criteria" to evaluate whether a doctor has performed a prohibited procedure. *Posters 'N' Things*, *supra*, at 525–526. Unlike the statutory language in *Stenberg* that prohibited the delivery of a "'substantial portion'" of the fetus—where a doctor might question how much of the fetus is a substantial portion—the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. *Stenberg*, 530 U. S., at 922 (quoting Neb. Rev. Stat. Ann. §28–326(9) (Supp. 1999)). Doctors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.

This conclusion is buttressed by the intent that must be proved to impose liability. The Court has made clear that scienter requirements alleviate vagueness concerns. *Posters 'N' Things*, *supra*, at 526; see also *Colautti* v. *Franklin*, 439 U. S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*"). The Act requires the doctor deliberately to have delivered the fetus to an anatomical landmark. 18 U. S. C. §1531(b)(1)(A) (2000 ed., Supp. IV). Because a doctor performing a D&E will not face criminal liability if he or she delivers a fetus beyond the prohibited point by mistake, the Act cannot be described as "a trap for

those who act in good faith." *Colautti, supra,* at 395 (internal quotation marks omitted).

Respondents likewise have failed to show that the Act should be invalidated on its face because it encourages arbitrary or discriminatory enforcement. *Kolender, supra,* at 357. Just as the Act's anatomical landmarks provide doctors with objective standards, they also "establish minimal guidelines to govern law enforcement." *Smith* v. *Goguen*, 415 U. S. 566, 574 (1974). The scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion. It cannot be said that the Act "vests virtually complete discretion in the hands of [law enforcement] to determine whether the [doctor] has satisfied [its provisions]." *Kolender, supra,* at 358 (invalidating a statute regulating loitering). Respondents' arguments concerning arbitrary enforcement, furthermore, are somewhat speculative. This is a preenforcement challenge, where "no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct]." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 503 (1982). The Act is not vague.

C

We next determine whether the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. A review of the statutory text discloses the limits of its reach. The Act prohibits intact D&E; and, notwithstanding respondents' arguments, it does not prohibit the D&E procedure in which the fetus is removed in parts.

1

The Act prohibits a doctor from intentionally performing an intact D&E. The dual prohibitions of the Act, both of which are necessary for criminal liability, correspond with the steps generally undertaken during this type of proce-

dure. First, a doctor delivers the fetus until its head lodges in the cervix, which is usually past the anatomical landmark for a breech presentation. See 18 U. S. C. § 1531(b)(1)(A) (2000 ed., Supp. IV). Second, the doctor proceeds to pierce the fetal skull with scissors or crush it with forceps. This step satisfies the overt-act requirement because it kills the fetus and is distinct from delivery. See § 1531(b)(1)(B). The Act's intent requirements, however, limit its reach to those physicians who carry out the intact D&E after intending to undertake both steps at the outset.

The Act excludes most D&Es in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability. A doctor performing a standard D&E procedure can often "tak[e] about 10–15 'passes' through the uterus to remove the entire fetus." *Planned Parenthood*, 320 F. Supp. 2d, at 962. Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery. § 1531(b)(1).

A comparison of the Act with the Nebraska statute struck down in *Stenberg* confirms this point. The statute in *Stenberg* prohibited "'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.'" 530 U. S., at 922 (quoting Neb. Rev. Stat. Ann. § 28–326(9) (Supp. 1999)). The Court concluded that this statute encompassed D&E because "D&E will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." 530 U. S., at 939. The Court also rejected the limiting interpretation urged by Nebraska's Attorney General that the statute's reference to

a "procedure" that "'kill[s] the unborn child'" was to a distinct procedure, not to the abortion procedure as a whole. *Id.*, at 943.

Congress, it is apparent, responded to these concerns because the Act departs in material ways from the statute in *Stenberg*. It adopts the phrase "delivers a living fetus," § 1531(b)(1)(A), instead of "'delivering . . . a living unborn child, or a substantial portion thereof,'" 530 U. S., at 938 (quoting Neb. Rev. Stat. Ann. § 28–326(9) (Supp. 1999)). The Act's language, unlike the statute in *Stenberg*, expresses the usual meaning of "deliver" when used in connection with "fetus," namely, extraction of an entire fetus rather than removal of fetal pieces. See Stedman's Medical Dictionary 470 (27th ed. 2000) (defining deliver as "[t]o assist a woman in childbirth" and "[t]o extract from an enclosed place, as the fetus from the womb, an object or foreign body"); see also I. Dox, B. Melloni, G. Eisner, & J. Melloni, The HarperCollins Illustrated Medical Dictionary 160 (4th ed. 2001); Merriam-Webster's Collegiate Dictionary 306 (10th ed. 1997). The Act thus displaces the interpretation of "delivering" dictated by the Nebraska statute's reference to a "substantial portion" of the fetus. *Stenberg*, *supra*, at 944 (indicating that the Nebraska "statute itself specifies that it applies *both* to delivering 'an intact unborn child' *or* 'a substantial portion thereof'"). In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result. See, *e. g.*, 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47:28 (rev. 6th ed. 2000). Here, unlike in *Stenberg*, the language does not require a departure from the ordinary meaning. D&E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.

The identification of specific anatomical landmarks to which the fetus must be partially delivered also differentiates the Act from the statute at issue in *Stenberg*.

§ 1531(b)(1)(A). The Court in *Stenberg* interpreted "'substantial portion'" of the fetus to include an arm or a leg. 530 U. S., at 939. The Act's anatomical landmarks, by contrast, clarify that the removal of a small portion of the fetus is not prohibited. The landmarks also require the fetus to be delivered so that it is partially "outside the body of the mother." § 1531(b)(1)(A). To come within the ambit of the Nebraska statute, on the other hand, a substantial portion of the fetus only had to be delivered into the vagina; no part of the fetus had to be outside the body of the mother before a doctor could face criminal sanctions. *Id.*, at 938–939.

By adding an overt-act requirement Congress sought further to meet the Court's objections to the state statute considered in *Stenberg*. Compare 18 U. S. C. § 1531(b)(1) (2000 ed., Supp. IV) with Neb. Rev. Stat. Ann. § 28–326(9) (Supp. 1999). The Act makes the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General advanced) by differentiating between the overall partial-birth abortion and the distinct overt act that kills the fetus. See *Stenberg*, *supra*, at 943–944. The fatal overt act must occur after delivery to an anatomical landmark, and it must be something "other than [the] completion of delivery." § 1531(b)(1)(B). This distinction matters because, unlike intact D&E, standard D&E does not involve a delivery followed by a fatal act.

The canon of constitutional avoidance, finally, extinguishes any lingering doubt as to whether the Act covers the prototypical D&E procedure. "'[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988) (quoting *Hooper* v. *California*, 155 U. S. 648, 657 (1895)). It is true this longstanding maxim of statutory interpretation has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an an-

tagonistic "'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.'" *Stenberg*, *supra*, at 977 (KENNEDY, J., dissenting) (quoting *Thornburgh*, 476 U. S., at 829 (O'Connor, J., dissenting); some internal quotation marks omitted). *Casey* put this novel statutory approach to rest. *Stenberg*, *supra*, at 977 (KENNEDY, J., dissenting). *Stenberg* need not be interpreted to have revived it. We read that decision instead to stand for the uncontroversial proposition that the canon of constitutional avoidance does not apply if a statute is not "genuinely susceptible to two constructions." *Almendarez-Torres* v. *United States*, 523 U. S. 224, 238 (1998); see also *Clark* v. *Martinez*, 543 U. S. 371, 385 (2005). In *Stenberg* the Court found the statute covered D&E. 530 U. S., at 938–945. Here, by contrast, interpreting the Act so that it does not prohibit standard D&E is the most reasonable reading and understanding of its terms.

2

Contrary arguments by respondents are unavailing. Respondents look to situations that might arise during D&E, situations not examined in *Stenberg*. They contend—relying on the testimony of numerous abortion doctors—that D&E may result in the delivery of a living fetus beyond the Act's anatomical landmarks in a significant fraction of cases. This is so, respondents say, because doctors cannot predict the amount the cervix will dilate before the abortion procedure. It might dilate to a degree that the fetus will be removed largely intact. To complete the abortion, doctors will commit an overt act that kills the partially delivered fetus. Respondents thus posit that any D&E has the potential to violate the Act, and that a physician will not know beforehand whether the abortion will proceed in a prohibited manner. Brief for Respondent Planned Parenthood et al. in No. 05–1382, p. 38.

This reasoning, however, does not take account of the Act's intent requirements, which preclude liability from attaching to an accidental intact D&E. If a doctor's intent at the outset is to perform a D&E in which the fetus would not be delivered to either of the Act's anatomical landmarks, but the fetus nonetheless is delivered past one of those points, the requisite and prohibited scienter is not present. 18 U. S. C. § 1531(b)(1)(A) (2000 ed., Supp. IV). When a doctor in that situation completes an abortion by performing an intact D&E, the doctor does not violate the Act. It is true that intent to cause a result may sometimes be inferred if a person "knows that that result is practically certain to follow from his conduct." 1 LaFave § 5.2(a), at 341. Yet abortion doctors intending at the outset to perform a standard D&E procedure will not know that a prohibited abortion "is practically certain to follow from" their conduct. *Ibid.* A fetus is only delivered largely intact in a small fraction of the overall number of D&E abortions. *Planned Parenthood*, 320 F. Supp. 2d, at 965.

The evidence also supports a legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance. Doctors, for example, may remove the fetus in a manner that will increase the chances of an intact delivery. See, *e. g.*, App. in No. 05–1382, at 74, 452. And intact D&E is usually described as involving some manner of serial dilation. See, *e. g.*, Dilation and Extraction 110. Doctors who do not seek to obtain this serial dilation perform an intact D&E on far fewer occasions. See, *e. g.*, *Carhart*, 331 F. Supp. 2d, at 857–858 ("In order for intact removal to occur on a regular basis, Dr. Fitzhugh would have to dilate his patients with a second round of laminaria"). This evidence belies any claim that a standard D&E cannot be performed without intending or foreseeing an intact D&E.

Many doctors who testified on behalf of respondents, and who objected to the Act, do not perform an intact D&E by accident. On the contrary, they begin every D&E abortion

with the objective of removing the fetus as intact as possible. See, *e. g.*, *id.*, at 869 ("Since Dr. Chasen believes that the intact D & E is safer than the dismemberment D & E, Dr. Chasen's goal is to perform an intact D & E every time"); see also *id.*, at 873, 886. This does not prove, as respondents suggest, that every D&E might violate the Act and that the Act therefore imposes an undue burden. It demonstrates only that those doctors who intend to perform a D&E that would involve delivery of a living fetus to one of the Act's anatomical landmarks must adjust their conduct to the law by not attempting to deliver the fetus to either of those points. Respondents have not shown that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the vast majority of D&E abortions. The Act, then, cannot be held invalid on its face on these grounds.

IV

Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U. S., at 878 (plurality opinion). The abortions affected by the Act's regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.

A

The Act's purposes are set forth in recitals preceding its operative provisions. A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion

in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." Congressional Findings ¶(14)(N). The Act expresses respect for the dignity of human life.

Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain:

> "Partial-birth abortion . . . confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." *Id.*, ¶(14)(J).

There can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession." *Washington* v. *Glucksberg*, 521 U. S. 702, 731 (1997); see also *Barsky* v. *Board of Regents of Univ. of N. Y.*, 347 U. S. 442, 451 (1954) (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). Under our precedents it is clear the State has a significant role to play in regulating the medical profession.

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had "undervalue[d] the State's interest in potential life." 505 U. S., at 873 (plurality opinion); see also *id.*, at 871. The plurality opinion indicated "[t]he fact that a law which serves a valid purpose, one not designed to strike

at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.*, at 874. This was not an idle assertion. The three premises of *Casey* must coexist. See *id.*, at 846 (opinion of the Court). The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey*'s requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," Congressional Findings ¶ (14)(L), and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide," *id.*, ¶ (14)(G). The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. *Glucksberg* found reasonable the State's "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia." 521 U. S., at 732–735, and n. 23.

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. *Casey*, *supra*, at 852–853 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05–380, pp. 22–24. Severe depression and loss of esteem can follow. See *ibid.*

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. See, *e. g.*, *National Abortion Federation*, 330 F. Supp. 2d, at 466, n. 22 ("Most of [the plaintiffs'] experts acknowledged that they do not describe to their patients what [the D&E and intact D&E] procedures entail in clear and precise terms"); see also *id.*, at 479.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. *Casey*, *supra*, at 873 (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what

she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

It is objected that the standard D&E is in some respects as brutal, if not more, than the intact D&E, so that the legislation accomplishes little. What we have already said, however, shows ample justification for the regulation. Partial-birth abortion, as defined by the Act, differs from a standard D&E because the former occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks. It was reasonable for Congress to think that partial-birth abortion, more than standard D&E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." Congressional Findings ¶ (14)(K). There would be a flaw in this Court's logic, and an irony in its jurisprudence, were we first to conclude a ban on both D&E and intact D&E was overbroad and then to say it is irrational to ban only intact D&E because that does not proscribe both procedures. In sum, we reject the contention that the congressional purpose of the Act was "to place a substantial obstacle in the path of a woman seeking an abortion." 505 U. S., at 878 (plurality opinion).

B

The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where "'necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.'" *Ayotte*, 546 U. S., at 327–328 (quoting *Casey*, *supra*, at 879 (plurality opinion)). The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it "subject[ed] [women] to significant health risks." *Ayotte*, *supra*, at 328; see also *Casey*, *supra*, at 880 (opinion of the Court). In *Ayotte* the parties agreed a health exception to the challenged parental-involvement statute was necessary "to avert serious and often irreversible damage to [a pregnant minor's] health." 546 U. S., at 328. Here, by contrast, whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.

Respondents presented evidence that intact D&E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*. See 530 U. S., at 932. Abortion doctors testified, for example, that intact D&E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp. Respondents also presented evidence that intact D&E was safer both because it reduces the risks that fetal parts will remain in the uterus and because it takes less time to complete. Respondents, in addition, proffered evidence that intact D&E was safer for women with certain medical conditions or women with fetuses that had certain anomalies. See, *e. g.*, *Carhart*, 331 F. Supp. 2d, at 923–929; *National*

Abortion Federation, 330 F. Supp. 2d, at 470–474; *Planned Parenthood*, 320 F. Supp. 2d, at 982–983.

These contentions were contradicted by other doctors who testified in the District Courts and before Congress. They concluded that the alleged health advantages were based on speculation without scientific studies to support them. They considered D&E always to be a safe alternative. See, *e. g.*, *Carhart*, *supra*, at 930–940; *National Abortion Federation*, *supra*, at 470–474; *Planned Parenthood*, 320 F. Supp. 2d, at 983.

There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. See, *e. g.*, *id.*, at 1033 ("[T]here continues to be a division of opinion among highly qualified experts regarding the necessity or safety of intact D & E"); see also *National Abortion Federation*, *supra*, at 482. The three District Courts that considered the Act's constitutionality appeared to be in some disagreement on this central factual question. The District Court for the District of Nebraska concluded "the banned procedure is, sometimes, the safest abortion procedure to preserve the health of women." *Carhart*, *supra*, at 1017. The District Court for the Northern District of California reached a similar conclusion. *Planned Parenthood*, *supra*, at 1002 (finding intact D&E was "under certain circumstances . . . significantly safer than D & E by disarticulation"). The District Court for the Southern District of New York was more skeptical of the purported health benefits of intact D&E. It found the Attorney General's "expert witnesses reasonably and effectively refuted [the plaintiffs'] proffered bases for the opinion that [intact D&E] has safety advantages over other second-trimester abortion procedures." *National Abortion Federation*, 330 F. Supp. 2d, at 479. In addition it did "not believe that many of [the plaintiffs'] purported reasons for why [intact D&E] is medically necessary [were] credible; rather [it found them to be] theoretical or false." *Id.*, at 480. The court nonetheless in-

validated the Act because it determined "a significant body of medical opinion . . . holds that D & E has safety advantages over induction and that [intact D&E] has some safety advantages (however hypothetical and unsubstantiated by scientific evidence) over D & E for some women in some circumstances." *Ibid.*

The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. See *Kansas* v. *Hendricks*, 521 U. S. 346, 360, n. 3 (1997); *Jones* v. *United States*, 463 U. S. 354, 364–365, n. 13, 370 (1983); *Lambert* v. *Yellowley*, 272 U. S. 581, 597 (1926); *Collins* v. *Texas*, 223 U. S. 288, 297–298 (1912); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 30–31 (1905); see also *Stenberg*, *supra*, at 969–972 (KENNEDY, J., dissenting); *Marshall* v. *United States*, 414 U. S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad").

This traditional rule is consistent with *Casey*, which confirms the State's interest in promoting respect for human life at all stages in the pregnancy. Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community. In *Casey* the controlling opinion held an informed-consent requirement in the abortion context was "no different from a requirement that a doctor give certain specific information about any medical procedure." 505 U. S., at 884 (joint opinion). The opinion stated "the doctor-patient relation here is entitled to the same solicitude it receives in other contexts." *Ibid.;* see also *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 518–519 (1989)

(plurality opinion) (criticizing *Roe*'s trimester framework because, *inter alia*, it "left this Court to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States" (internal quotation marks omitted)); *Mazurek* v. *Armstrong*, 520 U. S. 968, 973 (1997) *(per curiam)* (upholding a restriction on the performance of abortions to licensed physicians despite the respondents' contention "all health evidence contradicts the claim that there is any health basis for the law" (internal quotation marks omitted)).

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. See *Hendricks*, *supra*, at 360, n. 3. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D&E. One District Court found D&E to have extremely low rates of medical complications. *Planned Parenthood*, *supra*, at 1000. Another indicated D&E was "generally the safest method of abortion during the second trimester." *Carhart*, 331 F. Supp. 2d, at 1031; see also *National Abortion Federation*, *supra*, at 467–468 (explaining that "[e]xperts testifying for both sides" agreed D&E was safe). In addition the Act's prohibition only applies to the delivery of "a living fetus." 18 U. S. C. § 1531(b)(1)(A) (2000 ed., Supp. IV). If the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.

The instant cases, then, are different from *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 77–79

(1976), in which the Court invalidated a ban on saline amniocentesis, the then-dominant second-trimester abortion method. The Court found the ban in *Danforth* to be "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." *Id.*, at 79. Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.

In reaching the conclusion the Act does not require a health exception we reject certain arguments made by the parties on both sides of these cases. On the one hand, the Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Brief for Petitioner in No. 05–380, at 23. Although we review congressional fact-finding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. See *Crowell* v. *Benson*, 285 U. S. 22, 60 (1932) ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function").

As respondents have noted, and the District Courts recognized, some recitations in the Act are factually incorrect. See *National Abortion Federation*, 330 F. Supp. 2d, at 482, 488–491. Whether or not accurate at the time, some of the important findings have been superseded. Two examples suffice. Congress determined no medical schools provide instruction on the prohibited procedure. Congressional Findings ¶(14)(B). The testimony in the District Courts, however, demonstrated intact D&E is taught at medical schools. *National Abortion Federation*, *supra*, at 490; *Planned Parenthood*, 320 F. Supp. 2d, at 1029. Congress also found there existed a medical consensus that the prohibited procedure

is never medically necessary. Congressional Findings ¶ (1). The evidence presented in the District Courts contradicts that conclusion. See, *e. g.*, *Carhart*, *supra*, at 1012–1015; *National Abortion Federation*, *supra*, at 488–489; *Planned Parenthood*, *supra*, at 1025–1026. Uncritical deference to Congress' factual findings in these cases is inappropriate.

On the other hand, relying on the Court's opinion in *Stenberg*, respondents contend that an abortion regulation must contain a health exception "if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.' " Brief for Respondents in No. 05–380, p. 19 (quoting 530 U. S., at 938); see also Brief for Respondent Planned Parenthood et al. in No. 05–1382, at 12 (same). As illustrated by respondents' arguments and the decisions of the Courts of Appeals, *Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty. *Carhart*, 413 F. 3d, at 796; *Planned Parenthood*, 435 F. 3d, at 1173; see also *National Abortion Federation*, 437 F. 3d, at 296 (Walker, C. J., concurring) (explaining the standard under *Stenberg* "is a virtually insurmountable evidentiary hurdle").

A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve

a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

V

The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained. Tr. of Oral Arg. in No. 05–380, pp. 21–23. This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

The latitude given facial challenges in the First Amendment context is inapplicable here. Broad challenges of this type impose "a heavy burden" upon the parties maintaining the suit. *Rust* v. *Sullivan*, 500 U. S. 173, 183 (1991). What that burden consists of in the specific context of abortion statutes has been a subject of some question. Compare *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid" (internal quotation marks omitted)), with *Casey*, 505 U. S., at 895 (opinion of the Court) (indicating a spousal-notification statute would impose an undue burden "in a large fraction of the cases in which [it] is relevant" and holding the statutory provision facially invalid). See also *Janklow* v. *Planned Parenthood, Sioux Falls Clinic*, 517 U. S. 1174 (1996). We need not resolve that debate.

As the previous sections of this opinion explain, respondents have not demonstrated that the Act would be unconsti-

tutional in a large fraction of relevant cases. *Casey, supra,* at 895 (opinion of the Court). We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *United States* v. *Raines,* 362 U. S. 17, 21 (1960) (internal quotation marks omitted). For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000).

The Act is open to a proper as-applied challenge in a discrete case. Cf. *Wisconsin Right to Life, Inc.* v. *Federal Election Comm'n,* 546 U. S. 410, 412 (2006) *(per curiam).* No as-applied challenge need be brought if the prohibition in the Act threatens a woman's life because the Act already contains a life exception. 18 U. S. C. § 1531(a) (2000 ed., Supp. IV).

* * *

Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. For these reasons the judgments of the Courts of Appeals for the Eighth and Ninth Circuits are reversed.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion because it accurately applies current jurisprudence, including *Planned Parenthood of*

Southeastern Pa. v. *Casey*, 505 U. S. 833 (1992). I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe* v. *Wade*, 410 U. S. 113 (1973), has no basis in the Constitution. See *Casey*, *supra*, at 979 (SCALIA, J., concurring in judgment in part and dissenting in part); *Stenberg* v. *Carhart*, 530 U. S. 914, 980–983 (2000) (THOMAS, J., dissenting). I also note that whether the Partial-Birth Abortion Ban Act of 2003 constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it. See *Cutter* v. *Wilkinson*, 544 U. S. 709, 727, n. 2 (2005) (THOMAS, J., concurring).

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

In *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 844 (1992), the Court declared that "[l]iberty finds no refuge in a jurisprudence of doubt." There was, the Court said, an "imperative" need to dispel doubt as to "the meaning and reach" of the Court's 7-to-2 judgment, rendered nearly two decades earlier in *Roe* v. *Wade*, 410 U. S. 113 (1973). 505 U. S., at 845. Responsive to that need, the Court endeavored to provide secure guidance to "[s]tate and federal courts as well as legislatures throughout the Union," by defining "the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures." *Ibid.*

Taking care to speak plainly, the *Casey* Court restated and reaffirmed *Roe*'s essential holding. 505 U. S., at 845–846. First, the Court addressed the type of abortion regulation permissible prior to fetal viability. It recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.*, at 846. Second, the Court acknowledged "the State's power to restrict abortions *after fetal viability*, if the law

contains exceptions for pregnancies which endanger the woman's life *or health*." *Ibid.* (emphasis added). Third, the Court confirmed that "the State has legitimate interests from the outset of the pregnancy in protecting *the health of the woman* and the life of the fetus that may become a child." *Ibid.* (emphasis added).

In reaffirming *Roe*, the *Casey* Court described the centrality of "the decision whether to bear . . . a child," *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972), to a woman's "dignity and autonomy," her "personhood" and "destiny," her "conception of . . . her place in society." 505 U. S., at 851–852. Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect "the health of the woman." *Id.*, at 846.

Seven years ago, in *Stenberg* v. *Carhart*, 530 U. S. 914 (2000), the Court invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion."[1] With fidelity to the *Roe-Casey* line of precedent, the Court held the Nebraska statute unconstitutional in part because it lacked the requisite protection for the preservation of a woman's health. *Stenberg*, 530 U. S., at 930; cf. *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 327 (2006).

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Ob-

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[1] The term "partial-birth abortion" is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. See *Planned Parenthood Federation of Am.* v. *Ashcroft*, 320 F. Supp. 2d 957, 964 (ND Cal. 2004), aff'd, 435 F. 3d 1163 (CA9 2006). The medical community refers to the procedure as either dilation & extraction (D&X) or intact dilation and evacuation (intact D&E). See, *e. g.*, *ante*, at 136; *Stenberg* v. *Carhart*, 530 U. S. 914, 927 (2000).

stetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.

I dissent from the Court's disposition. Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices.

I

A

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." 505 U. S., at 869 (plurality opinion). See also *id.*, at 852 (majority opinion).[2] "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." *Id.*, at 896–897 (quoting *Hoyt* v. *Florida*, 368 U. S. 57, 62 (1961)). Those views, this Court made clear in *Casey*, "are no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U. S., at 897. Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." *Id.*, at 856. Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives."

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[2] *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 851–852 (1992), described more precisely than did *Roe* v. *Wade*, 410 U. S. 113 (1973), the impact of abortion restrictions on women's liberty. *Roe*'s focus was in considerable measure on "vindicat[ing] the right of the physician to administer medical treatment according to his professional judgment." *Id.*, at 165.

Ibid. Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. See, *e. g.*, Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261 (1992); Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1002–1028 (1984).

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. See, *e. g.*, *Ayotte*, 546 U. S., at 327–328 ("[O]ur precedents hold . . . that a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for the preservation of the life or health of the [woman]." (quoting *Casey*, 505 U. S., at 879 (plurality opinion))); *Stenberg*, 530 U. S., at 930 ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation."). See also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 768–769 (1986) (invalidating a *post*-viability abortion regulation for "fail[ure] to require that [a pregnant woman's] health be the physician's paramount consideration").

We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion. See *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 79 (1976) (holding unconstitutional a ban on a method of abortion that "force[d] a woman . . . to terminate her pregnancy by methods more dangerous to her health"). See also *Stenberg*, 530 U. S., at 931 ("[Our cases] make clear that a risk to . . . women's health is the same whether it happens

to arise from regulating a particular method of abortion, or from barring abortion entirely."). Indeed, we have applied the rule that abortion regulation must safeguard a woman's health to the particular procedure at issue here—intact dilation and evacuation (intact D&E).[3]

In *Stenberg*, we expressly held that a statute banning intact D&E was unconstitutional in part because it lacked a health exception. 530 U. S., at 930, 937. We noted that there existed a "division of medical opinion" about the rela-

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[3] Dilation and evacuation (D&E) is the most frequently used abortion procedure during the second trimester of pregnancy; intact D&E is a variant of the D&E procedure. See *ante*, at 135, 137; *Stenberg*, 530 U. S., at 924, 927; *Planned Parenthood*, 320 F. Supp. 2d, at 966. Second-trimester abortions (*i. e.*, midpregnancy, previability abortions) are, however, relatively uncommon. Between 85 and 90 percent of all abortions performed in the United States take place during the first three months of pregnancy. See *ante*, at 134. See also *Stenberg*, 530 U. S., at 923–927; *National Abortion Federation* v. *Ashcroft*, 330 F. Supp. 2d 436, 464 (SDNY 2004), aff'd *sub nom. National Abortion Federation* v. *Gonzales*, 437 F. 3d 278 (CA2 2006); *Planned Parenthood*, 320 F. Supp. 2d, at 960, and n. 4.

Adolescents and indigent women, research suggests, are more likely than other women to have difficulty obtaining an abortion during the first trimester of pregnancy. Minors may be unaware they are pregnant until relatively late in pregnancy, while poor women's financial constraints are an obstacle to timely receipt of services. See Finer, Frohwirth, Dauphinee, Singh, & Moore, Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States, 74 Contraception 334, 341–343 (2006). See also Drey et al., Risk Factors Associated with Presenting for Abortion in the Second Trimester, 107 Obstetrics & Gynecology 128, 133 (Jan. 2006) (concluding that women who have second-trimester abortions typically discover relatively late that they are pregnant). Severe fetal anomalies and health problems confronting the pregnant woman are also causes of second-trimester abortions; many such conditions cannot be diagnosed or do not develop until the second trimester. See, *e. g.*, Finer, *supra*, at 344; F. Cunningham et al., Williams Obstetrics 242, 290, 328–329 (22d ed. 2005); cf. Schechtman, Gray, Baty, & Rothman, Decision-Making for Termination of Pregnancies with Fetal Anomalies: Analysis of 53,000 Pregnancies, 99 Obstetrics & Gynecology 216, 220–221 (Feb. 2002) (nearly all women carrying fetuses with the most serious central nervous system anomalies chose to abort their pregnancies).

tive safety of intact D&E, *id.*, at 937, but we made clear that as long as "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health," a health exception is required, *id.*, at 938. We explained:

> "The word 'necessary' in *Casey*'s phrase 'necessary, in appropriate medical judgment, for the preservation of the life or health of the [pregnant woman],' cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey*'s words 'appropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion . . . ." *Id.*, at 937 (citation omitted).

Thus, we reasoned, division in medical opinion "at most means uncertainty, a factor that signals the presence of risk, not its absence." *Ibid.* "[A] statute that altogether forbids [intact D&E] . . . consequently must contain a health exception." *Id.*, at 938. See also *id.*, at 948 (O'Connor, J., concurring) ("Th[e] lack of a health exception necessarily renders the statute unconstitutional.").

B

In 2003, a few years after our ruling in *Stenberg,* Congress passed the Partial-Birth Abortion Ban Act—without an exception for women's health. See 18 U. S. C. § 1531(a) (2000 ed., Supp. IV).[4] The congressional findings on which the

[4] The Act's sponsors left no doubt that their intention was to nullify our ruling in *Stenberg,* 530 U. S. 914. See, *e. g.,* 149 Cong. Rec. 5731 (2003) (statement of Sen. Santorum) ("Why are we here? We are here because

Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. *Ante*, at 165–166. See *National Abortion Federation* v. *Ashcroft*, 330 F. Supp. 2d 436, 482 (SDNY 2004) ("Congress did not . . . carefully consider the evidence before arriving at its findings."), aff'd *sub nom. National Abortion Federation* v. *Gonzales*, 437 F. 3d 278 (CA2 2006). See also *Planned Parenthood Federation of Am.* v. *Ashcroft*, 320 F. Supp. 2d 957, 1019 (ND Cal. 2004) ("[N]one of the six physicians who testified before Congress had ever performed an intact D&E. Several did not provide abortion services at all; and one was not even an obgyn. . . . [T]he oral testimony before Congress was not only unbalanced, but intentionally polemic."), aff'd, 435 F. 3d 1163 (CA9 2006); *Carhart* v. *Ashcroft*, 331 F. Supp. 2d 805, 1011 (Neb. 2004) ("Congress arbitrarily relied upon the opinions of doctors who claimed to have no (or very little) recent and relevant experience with surgical abortions, and disregarded the views of doctors who had significant and relevant experience with those procedures."), aff'd, 413 F. 3d 791 (CA8 2005).

Many of the Act's recitations are incorrect. See *ante*, at 165–166. For example, Congress determined that no medical schools provide instruction on intact D&E. § 2(14)(B), 117 Stat. 1204, notes following 18 U. S. C. § 1531 (2000 ed., Supp. IV), p. 769, ¶ (14)(B) (Congressional Findings). But in fact, numerous leading medical schools teach the procedure. See *Planned Parenthood*, 320 F. Supp. 2d, at 1029; *National Abortion Federation*, 330 F. Supp. 2d, at 479. See also Brief for ACOG as *Amicus Curiae* 18 ("Among the schools that now teach the intact variant are Columbia, Cornell, Yale, New York University, Northwestern, University of Pitts-

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the Supreme Court defended the indefensible. . . . We have responded to the Supreme Court."). See also 148 Cong. Rec. 14273 (2002) (statement of Rep. Linder) (rejecting proposition that Congress has "no right to legislate a ban on this horrible practice because the Supreme Court says [it] cannot").

burgh, University of Pennsylvania, University of Rochester, and University of Chicago.").

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. Congressional Findings ¶ (1). But the evidence "very clearly demonstrate[d] the opposite." *Planned Parenthood*, 320 F. Supp. 2d, at 1025. See also *Carhart*, 331 F. Supp. 2d, at 1008–1009 ("[T]here was no evident consensus in the record that Congress compiled. There was, however, a substantial body of medical opinion presented to Congress in opposition. If anything . . . the congressional record establishes that there was a 'consensus' in favor of the banned procedure."); *National Abortion Federation*, 330 F. Supp. 2d, at 488 ("The congressional record itself undermines [Congress'] finding" that there is a medical consensus that intact D&E "is never medically necessary and should be prohibited." (internal quotation marks omitted)).

Similarly, Congress found that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." Congressional Findings (14)(B), in notes following 18 U. S. C. § 1531 (2000 ed., Supp. IV), p. 769. But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D&E carries meaningful safety advantages over other methods. See *National Abortion Federation*, 330 F. Supp. 2d, at 490. See also *Planned Parenthood*, 320 F. Supp. 2d, at 1021 ("Congress in its findings . . . chose to disregard the statements by ACOG and other medical organizations."). No comparable medical groups supported the ban. In fact, "all of the government's own witnesses disagreed with many of the specific congressional findings." *Id.*, at 1024.

C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of "much more extensive medical and scientific evidence . . . concerning the safety and necessity of intact D&Es." *Planned Parenthood*, 320 F. Supp. 2d, at 1014; cf. *National Abortion Federation*, 330 F. Supp. 2d, at 482 (District Court "heard more evidence during its trial than Congress heard over the span of eight years.").

During the District Court trials, "numerous" "extraordinarily accomplished" and "very experienced" medical experts explained that, in certain circumstances and for certain women, intact D&E is safer than alternative procedures and necessary to protect women's health. *Carhart*, 331 F. Supp. 2d, at 1024–1027; see *Planned Parenthood*, 320 F. Supp. 2d, at 1001 ("[A]ll of the doctors who actually perform intact D&Es concluded that in their opinion and clinical judgment, intact D&Es remain the safest option for certain individual women under certain individual health circumstances, and are significantly safer for these women than other abortion techniques, and are thus medically necessary."); cf. *ante*, at 161 ("Respondents presented evidence that intact D&E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*.").

According to the expert testimony plaintiffs introduced, the safety advantages of intact D&E are marked for women with certain medical conditions, for example, uterine scarring, bleeding disorders, heart disease, or compromised immune systems. See *Carhart*, 331 F. Supp. 2d, at 924–929, 1026–1027; *National Abortion Federation*, 330 F. Supp. 2d, at 472–473; *Planned Parenthood*, 320 F. Supp. 2d, at 992–994, 1001. Further, plaintiffs' experts testified that intact D&E is significantly safer for women with certain pregnancy-related conditions, such as placenta previa and accreta, and for women carrying fetuses with certain abnormalities, such

as severe hydrocephalus. See *Carhart*, 331 F. Supp. 2d, at 924, 1026–1027; *National Abortion Federation*, 330 F. Supp. 2d, at 473–474; *Planned Parenthood*, 320 F. Supp. 2d, at 992–994, 1001. See also *Stenberg*, 530 U. S., at 929; Brief for ACOG as *Amicus Curiae* 2, 13–16.

Intact D&E, plaintiffs' experts explained, provides safety benefits over D&E by dismemberment for several reasons: *First*, intact D&E minimizes the number of times a physician must insert instruments through the cervix and into the uterus, and thereby reduces the risk of trauma to, and perforation of, the cervix and uterus—the most serious complication associated with nonintact D&E. See *Carhart*, 331 F. Supp. 2d, at 923–928, 1025; *National Abortion Federation*, 330 F. Supp. 2d, at 471; *Planned Parenthood*, 320 F. Supp. 2d, at 982, 1001. *Second*, removing the fetus intact, instead of dismembering it *in utero*, decreases the likelihood that fetal tissue will be retained in the uterus, a condition that can cause infection, hemorrhage, and infertility. See *Carhart*, 331 F. Supp. 2d, at 923–928, 1025–1026; *National Abortion Federation*, 330 F. Supp. 2d, at 472; *Planned Parenthood*, 320 F. Supp. 2d, at 1001. *Third*, intact D&E diminishes the chances of exposing the patient's tissues to sharp bony fragments sometimes resulting from dismemberment of the fetus. See *Carhart*, 331 F. Supp. 2d, at 923–928, 1026; *National Abortion Federation*, 330 F. Supp. 2d, at 471; *Planned Parenthood*, 320 F. Supp. 2d, at 1001. *Fourth*, intact D&E takes less operating time than D&E by dismemberment, and thus may reduce bleeding, the risk of infection, and complications relating to anesthesia. See *Carhart*, 331 F. Supp. 2d, at 923–928, 1026; *National Abortion Federation*, 330 F. Supp. 2d, at 472; *Planned Parenthood*, 320 F. Supp. 2d, at 1001. See also *Stenberg*, 530 U. S., at 928–929, 932; Brief for ACOG as *Amicus Curiae* 2, 11–13.

Based on thoroughgoing review of the trial evidence and the congressional record, each of the District Courts to consider the issue rejected Congress' findings as unreasonable-

and not supported by the evidence. See *Carhart*, 331 F. Supp. 2d, at 1008–1027; *National Abortion Federation*, 330 F. Supp. 2d, at 482, 488–491; *Planned Parenthood*, 320 F. Supp. 2d, at 1032. The trial courts concluded, in contrast to Congress' findings, that "significant medical authority supports the proposition that in some circumstances, [intact D&E] is the safest procedure." *Id.*, at 1033 (quoting *Stenberg*, 530 U. S., at 932); accord *Carhart*, 331 F. Supp. 2d, at 1008–1009, 1017–1018; *National Abortion Federation*, 330 F. Supp. 2d, at 480–482;[5] cf. *Stenberg*, 530 U. S., at 932 ("[T]he record shows that significant medical authority supports the proposition that in some circumstances, [intact D&E] would be the safest procedure.").

The District Courts' findings merit this Court's respect. See, *e. g.*, Fed. Rule Civ. Proc. 52(a); *Salve Regina College* v. *Russell*, 499 U. S. 225, 233 (1991). Today's opinion supplies no reason to reject those findings. Nevertheless, despite the District Courts' appraisal of the weight of the evidence, and in undisguised conflict with *Stenberg*, the Court asserts that the Partial-Birth Abortion Ban Act can survive "when . . . medical uncertainty persists." *Ante*, at 163. This assertion is bewildering. Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty, see *supra*, at 172–173; it gives short shrift to the records before us, carefully canvassed by the District Courts.

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[5] Even the District Court for the Southern District of New York, which was more skeptical of the health benefits of intact D&E, see *ante*, at 162, recognized: "[T]he Government's own experts disagreed with almost all of Congress's factual findings"; a "significant body of medical opinion" holds that intact D&E has safety advantages over nonintact D&E; "[p]rofessional medical associations have also expressed their view that [intact D&E] may be the safest procedure for some women"; and "[t]he evidence indicates that the same disagreement among experts found by the Supreme Court in *Stenberg* existed throughout the time that Congress was considering the legislation, despite Congress's findings to the contrary." *National Abortion Federation*, 330 F. Supp. 2d, at 480–482.

Those records indicate that "the majority of highly-qualified experts on the subject believe intact D&E to be the safest, most appropriate procedure under certain circumstances." *Planned Parenthood*, 320 F. Supp. 2d, at 1034. See *supra*, at 177.

The Court acknowledges some of this evidence, *ante*, at 161, but insists that, because some witnesses disagreed with ACOG and other experts' assessment of risk, the Act can stand. *Ante*, at 162, 166–167. In this insistence, the Court brushes under the rug the District Courts' well-supported findings that the physicians who testified that intact D&E is never necessary to preserve the health of a woman had slim authority for their opinions. They had no training for, or personal experience with, the intact D&E procedure, and many performed abortions only on rare occasions. See *Planned Parenthood*, 320 F. Supp. 2d, at 980; *Carhart*, 331 F. Supp. 2d, at 1025; cf. *National Abortion Federation*, 330 F. Supp. 2d, at 462–464. Even indulging the assumption that the Government witnesses were equally qualified to evaluate the relative risks of abortion procedures, their testimony could not erase the "significant medical authority support[ing] the proposition that in some circumstances, [intact D&E] would be the safest procedure." *Stenberg*, 530 U. S., at 932.[6]

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[6] The majority contends that "[i]f the intact D&E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure." *Ante*, at 164. But a "significant body of medical opinion believes that inducing fetal death by injection is almost always inappropriate to the preservation of the health of women undergoing abortion because it poses tangible risk and provides no benefit to the woman." *Carhart* v. *Ashcroft*, 331 F. Supp. 2d 805, 1028 (Neb. 2004) (internal quotation marks omitted), aff'd, 413 F. 3d 791 (CA8 2005). In some circumstances, injections are "absolutely [medically] contraindicated." 331 F. Supp. 2d, at 1027. See also *id.*, at 907–912; *National Abortion Federation*, 330 F. Supp. 2d, at 474–475; *Planned Parenthood*, 320 F. Supp. 2d,

II

A

The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D&E *sans* any exception to safeguard a woman's health. Today's ruling, the Court declares, advances "a premise central to [*Casey*'s] conclusion"—*i. e.*, the Government's "legitimate and substantial interest in preserving and promoting fetal life." *Ante*, at 145. See also *ante*, at 146 ("[W]e must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."). But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. See *Stenberg*, 530 U. S., at 930. And surely the statute was not designed to protect the lives or health of pregnant women. *Id.*, at 951 (GINSBURG, J., concurring); cf. *Casey*, 505 U. S., at 846 (recognizing along with the State's legitimate interest in the life of the fetus, its "legitimate interes[t] . . . in protecting the *health of the woman*" (emphasis added)). In short, the Court upholds a law that, while doing nothing to "preserv[e] . . . fetal life," *ante*, at 145, bars a woman from choosing intact D&E although her doctor "reasonably believes [that procedure] will best protect [her]," *Stenberg*, 530 U. S., at 946 (STEVENS, J., concurring).

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D&E procedure. See *ante*, at 164. But why not, one might ask.

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at 995–997. The Court also identifies medical induction of labor as an alternative. See *ante*, at 140. That procedure, however, requires a hospital stay, *ibid.*, rendering it inaccessible to patients who lack financial resources, and it too is considered less safe for many women, and impermissible for others. See *Carhart*, 331 F. Supp. 2d, at 940–949, 1017; *National Abortion Federation*, 330 F. Supp. 2d, at 468–470; *Planned Parenthood*, 320 F. Supp. 2d, at 961, n. 5, 992–994, 1000–1002.

Nonintact D&E could equally be characterized as "brutal," *ante*, at 157, involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs, *ante*, at 135. "[T]he notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational." *Stenberg*, 530 U. S., at 946–947 (STEVENS, J., concurring).

Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. *Ante*, at 158. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, *ante*, at 136, 164, or a fetus delivered through medical induction or cesarean, *ante*, at 140. Yet, the availability of those procedures—along with D&E by dismemberment—the Court says, saves the ban on intact D&E from a declaration of unconstitutionality. *Ante*, at 164–165. Never mind that the procedures deemed acceptable might put a woman's health at greater risk. See *supra*, at 180, and n. 6; cf. *ante*, at 136, 161–162.

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. See *ante*, at 158 ("Congress could . . . conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."). Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. See, *e. g.*, *Casey*, 505 U. S., at 850 ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."); *Lawrence* v. *Texas*, 539 U. S. 558, 571 (2003) (Though "[f]or many persons [objections to homosexual conduct] are not trivial

concerns but profound and deep convictions accepted as ethical and moral principles," the power of the State may not be used "to enforce these views on the whole society through operation of the criminal law." (citing *Casey*, 505 U. S., at 850)).

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem." *Ante*, at 159.[7] Because of women's

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[7] The Court is surely correct that, for most women, abortion is a painfully difficult decision. See *ante*, at 159. But "neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have . . . ." Cohen, Abortion and Mental Health: Myths and Realities, 9 Guttmacher Policy Rev. 8 (2006); see generally Bazelon, Is There a Post-Abortion Syndrome? N. Y. Times Magazine, Jan. 21, 2007, p. 40. See also, *e. g.*, American Psychological Association, APA Briefing Paper on the Impact of Abortion (2005) (rejecting theory of a postabortion syndrome and stating that "[a]ccess to legal abortion to terminate an unwanted pregnancy is vital to safeguard both the physical and mental health of women"); Schmiege & Russo, Depression and Unwanted First Pregnancy: Longitudinal Cohort Study, 331 British Medical J. 1303 (2005) (finding no credible evidence that choosing to terminate an unwanted first pregnancy contributes to risk of subsequent depression); Gilchrist, Hannaford, Frank, & Kay, Termination of Pregnancy and Psychiatric Morbidity, 167 British J. of Psychiatry 243, 247–248 (1995) (finding, in a cohort of more than 13,000 women, that the rate of psychiatric disorder was no higher among women who terminated pregnancy than among those who carried pregnancy to term); Stotland, The Myth of the Abortion Trauma Syndrome, 268 JAMA 2078, 2079 (1992) ("Scientific studies indicate that legal abortion results in fewer deleterious sequelae for women compared with other possible outcomes of unwanted pregnancy. There is no evidence of an abortion trauma syndrome."); American Psychological Association, Council Policy Manual: (N)(I)(3), Public Interest (1989) (declaring assertions about widespread severe negative psychological effects of abortion to be "without fact"). But see Cougle, Reardon, & Coleman, Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth, 19 J. Anxiety Disorders

fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D&E procedure. *Ante*, at 159.[8] The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Cf. *Casey*, 505 U. S., at 873 (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning."). Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.[9]

137, 142 (2005) (advancing theory of a postabortion syndrome but acknowledging that "no causal relationship between pregnancy outcome and anxiety could be determined" from study); Reardon et al., Psychiatric Admissions of Low-Income Women Following Abortion and Childbirth, 168 Canadian Medical Assn. J. 1253, 1255–1256 (May 13, 2003) (concluding that psychiatric admission rates were higher for women who had an abortion compared with women who delivered); cf. Major, Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research, 168 Canadian Medical Assn. J. 1257, 1258 (May 13, 2003) (critiquing Reardon study for failing to control for a host of differences between women in the delivery and abortion samples).

[8] Notwithstanding the "bond of love" women often have with their children, see *ante*, at 159, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity. See *Casey*, 505 U. S., at 891 ("[O]n an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault."). See also Glander, Moore, Michielutte, & Parsons, The Prevalence of Domestic Violence Among Women Seeking Abortion, 91 Obstetrics & Gynecology 1002 (1998); Holmes, Resnick, Kilpatrick, & Best, Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women, 175 Am. J. Obstetrics & Gynecology 320 (Aug. 1996).

[9] Eliminating or reducing women's reproductive choices is manifestly *not* a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies. See, *e. g.*, World Health Organization, Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000, pp. 3, 16 (4th ed. 2004) ("Restrictive legislation is associated with a high incidence of unsafe abortion" worldwide;

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Compare, *e. g.*, *Muller* v. *Oregon*, 208 U. S. 412, 422–423 (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal functio[n]"); *Bradwell* v. *State*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother."), with *United States* v. *Virginia*, 518 U. S. 515, 533, 542, n. 12 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have . . . impeded . . . women's progress toward full citizenship stature throughout our Nation's history"); *Califano* v. *Goldfarb*, 430 U. S. 199, 207 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Though today's majority may regard women's feelings on the matter as "self-evident," *ante*, at 159, this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society," *Casey*, 505 U. S., at 852. See also

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unsafe abortion represents 13 percent of all "maternal" deaths); Henshaw, Unintended Pregnancy and Abortion: A Public Health Perspective, in A Clinician's Guide to Medical and Surgical Abortion 11, 19 (M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield eds. 1999) ("Before legalization, large numbers of women in the United States died from unsafe abortions."); H. Boonstra, R. Gold, C. Richards, & L. Finer, Abortion in Women's Lives 13, and fig. 2.2 (2006) ("as late as 1965, illegal abortion still accounted for an estimated . . . 17% of all officially reported pregnancy-related deaths"; "[d]eaths from abortion declined dramatically after legalization").

id., at 877 (plurality opinion) ("[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."); *supra*, at 171–172.

B

In cases on a "woman's liberty to determine whether to [continue] her pregnancy," this Court has identified viability as a critical consideration. See *Casey*, 505 U. S., at 869–870 (plurality opinion). "[T]here is no line [more workable] than viability," the Court explained in *Casey*, for viability is "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. . . . In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.*, at 870.

Today, the Court blurs that line, maintaining that "[t]he Act [legitimately] appl[ies] both previability and postviability because . . . a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Ante*, at 147. Instead of drawing the line at viability, the Court refers to Congress' purpose to differentiate "abortion and infanticide" based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed. See *ante*, at 158 (quoting Congressional Findings ¶ (14)(G)).

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." See *supra*, at 182; cf. *ante*, at 147 (noting that "[i]n this litigation" the Attorney General "does not dispute that the Act would impose an undue burden if it covered standard D&E"). The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abor-

tions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." *Ante*, at 144, 154, 155, 161, 163. A fetus is described as an "unborn child," and as a "baby," *ante*, at 134, 138; second-trimester, previability abortions are referred to as "late-term," *ante*, at 156; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience," *ante*, at 134, 166. Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act, *ante*, at 158, 166. And, most troubling, *Casey*'s principles, confirming the continuing vitality of "the essential holding of *Roe*," are merely "assume[d]" for the moment, *ante*, at 146, 161, rather than "retained" or "reaffirmed," *Casey*, 505 U. S., at 846.

III

A

The Court further confuses our jurisprudence when it declares that "facial attacks" are not permissible in "these circumstances," *i. e.*, where medical uncertainty exists. *Ante*, at 167; see *ibid.* ("In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."). This holding is perplexing given that, in materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face. *Stenberg*, 530 U. S., at 930; see *id.*, at 937 (in facial challenge, law held unconstitutional because "significant body of medical opinion believes [the] procedure may bring with it greater safety for *some patients*" (emphasis added)). See also *Sabri* v. *United States*, 541 U. S. 600, 609–610 (2004) (identifying abortion as one setting in which we have recognized the validity of facial challenges); Fallon, Making Sense of Overbreadth, 100 Yale L. J. 853, 859, n. 29 (1991) ("[V]irtually all of the abortion cases reaching the Supreme Court since Roe v. Wade, 410 U. S. 113 (1973), have involved facial attacks on state statutes, and the Court, whether accepting

or rejecting the challenges on the merits, has typically accepted this framing of the question presented."). Accord Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1356 (2000); Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 271–276 (1994).

Without attempting to distinguish *Stenberg* and earlier decisions, the majority asserts that the Act survives review because respondents have not shown that the ban on intact D&E would be unconstitutional "in a large fraction of [relevant] cases." *Ante*, at 167 (citing *Casey*, 505 U. S., at 895). But *Casey* makes clear that, in determining whether any restriction poses an undue burden on a "large fraction" of women, the relevant class is *not* "all women," nor "all pregnant women," nor even all women "seeking abortions." *Ibid.* Rather, a provision restricting access to abortion "must be judged by reference to those [women] for whom it is an actual rather than an irrelevant restriction." *Ibid.* Thus the absence of a health exception burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require an intact D&E because other procedures would place their health at risk.[10] Cf. *Stenberg*, 530 U. S., at 934 (accepting the "relative rarity" of medically indicated intact D&Es as true but not "highly relevant"—for "the health exception question is whether protecting women's health requires an exception for those infrequent occasions"); *Ayotte*, 546 U. S., at 328 (facial challenge entertained where "[i]n some very small percentage of cases . . . women . . . need immediate abortions to avert serious and often irreversible damage to their health"). It makes no sense to conclude that this facial challenge fails because respondents have not shown that a health exception is nec-

[10] There is, in short, no fraction because the numerator and denominator are the same: The health exception reaches only those cases where a woman's health is at risk. Perhaps for this reason, in mandating safeguards for women's health, we have never before invoked the "large fraction" test.

essary for a large fraction of second-trimester abortions, including those for which a health exception is unnecessary: The very purpose of a health *exception* is to protect women in *exceptional* cases.

B

If there is anything at all redemptive to be said of today's opinion, it is that the Court is not willing to foreclose entirely a constitutional challenge to the Act. "The Act is open," the Court states, "to a proper as-applied challenge in a discrete case." *Ante*, at 168; see *ante*, at 167 ("The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained."). But the Court offers no clue on what a "proper" lawsuit might look like. See *ante*, at 167–168. Nor does the Court explain why the injunctions ordered by the District Courts should not remain in place, trimmed only to exclude instances in which another procedure would safeguard a woman's health at least equally well. Surely the Court cannot mean that no suit may be brought until a woman's health is immediately jeopardized by the ban on intact D&E. A woman "suffer[ing] from medical complications," *ante*, at 168, needs access to the medical procedure at once and cannot wait for the judicial process to unfold. See *Ayotte*, 546 U. S., at 328.

The Court appears, then, to contemplate another lawsuit by the initiators of the instant actions. In such a second round, the Court suggests, the challengers could succeed upon demonstrating that "in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." *Ante*, at 167. One may anticipate that such a preenforcement challenge will be mounted swiftly, to ward off serious, sometimes irremediable harm, to women whose health would be endangered by the intact D&E prohibition.

The Court envisions that in an as-applied challenge, "the nature of the medical risk can be better quantified and balanced." *Ibid.* But it should not escape notice that the rec-

ord already includes hundreds and hundreds of pages of testimony identifying "discrete and well-defined instances" in which recourse to an intact D&E would better protect the health of women with particular conditions. See *supra*, at 177–179. Record evidence also documents that medical exigencies, unpredictable in advance, may indicate to a well-trained doctor that intact D&E is the safest procedure. See *ibid.* In light of this evidence, our unanimous decision just one year ago in *Ayotte* counsels against reversal. See 546 U. S., at 331 (remanding for reconsideration of the remedy for the absence of a health exception, suggesting that an injunction prohibiting unconstitutional applications might suffice).

The Court's allowance only of an "as-applied challenge in a discrete case," *ante*, at 168—jeopardizes women's health and places doctors in an untenable position. Even if courts were able to carve out exceptions through piecemeal litigation for "discrete and well-defined instances," *ante*, at 167, women whose circumstances have not been anticipated by prior litigation could well be left unprotected. In treating those women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients. The Court is thus gravely mistaken to conclude that narrow as-applied challenges are "the proper manner to protect the health of the woman." Cf. *ibid.*

IV

As the Court wrote in *Casey*, "overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." 505 U. S., at 865. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition,

indispensable." *Id.*, at 854. See also *id.*, at 867 ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

Though today's opinion does not go so far as to discard *Roe* or *Casey*, the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of "the rule of law" and the "principles of *stare decisis.*" Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is necessary to protect a woman's health. See *supra*, at 174–175, n. 4. Although Congress' findings could not withstand the crucible of trial, the Court defers to the legislative override of our Constitution-based rulings. See *supra*, at 174–176. A decision so at odds with our jurisprudence should not have staying power.

In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives. See *supra*, at 171, n. 2; *supra*, at 174–175, n. 4. When "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue." *Stenberg*, 530 U. S., at 952 (GINSBURG, J., concurring) (quoting *Hope Clinic* v. *Ryan*, 195 F. 3d 857, 881 (CA7 1999) (Posner, C. J., dissenting)).

* * *

For the reasons stated, I dissent from the Court's disposition and would affirm the judgments before us for review.

Syllabus

JAMES *v.* UNITED STATES

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

No. 05–9264. Argued November 7, 2006—Decided April 18, 2007

Pleading guilty to possessing a firearm after a felony conviction in violation of 18 U. S. C. § 922(g)(1), petitioner James admitted to the three prior felony convictions listed in his federal indictment, including a Florida state-law conviction for attempted burglary. The Government argued at sentencing that those convictions subjected James to the 15-year mandatory minimum prison term provided by the Armed Career Criminal Act (ACCA), § 924(e), for an armed defendant who has three prior "violent felony" convictions. James objected that his attempted burglary conviction was not for a "violent felony." The District Court held that it was, and the Eleventh Circuit affirmed.

Held: Attempted burglary, as defined by Florida law, is a "violent felony" under ACCA. Pp. 196–214.

(a) James' argument that ACCA's text and structure categorically exclude attempt offenses is rejected. Pp. 196–201.

(i) Section 924(e)(2)(B) defines "violent felony" as "any crime punishable by imprisonment for [more than] one year . . . that . . . (i) has as an element the use, attempted use, or threatened use of physical force against . . . another . . . or . . . (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Florida law defined "burglary" when James was convicted as "entering or remaining in a structure . . . with the intent to commit an offense therein," Fla. Stat. § 810.02(1), and declared: "A person who . . . does any act toward the commission of [an offense] but fails in the perpetration or . . . execution thereof, commits the offense of criminal attempt," § 777.04(1). The attempted burglary conviction at issue was punishable by imprisonment exceeding one year. The parties agree that it does not qualify as a "violent felony" under clause (i) of § 924(e)(2)(B) or as one of the specific crimes enumerated in clause (ii). For example, it is not "burglary" because it does not meet the definition of "generic burglary" found in *Taylor* v. *United States*, 495 U. S. 575, 598: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." Thus, the question here is whether attempted burglary, as defined by Florida, falls within clause (ii)'s residual provision

for crimes that "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another." Pp. 196–197.

(ii) ACCA's text does not exclude attempt offenses from the residual provision's scope. James' claim that clause (i)'s express inclusion of attempts, combined with clause (ii)'s failure to mention them, demonstrates an intent to categorically exclude them from clause (ii) would unduly narrow the residual provision, which does not suggest any intent to exclude attempts that otherwise meet the statutory criteria. See, *e. g.*, *Chevron U. S. A. Inc.* v. *Echazabal*, 536 U. S. 73, 80. James also argues to no avail that, under the *ejusdem generis* canon, the residual provision must be read to extend only to completed offenses because the specifically enumerated offenses—burglary, arson, extortion, and explosives crimes—all have that common attribute. Rather, the most relevant common attribute of the enumerated offenses is that, while not technically crimes against the person, they nevertheless create significant risks of bodily injury to others, or of violent confrontation that could lead to such injury. See, *e. g.*, *Taylor*, *supra*, at 597. The inclusion of the residual provision indicates Congress' intent that the preceding enumerated offenses not be an exhaustive list. Pp. 198–200.

(iii) Nor does the legislative history exclude attempt offenses from ACCA's residual provision. Whatever weight might ordinarily be given the House's 1984 rejection of language that would have included attempted robbery and attempted burglary as ACCA predicate offenses, it is not probative here because the 1984 action was not Congress' last word on the subject. Since clause (ii)'s residual provision was added to ACCA in 1988, Congress' 1984 rejection of the language including attempt offenses is not dispositive. Pp. 200–201.

(b) Attempted burglary, as defined by Florida law, "involves conduct that presents a serious potential risk of physical injury to another" under the residual provision. Under the "categorical approach" it has used for other ACCA offenses, the Court considers whether the offense's elements are of the type that would justify its inclusion within the residual provision, without inquiring into the particular offender's specific conduct. See, *e. g.*, *Taylor*, *supra*, at 602. Pp. 201–212.

(i) On its face, Florida's attempt statute requires only that a defendant take "any act toward the commission" of burglary. But because the Florida Supreme Court's *Jones* decision considerably narrowed the application of this broad language in the context of attempted burglary, requiring an overt act directed toward entering or remaining in a structure, merely preparatory activity posing no real danger of harm to others, *e. g.*, acquiring burglars' tools or casing a structure, is not enough. Pp. 202–203.

Syllabus

(ii) Overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein, "presents a serious potential risk of physical injury to another" under the residual provision of clause (ii). The clause's enumerated offenses provide one baseline from which to measure whether similar conduct satisfies the quoted language. Here, the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses, completed burglary. See *Taylor*, *supra*, at 600, n. 9. The main risk of burglary arises not from the simple physical act of wrongfully entering another's property, but from the possibility that an innocent person might confront the burglar during the crime. Attempted burglary poses the same kind of risk. Indeed, that risk may be even greater than the risk posed by a typical completed burglary. Many completed burglaries do not involve confrontations, but attempted burglaries often do. Every Court of Appeals that has construed an attempted burglary law similar to Florida's has held that attempted burglary qualifies as a "violent felony." Support is also found in the U. S. Sentencing Commission's determination that a predicate "crime of violence" for purposes of the Sentencing Guidelines' career offender enhancement "include[s] . . . attempting to commit [an] offens[e]." See Guidelines Manual § 4B1.2, comment., n. 1. Pp. 203–207.

(iii) Neither ACCA nor *Taylor* supports James' argument that, under the categorical approach, attempted burglary cannot be treated as an ACCA predicate offense unless *all* cases present a risk of physical injury to others. ACCA does not require such certainty, and James' argument misapprehends *Taylor*, under which the proper inquiry is not whether every factual offense conceivably covered by a statute necessarily presents a serious potential risk of injury, but whether the conduct encompassed by the offense's elements, in the ordinary case, presents such a risk. Pp. 207–209.

(c) James' argument that the scope of Florida's underlying burglary statute itself precludes treating attempted burglary as an ACCA predicate offense is not persuasive. Although the state-law definition of "[d]welling" to include the "curtilage thereof," Fla. Stat. § 810.011(2), takes Florida's underlying burglary offense outside *Taylor*'s "generic burglary" definition, 495 U. S., at 598, that is not dispositive because the Government does not argue that James' conviction constitutes "burglary" under ACCA. Rather, it relies on the residual provision, which—as *Taylor* recognized—can cover conduct outside the strict definition of, but nevertheless similar to, generic burglary. *Id.*, at 600, n. 9. The Florida Supreme Court's *Hamilton* decision construed curtilage narrowly, requiring some form of enclosure for the area surround-

ing a residence. A burglar illegally attempting to enter the curtilage around a dwelling creates much the same risk of confrontation as one attempting to enter the structure itself. Pp. 212–213.

(d) Because the Court is here engaging in statutory interpretation, not judicial factfinding, James' argument that construing attempted burglary as a violent felony raises Sixth Amendment issues under *Apprendi* v. *New Jersey*, 530 U. S. 466, lacks merit. Pp. 213–214.

430 F. 3d 1150, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 214. THOMAS, J., filed a dissenting opinion, *post*, p. 231.

Craig L. Crawford argued the cause for petitioner. With him on the briefs were *R. Fletcher Peacock* and *Jeffrey T. Green*.

Jonathan L. Marcus argued the cause for the United States. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Fisher*, *Deputy Solicitor General Dreeben*, and *Daniel S. Goodman*.

JUSTICE ALITO delivered the opinion of the Court.

The Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e)(1) (2000 ed., Supp. IV), provides that a defendant convicted of possession of a firearm by a convicted felon, in violation of § 922(g), is subject to a mandatory sentence of 15 years of imprisonment if the defendant has three prior convictions "for a violent felony or a serious drug offense."

The question before us is whether attempted burglary, as defined by Florida law, is a "violent felony" under ACCA. We hold that it is, and we therefore affirm the judgment of the Court of Appeals.

I

Petitioner Alphonso James pleaded guilty in federal court to one count of possessing a firearm after being convicted of a felony, in violation of § 922(g)(1). In his guilty plea, James

admitted to the three prior felony convictions listed in his federal indictment. These included a conviction in Florida state court for attempted burglary of a dwelling, in violation of Fla. Stat. §§ 810.02 and 777.04 (1993).[1]

At sentencing, the Government argued that James was subject to ACCA's 15-year mandatory minimum term because of his three prior convictions. James objected, arguing that his attempted burglary conviction did not qualify as a "violent felony" under 18 U. S. C. § 924(e). The District Court held that attempted burglary is a violent felony, and the Court of Appeals for the Eleventh Circuit affirmed that holding, 430 F. 3d 1150, 1157 (2005). We granted certiorari, 547 U. S. 1191 (2006).

II

A

ACCA's 15-year mandatory minimum applies "[i]n the case of a person who violates section 922(g) of this title [the felon in possession of a firearm provision] and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." § 924(e)(1) (2000 ed., Supp. IV). ACCA defines a "violent felony" as

> "any crime punishable by imprisonment for a term exceeding one year . . . that—
>
> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B).

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[1] James' two other prior convictions—for possession of cocaine and trafficking in cocaine—were determined to be "serious drug offense[s]" under ACCA, see 18 U. S. C. § 924(e)(1) (2000 ed., Supp. IV), and are not at issue here.

Florida defined the crime of burglary at the time of James' conviction as follows: "'Burglary' means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." Fla. Stat. § 810.02(1). Florida's criminal attempt statute provided: "A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt." § 777.04(1). The attempted burglary conviction at issue here was punishable by imprisonment for a term exceeding one year.

The parties agree that attempted burglary does not qualify as a "violent felony" under clause (i) of ACCA's definition because it does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U. S. C. § 924(e)(2)(B)(i). Nor does it qualify as one of the specific crimes enumerated in clause (ii). Attempted burglary is not arson or extortion. It does not involve the use of explosives. And it is not "burglary" because it does not meet the definition of burglary under ACCA that this Court set forth in *Taylor* v. *United States*, 495 U. S. 575, 598 (1990): "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." See Fla. Stat. § 777.04(1) (crime of attempt under Florida law requires as an element that the defendant "fai[l] in the perpetration or [be] intercepted or prevented in the execution" of the underlying offense).

The question before the Court, then, is whether attempted burglary, as defined by Florida law, falls within ACCA's residual provision for crimes that "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii).

B

Before determining whether the elements of attempted burglary under Florida law qualify under ACCA's residual provision, we first consider James' argument that the statute's text and structure categorically exclude attempt offenses from the scope of the residual provision. We conclude that nothing in the plain language of clause (ii), when read together with the rest of the statute, prohibits attempt offenses from qualifying as ACCA predicates when they involve conduct that presents a serious potential risk of physical injury to another.

James first argues that the residual provision of clause (ii) must be read in conjunction with clause (i), which expressly includes in its definition of "violent felony" offenses that have "as an element the . . . *attempted use* . . . of physical force against the person of another." § 924(e)(2)(B)(i) (emphasis added). James thus concludes that Congress' express inclusion of attempt offenses in clause (i), combined with its failure to mention attempts in clause (ii), demonstrates an intent to categorically exclude attempt offenses from the latter provision.

We are not persuaded. James' reading would unduly narrow clause (ii)'s residual provision, the language of which does not suggest any intent to exclude attempt offenses that otherwise meet the statutory criteria. Clause (i), in contrast, lacks a broad residual provision, thus making it necessary to specify exactly what types of offenses—including attempt offenses—are covered by its language. In short, "the expansive phrasing of" clause (ii) "points directly away from the sort of exclusive specification" that James would read into it. *Chevron U. S. A. Inc.* v. *Echazabal*, 536 U. S. 73, 80 (2002); see also *United States* v. *Davis*, 16 F. 3d 212, 217 (CA7) (rejecting argument that "had Congress wished to include attempted burglary as a § 924(e) predicate offense, it would have done so expressly" as "untenable in light of the very existence of the 'otherwise' clause, which Congress

plainly included to serve as a catch-all provision"), cert. denied, 513 U. S. 945 (1994).

James next invokes the canon of *ejusdem generis*—that when a general phrase follows a list of specifics, it should be read to include only things of the same type as those specifically enumerated. He argues that the "common attribute" of the offenses specifically enumerated in clause (ii)—burglary, arson, extortion, and crimes involving the use of explosives—is that they are all completed offenses. The residual provision, he contends, should similarly be read to extend only to completed offenses.

This argument is unavailing. As an initial matter, the premise on which it depends—that clause (ii)'s specifically enumerated crimes are limited to completed offenses—is false. An unsuccessful attempt to blow up a government building, for example, would qualify as a specifically enumerated predicate offense because it would "involv[e] [the] use of explosives." See, *e. g.*, § 844(f)(1) (2000 ed., Supp. IV) (making it a crime to "maliciously damag[e] or destro[y], or *attemp[t]* to damage or destroy, by means of fire or an explosive," certain property used in or affecting interstate commerce (emphasis added)).

In any event, the most relevant common attribute of the enumerated offenses of burglary, arson, extortion, and explosives use is not "completion." Rather, it is that all of these offenses, while not technically crimes against the person, nevertheless create significant risks of bodily injury or confrontation that might result in bodily injury. As we noted in *Taylor:*

> "Congress thought that certain general categories of property crimes—namely burglary, arson, extortion, and the use of explosives—so often presented a risk of injury to persons, or were so often committed by career criminals, that they should be included in the enhancement statute even though, considered solely in terms of their statutory elements, they do not necessarily involve the

> use or threat of force against a person." 495 U. S., at 597.

See also *id.*, at 588 (noting that Congress singled out burglary because it "often creates the possibility of a violent confrontation"); *United States* v. *Adams*, 51 Fed. Appx. 507, 508 (CA6 2002) (arson presents "a serious potential risk of physical injury to another" because "[n]ot only might the targeted building be occupied," but also "the fire could harm firefighters and onlookers and could spread to occupied structures"); H. R. Rep. No. 99–849, p. 3 (1986) (purpose of clause (ii) was to "add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person").

Congress' inclusion of a broad residual provision in clause (ii) indicates that it did not intend the preceding enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others and therefore merit status as a § 924(e) predicate offense. Nothing in the statutory language supports the view that Congress intended to limit this category solely to completed offenses.

C

James also relies on ACCA's legislative history to buttress his argument that clause (ii) categorically excludes attempt offenses. In the deliberations leading up to ACCA's adoption in 1984, the House rejected a version of the statute that would have provided enhanced penalties for use of a firearm by persons with two prior convictions for "any robbery or burglary offense, *or a conspiracy or attempt to commit such an offense.*" S. 52, 98th Cong., 2d Sess., § 2 (1984) (emphasis added). The bill that ultimately became law omitted any reference to attempts, and simply defined "violent felony" to include "robbery or burglary, or both." Armed Career Criminal Act of 1984, § 1802, 98 Stat. 2185, repealed in 1986 by Pub. L. 99–308, § 104(b), 100 Stat. 459. James argues

that Congress' rejection of this explicit "attempt" language in 1984 evidenced an intent to exclude attempted burglary as a predicate offense.

Whatever weight this legislative history might ordinarily have, we do not find it probative here, because the 1984 enactment on which James relies was not Congress' last word on the subject. In 1986, Congress amended ACCA for the purpose of "'expanding' the range of predicate offenses." *Taylor*, *supra*, at 584. The 1986 amendments added the more expansive language that is at issue in this case—including clause (ii)'s language defining as violent felonies offenses that are "burglary, arson, or extortion, involv[e] use of explosives, or otherwise involv[e] conduct that presents a serious potential risk of physical injury to another." Career Criminals Amendment Act of 1986, § 1402(b), 100 Stat. 3207–40, codified at 18 U. S. C. § 924(e)(2)(B)(ii). This language is substantially broader than the 1984 provision that it amended. Because both the Government and the Court of Appeals relied on the broader language of the 1986 amendments—specifically, the residual provision—as the textual basis for including attempted burglary within the law's scope, Congress' rejection of express language including attempt offenses in the 1984 provision is not dispositive. Congress did not consider, much less reject, any such language when it enacted the 1986 amendments. What it did consider, and ultimately adopted, was a broadly worded residual clause that does not by its terms exclude attempt offenses, and whose reach is broad enough to encompass at least some such offenses.

III

Having concluded that neither the statutory text nor the legislative history discloses any congressional intent to categorically exclude attempt offenses from the scope of § 924(e)(2)(B)(ii)'s residual provision, we next ask whether attempted burglary, as defined by Florida law, is an offense that "involves conduct that presents a serious potential risk

of physical injury to another." In answering this question, we employ the "'categorical approach'" that this Court has taken with respect to other offenses under ACCA. Under this approach, we "'look only to the fact of conviction and the statutory definition of the prior offense,'" and do not generally consider the "particular facts disclosed by the record of conviction." *Shepard* v. *United States*, 544 U. S. 13, 17 (2005) (quoting *Taylor*, 495 U. S., at 602). That is, we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.

A

We begin by examining what constitutes attempted burglary under Florida law. On its face, Florida's attempt statute requires only that a defendant take "any act toward the commission" of burglary. Fla. Stat. § 777.04(1). James contends that this broad statutory language sweeps in merely preparatory activity that poses no real danger of harm to others—for example, acquiring burglars' tools or casing a structure while planning a burglary.

But while the statutory language is broad, the Florida Supreme Court has considerably narrowed its application in the context of attempted burglary, requiring an "overt act directed toward entering or remaining in a structure or conveyance." *Jones* v. *State*, 608 So. 2d 797, 799 (1992). Mere preparation is not enough. See *ibid.*[2] Florida's lower

[2] The *Jones* court distinguished its earlier holding in *Thomas* v. *State*, 531 So. 2d 708 (1988). There, the State Supreme Court upheld a conviction under a state statute criminalizing the possession of burglary tools, Fla. Stat. § 810.06, where the defendant had been arrested after jumping a fence and trying to run away from police while carrying a screwdriver. *Jones* held that "the overt act necessary to convict of the burglary tool crime is not the same as the overt act required to prove attempted burglary," and noted that the conduct charged in *Thomas* would not be sufficient to prove attempted burglary because the defendant in that case com-

courts appear to have consistently applied this heightened standard. See, *e. g.*, *Richardson* v. *State*, 922 So. 2d 331, 334 (App. 2006); *Davis* v. *State*, 741 So. 2d 1213, 1214 (App. 1999).

The pivotal question, then, is whether overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein, is "conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii).

B

In answering this question, we look to the statutory language for guidance. The specific offenses enumerated in clause (ii) provide one baseline from which to measure whether other similar conduct "otherwise . . . presents a serious potential risk of physical injury." In this case, we can ask whether the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses—here, completed burglary. See *Taylor*, *supra*, at 600, n. 9 ("The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii)").

The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate. That is, the risk arises not from the completion of the burglary, but from the possibility that an innocent person might appear while the crime is in progress.

Attempted burglary poses the same kind of risk. Interrupting an intruder at the doorstep while the would-be burglar is attempting a break-in creates a risk of violent

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mitted no overt act directed toward entering or remaining in a building. 608 So. 2d, at 799.

confrontation comparable to that posed by finding him inside the structure itself. As one court has explained:

> "In all of these cases the risk of injury arises, not from the completion of the break-in, but rather from the possibility that some innocent party may appear on the scene while the break-in is occurring. This is just as likely to happen before the defendant succeeds in breaking in as after. Indeed, the possibility may be at its peak while the defendant is still outside trying to break in, as that is when he is likely to be making noise and exposed to the public view. . . . [T]here is a serious risk of confrontation while a perpetrator is attempting to enter the building." *United States* v. *Payne*, 966 F. 2d 4, 8 (CA1 1992).

Indeed, the risk posed by an attempted burglary that can serve as the basis for an ACCA enhancement may be even greater than that posed by a typical completed burglary. All burglaries begin as attempted burglaries. But ACCA only concerns that subset of attempted burglaries where the offender has been apprehended, prosecuted, and convicted. This will typically occur when the attempt is thwarted by some outside intervenor—be it a property owner or law enforcement officer. Many completed burglaries do not involve such confrontations. But attempted burglaries often do; indeed, it is often just such outside intervention that prevents the attempt from ripening into completion.

Concluding that attempted burglary presents a risk that is comparable to the risk posed by the completed offense, every Court of Appeals that has construed an attempted burglary law similar in scope to Florida's has held that the offense qualifies as a "violent felony" under clause (ii)'s residual provision.[3] The only cases holding to the contrary

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[3] See *United States* v. *Lane*, 909 F. 2d 895, 903 (CA6 1990) (construing Ohio attempted burglary law: " 'The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person

involved attempt laws that could be satisfied by preparatory conduct that does not pose the same risk of violent confrontation and physical harm posed by an attempt to enter a structure illegally.[4] Given that Florida law, as interpreted

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who comes to investigate.' . . . The fact that [the defendant] did not complete the burglary offense does not diminish the serious potential risk of injury to another arising from an attempted burglary"); *United States* v. *Fish*, 928 F. 2d 185, 188 (CA6 1991) (Michigan attempted burglary law); *United States* v. *Payne*, 966 F. 2d 4, 8 (CA1 1992) (Massachusetts attempted-breaking-and-entering law); *United States* v. *O'Brien*, 972 F. 2d 47, 52 (CA3 1992) (Massachusetts attempted-breaking-and-entering law: "[T]he possibility of a violent confrontation with an innocent party is always present when a perpetrator attempts to enter a building illegally, even when the crime is not actually completed"); *United States* v. *Solomon*, 998 F. 2d 587, 590 (CA8 1993) (Minnesota attempted burglary law); *United States* v. *Custis*, 988 F. 2d 1355, 1364 (CA4 1993) (Maryland attempted-breaking-and-entering law: "In most cases, attempted breaking and entering will be charged when a defendant has been interrupted in the course of illegally entering a home. Interrupting an intruder while breaking into a home involves a risk of confrontation nearly as great as finding him inside the house"); *United States* v. *Thomas*, 2 F. 3d 79, 80 (CA4 1993) (New Jersey attempted burglary law); *United States* v. *Andrello*, 9 F. 3d 247, 249–250 (CA2 1993) *(per curiam)* (New York attempted burglary law); *United States* v. *Davis*, 16 F. 3d 212, 218 (CA7 1994) (Illinois attempted burglary law); *United States* v. *Bureau*, 52 F. 3d 584, 593 (CA6 1995) (Tennessee attempted burglary law: "[T]he propensity for a violent confrontation and the serious potential risk of injury inherent in burglary is not diminished where the burglar is not successful in completing the crime. The potential risk of injury is especially great where the burglar succeeds in entry or near-entry despite not fully completing the crime"); *United States* v. *Demint*, 74 F. 3d 876, 878 (CA8 1996) *(per curiam)* (Florida attempted burglary law); *United States* v. *Collins*, 150 F. 3d 668, 671 (CA7 1998) (Wisconsin attempted burglary law: "We have already recognized the inherently dangerous situation and possibility of confrontation that is created when a burglar attempts to illegally enter a building or residence. . . . Wisconsin's requirement that a defendant must attempt to enter a building before he can be found guilty of attempted burglary is sufficient to mandate that attempted burglary in Wisconsin constitutes a violent felony").

[4] In *United States* v. *Strahl*, 958 F. 2d 980, 986 (1992), the Tenth Circuit held that attempted burglary under Utah law did not qualify as an ACCA predicate offense because a conviction could be "based upon conduct such

by that State's highest court, requires an overt act directed toward the entry of a structure, we need not consider whether the more attenuated conduct encompassed by such laws presents a potential risk of serious injury under ACCA.

The United States Sentencing Commission has come to a similar conclusion with regard to the Sentencing Guidelines' career offender enhancement, whose definition of a predicate "crime of violence" closely tracks ACCA's definition of "violent felony." See United States Sentencing Commission, Guidelines Manual §4B1.2(a)(2) (Nov. 2006) (USSG). The Commission has determined that "crime[s] of violence" for the purpose of the Guidelines enhancement "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." §4B1.2, comment., n. 1. This judgment was based on the Commission's review of empirical sentencing data and presumably reflects an assessment that attempt crimes often pose a similar risk of injury as completed offenses. As then-Chief Judge Breyer explained, "[t]he Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between" a particular offense and "the likelihood of accompanying violence." *United States* v. *Doe*, 960 F. 2d 221, 225 (CA1 1992); see also USSG §1A3 (Nov. 1987), re-

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as making a duplicate key, 'casing' the targeted building, obtaining floor plans of a structure, or possessing burglary tools." *United States* v. *Permenter*, 969 F. 2d 911, 913 (CA10 1992), similarly excluded a conviction under an Oklahoma statute that could be satisfied by the defendant's "merely 'casing' the targeted structure." In *United States* v. *Martinez*, 954 F. 2d 1050, 1054 (1992), the Fifth Circuit came to the same conclusion as to a Texas attempted burglary statute that did not require that the defendant be "in the vicinity of any building." And in *United States* v. *Weekley*, 24 F. 3d 1125, 1127 (CA9 1994), the Court of Appeals concluded that ACCA was not satisfied by a conviction under a Washington law that covered "relatively unrisky" conduct such as casing the neighborhood, selecting a house to burgle, and possessing neckties to be used in the burglary.

printed in § 1A1.1 comment. (Nov. 2006) (describing empirical basis of Commission's formulation of Guidelines); *United States* v. *Chambers*, 473 F. 3d 724 (CA7 2007) (noting the usefulness of empirical analysis from the Commission in determining whether an unenumerated crime poses a risk of violence). While we are not bound by the Sentencing Commission's conclusion, we view it as further evidence that a crime like attempted burglary poses a risk of violence similar to that presented by the completed offense.

C

James responds that it is not enough that attempted burglary "'generally'" or in "'most cases'" will create a risk of physical injury to others. Brief for Petitioner 32. Citing the categorical approach we employed in *Taylor*, he argues that we cannot treat attempted burglary as an ACCA predicate offense unless *all* cases present such a risk. James' approach is supported by neither the statute's text nor this Court's holding in *Taylor*.

One could, of course, imagine a situation in which attempted burglary might not pose a realistic risk of confrontation or injury to anyone—for example, a break-in of an unoccupied structure located far off the beaten path and away from any potential intervenors. But ACCA does not require metaphysical certainty. Rather, § 924(e)(2)(B)(ii)'s residual provision speaks in terms of a "potential risk." These are inherently probabilistic concepts.[5] Indeed, the combination of the two terms suggests that Congress intended to encompass possibilities even more contingent or remote than a sim-

[5] See, *e. g.*, Black's Law Dictionary 1188 (7th ed. 1999) (potential: "[c]apable of coming into being; possible"); *id.*, at 1328 (risk: "[t]he chance of injury, damage, or loss; danger or hazard"); Webster's Third New International Dictionary 1775 (1971) (potential: "existing in possibility: having the capacity or a strong possibility for development into a state of actuality"); *id.*, at 1961 (risk: "the possibility of loss, injury, disadvantage, or destruction").

ple "risk," much less a certainty. While there may be some attempted burglaries that do not present a serious potential risk of physical injury to another, the same is true of completed burglaries—which are explicitly covered by the statutory language and provide a baseline against which to measure the degree of risk that a nonenumerated offense must "otherwise" present in order to qualify.

James' argument also misapprehends *Taylor*'s categorical approach. We do not view that approach as requiring that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony. Cf. *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 193 (2007) ("[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime").

Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another. One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury—for example, an attempted murder where the gun, unbeknownst to the shooter, had no bullets, see *United States* v. *Thomas*, 361 F. 3d 653, 659 (CADC 2004). Or, to take an example from the offenses specifically enumerated in § 924(e)(2)(B)(ii), one could imagine an extortion scheme where an anonymous blackmailer threatens to release embarrassing personal information about the victim unless he is mailed regular payments. In both cases, the risk of physical injury to another approaches zero. But that does not mean that the offenses of attempted murder or extortion are categorically nonviolent.

As long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of § 924(e)(2)(B)(ii)'s residual provision. Attempted burglary under Florida law—as construed in *Jones* to require an overt act directed toward entry of a structure—satisfies this test.

D

JUSTICE SCALIA's dissent criticizes our approach on the ground that it does not provide sufficient guidance for lower courts required to decide whether unenumerated offenses other than attempted burglary qualify as violent felonies under ACCA. But the dissent's alternative approach has more serious disadvantages. Among other things, that approach unnecessarily decides an important question that the parties have not briefed (the meaning of the term "extortion" in § 924(e)(2)(B)(ii)), decides that question in a way that is hardly free from doubt, and fails to provide an interpretation of the residual provision that furnishes clear guidance for future cases.

The dissent interprets the residual provision to require at least as much risk as the least dangerous enumerated offense. But the ordinary meaning of the language of the residual clause does not impose such a requirement. What the clause demands is "a serious potential risk of physical injury to another." While it may be reasonable to infer that the risks presented by the enumerated offenses involve a risk of this magnitude, it does not follow that an offense that presents a lesser risk necessarily fails to qualify. Nothing in the language of § 924(e)(2)(B)(ii) rules out the possibility that an offense may present "a serious risk of physical injury to another" without presenting as great a risk as any of the enumerated offenses.

Moreover, even if an unenumerated offense could not qualify without presenting at least as much risk as the least risky

of the enumerated offenses, it would not be necessary to identify the least risky of those offenses in order to decide this case. Rather, it would be sufficient to establish simply that the unenumerated offense presented at least as much risk as one of the enumerated offenses. Thus, JUSTICE SCALIA's interpretation of the meaning of the term "extortion" is unnecessary—and inadvisable. The parties have not briefed this issue, and the proposed interpretation is hardly beyond question. Instead of interpreting the meaning of the term "extortion" in accordance with its meaning at common law or in modern federal and state statutes, see *Taylor*, 495 U. S., at 598, it is suggested that we adopt an interpretation that seems to be entirely novel and that greatly reduces the reach of ACCA.

The stated reason for tackling this question is to provide guidance for the lower courts in future cases—surely a worthy objective. But in practical terms, the proposed interpretation of the residual clause would not make it much easier for the lower courts to decide whether other unenumerated offenses qualify. Without hard statistics—and no such statistics have been called to our attention—how is a lower court to determine whether the risk posed by generic burglary is greater or less than the risk posed by an entirely unrelated unenumerated offense—say, escape from prison? [6]

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[6] While ACCA requires judges to make sometimes difficult evaluations of the risks posed by different offenses, we are not persuaded by JUSTICE SCALIA's suggestion—which was not pressed by James or his *amici*—that the residual provision is unconstitutionally vague. See *post*, at 230. The statutory requirement that an unenumerated crime "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another" is not so indefinite as to prevent an ordinary person from understanding what conduct it prohibits. See *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983). Similar formulations have been used in other federal and state criminal statutes. See, *e. g.*, 18 U. S. C. § 2332b(a)(1)(B) (defining "terrorist act" as conduct that, among other things, "creates a substantial

In the end, JUSTICE SCALIA's analysis of this case turns on the same question as ours—*i. e.*, the comparative risks presented by burglary and attempted burglary. The risk of physical injury in both cases occurs when there is a confrontation between the criminal and another person, whether an occupant of the structure, a law enforcement officer or security guard, or someone else. It is argued that when such an encounter occurs during a consummated burglary (*i. e.*, after entry), the risk is greater than it is when the encounter occurs during an attempted burglary (*i. e.*, before entry is effected), and that may be true. But this argument fails to come to grips with the fact that such encounters may occur much more frequently during attempted burglaries because it is precisely due to such encounters that many planned burglaries do not progress beyond the attempt stage. JUSTICE SCALIA dismisses the danger involved when encounters occur during attempted burglaries, stating that such encounters are "likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." *Post*, at 226. But there are many other possible scenarios. An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner angered by the sort of conduct recited in James' presentence report—throwing a hammer through a window—may give chase, and a violent encounter may ensue. For these rea-

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risk of serious bodily injury to any other person"); Ariz. Rev. Stat. Ann. § 13–2508(A)(2) (West 2001) (offense of resisting arrest requires preventing an officer from effectuating an arrest by "any . . . means creating a substantial risk of causing physical injury to the peace officer or another"); Cal. Health & Safety Code Ann. § 42400.3(b) (West 2006) (criminalizing air pollution that "results in any unreasonable risk of great bodily injury to, or death of, any person"); N. Y. Penal Law Ann. § 490.47 (West Supp. 2007) ("[c]riminal use of a chemical weapon or biological weapon" requires "a grave risk of death or serious physical injury to another person not a participant in the crime").

sons and the reasons discussed above, we are convinced that the offense of attempted burglary, as defined by Florida law, qualifies under ACCA's residual clause.

IV

Although the question on which this Court granted certiorari focused on the attempt prong of Florida's attempted burglary law, James also argues that the scope of the State's underlying burglary statute itself precludes treating attempted burglary as a violent felony for ACCA purposes. Specifically, he argues that Florida's burglary statute differs from "generic" burglary as defined in *Taylor*, *supra*, at 598, because it defines a "'[d]welling'" to include not only the structure itself, but also the "curtilage thereof,"[7] Fla. Stat. § 810.011(2).

We agree that the inclusion of curtilage takes Florida's underlying offense of burglary outside the definition of "generic burglary" set forth in *Taylor*, which requires an unlawful entry into, or remaining in, "a *building or other structure.*" 495 U. S., at 598 (emphasis added). But that conclusion is not dispositive, because the Government does not argue that James' conviction for attempted burglary constitutes "burglary" under § 924(e)(2)(B)(ii). Rather, it relies on the residual provision of that clause, which—as the Court has recognized—can cover conduct that is outside the strict definition of, but nevertheless similar to, generic burglary. *Id.*, at 600, n. 9.

Is the risk posed by an attempted entry of the curtilage comparable to that posed by the attempted entry of a structure (which, as we concluded above, is sufficient to qualify

[7] Burglary under Florida law differs from "generic" burglary in a second respect: It extends not just to entries of structures, but also of "conveyance[s]." Fla. Stat. § 810.02(1). But because James (in accordance with what appears to be the general practice in Florida) was specifically charged with and convicted of "attempted burglary *of a dwelling*," we need not examine this point further.

under the residual provision)? We must again turn to state law in order to answer this question.

The Florida Supreme Court has construed curtilage narrowly, requiring "some form of an enclosure in order for the area surrounding a residence to be considered part of the 'curtilage' as referred to in the burglary statute." *State* v. *Hamilton*, 660 So. 2d 1038, 1044 (1995) (holding that a yard surrounded by trees was not "curtilage"); see also *United States* v. *Matthews*, 466 F. 3d 1271, 1274 (CA11 2006) ("Florida case law construes curtilage narrowly, to include only an enclosed area surrounding a structure"). Given this narrow definition, we do not believe that the inclusion of curtilage so mitigates the risk presented by attempted burglary as to take the offense outside the scope of clause (ii)'s residual provision.

A typical reason for enclosing the curtilage adjacent to a structure is to keep out unwanted visitors—especially those with criminal motives. And a burglar who illegally attempts to enter the enclosed area surrounding a dwelling creates much the same risk of physical confrontation with a property owner, law enforcement official, or other third party as does one who attempts to enter the structure itself. In light of Florida's narrow definition of curtilage, attempted burglary of the curtilage requires both physical proximity to the structure and an overt act directed toward breaching the enclosure. Such an attempt "presents a serious potential risk that violence will ensue and someone will be injured." *Id.*, at 1275 (holding that burglary of the curtilage is a violent felony under ACCA's residual provision).

V

Finally, James argues that construing attempted burglary as a violent felony raises Sixth Amendment issues under *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and its progeny because it is based on "judicial fact finding" about the risk presented by "the acts that underlie 'most' convictions for

attempted burglary." Brief for Petitioner 34, 35. This argument is without merit.

In determining whether attempted burglary under Florida law qualifies as a violent felony under § 924(e)(2)(B)(ii), the Court is engaging in statutory interpretation, not judicial factfinding. Indeed, by applying *Taylor*'s categorical approach, we have avoided any inquiry into the underlying facts of James' particular offense, and have looked solely to the elements of attempted burglary as defined by Florida law. Such analysis raises no Sixth Amendment issue.[8]

* * *

For these reasons, the judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.

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

I disagree with the Court's basic approach in this case, and must therefore lay out my own.

I

As the Court acknowledges, *ante,* at 197, the only way attempted burglary can qualify as a violent felony under the Armed Career Criminal Act (ACCA) is by falling within the "residual provision" of clause (ii)—that is, if it is a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. § 924(e)(2)(B)(ii). This was the basis for the Eleventh Circuit's decision ("We . . . hold that an attempt to commit bur-

[8] To the extent that James contends that the simple fact of his prior conviction was required to be found by a jury, his position is baseless. James admitted the fact of his prior conviction in his guilty plea, and in any case, we have held that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes. *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998).

glary . . . presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a 'violent felony,' " 430 F. 3d 1150, 1157 (2005)), and it is the center of the parties' dispute before this Court.

The problem with the Court's approach to determining which crimes fit within the residual provision is that it is almost entirely ad hoc. *This* crime, the Court says, *does* "involv[e] conduct that presents a serious potential risk of physical injury to another." That gets this case off our docket, sure enough. But it utterly fails to do what this Court is supposed to do: provide guidance concrete enough to ensure that the ACCA residual provision will be applied with an acceptable degree of consistency by the hundreds of district judges who impose sentences every day. The one guideline the Court does suggest is that the sentencer should compare the unenumerated offense at issue with the "closest analog" among the four offenses that are set forth (burglary, arson, extortion, and crimes involving the use of explosives), and should include the unenumerated offense within ACCA if the risk it poses is "comparable." *Ante*, at 203. The principal attraction of this test, I suspect, is that it makes it relatively easy to decide the present case (though, as I shall subsequently discuss, I think the Court reaches the wrong conclusion as to whether attempted burglary poses a comparable risk). Assuming that "comparable" means "about the same," the Court's test does provide some guidance where the most closely analogous offense is clear (as here) *and* the risk is comparable. But what if, as will very often be the case, it is not at all obvious which of the four enumerated offenses is the closest analog—or if (to tell the truth) none of them is analogous at all? Is, for example, driving under the influence of alcohol more analogous to burglary, arson, extortion, or a crime involving use of explosives? And if an analog *is* identified, what is to be done if the offense at issue does *not* present a comparable risk? The Court declines to say, but it seems inconceivable that it means the offense to

be *excluded* from ACCA for that reason. For example, it does not comport with any conceivable congressional intent to disqualify an unenumerated crime that is most analogous to arson and presents nowhere near the risk of injury posed by arson, but presents a far *greater* risk of injury than burglary, which Congress has explicitly included. Thus, for what is probably the vast majority of cases, today's opinion provides no guidance whatever, leaving the lower courts to their own devices in deciding, crime-by-crime, which conviction "involves conduct that presents a serious potential risk of physical injury to another." It will take decades, and dozens of grants of certiorari, to allocate all the Nation's crimes to one or the other side of this entirely reasonable and entirely indeterminate line. Compare *ante*, at 204 (concluding that attempted burglary poses sufficient risk), with *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004) (concluding that driving under the influence of alcohol does not pose a "substantial risk that physical force against the person or property of another may be used," 18 U. S. C. § 16(b)).

Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of ACCA's residual provision, yet its boundaries are ill defined. If we are not going to deny effect to this statute as being impermissibly vague, see Part III, *infra*, we have the responsibility to derive from the text rules of application that will provide notice of what is covered and prevent arbitrary or discriminatory sentencing. See *Kolender* v. *Lawson*, 461 U. S. 352, 357 (1983). Offenders should be on notice that a particular course of conduct will result in a mandatory minimum prison term of 15 years. The Court prefers to keep them guessing.

II

The residual provision of clause (ii) of ACCA's definition of violent felony—the clause that sweeps within ACCA's ambit any crime that "otherwise involves conduct that presents a

serious potential risk of physical injury to another"—is, to put it mildly, not a model of clarity. I do not pretend to have an all-encompassing solution that provides for crystal-clear application of the statute in all contexts. But we can do much better than today's opinion with what Congress has given us.

A

The Eleventh Circuit properly sought to resolve this case by employing the "categorical approach" of looking only to the statutory elements of attempted burglary. See 430 F. 3d, at 1154, 1156–1157. This "generally prohibits the later court from delving into particular facts disclosed by the record of conviction, thus leaving the court normally to 'look only to the fact of conviction and the statutory definition of the prior offense.'" *Shepard* v. *United States*, 544 U. S. 13, 17 (2005) (quoting *Taylor* v. *United States*, 495 U. S. 575, 602 (1990)). As the Court does, *ante*, at 202, I would also begin with this approach.

The Government would have us provide some certainty—at least enough to decide the present case—by holding that the attempt to commit a crime of violence should be treated the same as the completed crime. It points out that various federal laws, and many state laws, punish attempt with the same sanction as the completed crime. See Brief for United States 18–20. This would be persuasive if punishment were meted out solely on the basis of the risk of physical injury that a crime presents. It seems to me, however, that similar punishment does not necessarily imply similar risk; it more likely represents a judgment that the two crimes display a similar degree of depravity deserving of punishment or needful of deterrence. A person guilty of attempted burglary may not have placed anyone at physical risk, but he was just as *willing* to do so as the successful burglar. It seems to me impossible to say that equivalence of punishment suggests equivalence of imposed risk. I therefore look elsewhere for some clarification of the statutory text.

First to invite analysis is the word Congress placed at the forefront of the residual provision: "otherwise." When used as an adverb (as it is in § 924(e)(2)(B)(ii), modifying the verb "involves"), "otherwise" is defined as "[i]n a different manner" or "in another way." Webster's New International Dictionary 1729 (2d ed. 1954). Thus, the most natural reading of the statute is that committing one of the enumerated crimes (burglary, arson, extortion, or crimes involving explosives) is *one way* to commit a crime "involv[ing] conduct that presents a serious potential risk of physical injury to another"; and that *other ways* of committing a crime of that character similarly constitute "violent felon[ies]." In other words, the enumerated crimes are examples of what Congress had in mind under the residual provision, and the residual provision should be interpreted with those examples in mind. This commonsense principle of construction is sometimes referred to as the canon of *ejusdem generis:* "[W]hen a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." Black's Law Dictionary 535 (7th ed. 1999) (Black's); see, *e. g.*, *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384–385 (2003). In this case, the application of that principle suggests that what the residual provision means by the general phrase "conduct that presents a serious potential risk of physical injury to another" is conduct that resembles, insofar as the degree of such risk is concerned, the previously enumerated crimes.[1]

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[1] The Court imprecisely identifies the common characteristic of the enumerated offenses, and therefore the defining characteristic of the residual provision, as crimes that "create significant risks of bodily injury or *confrontation* that might result in bodily injury." *Ante*, at 199 (emphasis added). Of course, adding the word "confrontation" is a convenient way of shoehorning attempted burglary into the ambit of the residual provision, but it is an invention entirely divorced from the statutory text.

In another context, I might conclude that any degree of risk that is merely *similar*, even if *slightly less*, would qualify. Obviously, such an interpretation would leave a good deal of ambiguity on the downside: How low on the risk scale can one go before the risk becomes *too* dissimilar from the enumerated crimes? Since the text sets forth no criterion, courts might vary dramatically in their answer. Cf. *Leocal*, 543 U. S. 1 (reversing the Eleventh Circuit's determination that driving under the influence of alcohol qualifies as a crime of violence under 18 U. S. C. § 16). Where it is reasonably avoidable, such indeterminateness is unacceptable in the context of criminal sanctions. The rule of lenity, grounded in part on the need to give " 'fair warning' " of what is encompassed by a criminal statute, *United States* v. *Bass*, 404 U. S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931)), demands that we give this text the more narrow reading of which it is susceptible. The requirement that the degree of risk be similar to that for the enumerated crimes means that it be no lesser than the risk posed by the least dangerous of those enumerated crimes.

B

I would turn, then, to the next logical question: Which of the four enumerated crimes—burglary, arson, extortion, or crimes involving use of explosives—poses the least "serious potential risk of physical injury to another"? The two that involve use of fire or explosives cannot possibly qualify. Thus, the question I must address is whether burglary or extortion poses a lesser risk. To do so, I must first define those crimes.

In *Taylor*, we defined "burglary" as used in the very provision of ACCA at issue here. We first determined that " 'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes." 495 U. S., at 592. We considered but rejected the common-law definition, finding that "the contem-

porary understanding of 'burglary' has diverged a long way from its common-law roots." *Id.*, at 593. Ultimately, we concluded that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." *Id.*, at 598. To determine that sense, we looked for guidance to 2 W. LaFave & A. Scott, Substantive Criminal Law (1986), and the American Law Institute's Model Penal Code (1980). We defined "burglary" as "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, *supra*, at 599.

In defining "extortion" for purposes of ACCA, I would follow the same approach. "At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office." *Scheidler* v. *National Organization for Women, Inc.*, 537 U. S. 393, 402 (2003) (quoting 4 W. Blackstone, Commentaries on the Laws of England 141 (1769), and citing 3 R. Anderson, Wharton's Criminal Law and Procedure § 1393, pp. 790–791 (1957)); see also 3 W. LaFave, Substantive Criminal Law § 20.4 (2d ed. 2003). As with burglary, however, modern conceptions of extortion have gone well beyond the common-law understanding. In the Hobbs Act, for example, Congress "explicitly 'expanded the common-law definition of extortion to include acts by private individuals.'" *Scheidler*, *supra*, at 402 (quoting *Evans* v. *United States*, 504 U. S. 255, 261 (1992)). And whereas the Hobbs Act retained the common-law requirement that something of value actually be *acquired* by the extortionist, *Scheidler*, *supra*, at 404–405, the majority of state statutes require only "that the defendant make a threat with *intent* thereby to acquire the victim's property," 3 LaFave, Substantive Criminal Law

§ 20.4(a)(1), at 199 (emphasis added). Further, under most state statutes, the category of qualifying threats has expanded dramatically, to include threats to: "kill the victim in the future," "cause economic harm," "'bring about or continue a strike, boycott or other collective unofficial action,'" "unlawfully detain," "accuse the victim of a crime," "expose some disgraceful defect or secret of the victim which, when known, would subject him to public ridicule or disgrace," and "impair one's credit or business repute." *Id.*, § 20.4(a)(4), at 200, 201.

The Model Penal Code's definition of "Theft by Extortion" reflects this expansive modern notion of the crime:

> "A person is guilty of theft [by extortion] if he purposely obtains property of another by threatening to:
>
> "(1) inflict bodily injury on anyone or commit any other criminal offense; or
>
> "(2) accuse anyone of a criminal offense; or
>
> "(3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
>
> "(4) take or withhold action as an official, or cause an official to take or withhold action; or
>
> "(5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or
>
> "(6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
>
> "(7) inflict any other harm which would not benefit the actor." § 223.4, at 201.

Other federal statutes, including the Hobbs Act, 18 U. S. C. § 1951, the Travel Act, § 1952 (2000 ed. and Supp. IV), and the Racketeer Influenced and Corrupt Organizations Act

(RICO), § 1961 *et seq.*, use a similarly broad conception of extortion. See *United States* v. *Nardello*, 393 U. S. 286 (1969) (Travel Act); *Scheidler*, *supra* (Hobbs Act and RICO).[2]

The word "extortion" in ACCA's definition of "violent felony" cannot, however, incorporate the full panoply of threats that would qualify under the Model Penal Code, many of which are inherently nonviolent. I arrive at this conclusion for two reasons: First, another canon of statutory construction, *noscitur a sociis*, which counsels that "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." Black's 1084; see *Keffeler*, 537 U. S., at 384–385. Of course *noscitur a sociis* is just an erudite (or some would say antiquated) way of saying what common sense tells us to be true: "[A] word is known by the company it keeps," *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961)—that is to say, which of various possible meanings a word should be given must be determined in a manner that makes it "fit" with the words with which it is closely associated. The words immediately surrounding "extortion" in § 924(e)(2)(B)(ii) are "burglary," "arson," and crimes "involv[ing] use of explosives." The Model Penal Code's sweeping definition of extortion would sit uncomfortably indeed amidst this list of crimes which, as the "otherwise" residual provision makes plain, are characterized by their potential for violence and their risk of physical harm to others. ACCA's usage of "extortion" differs from the con-

[2] The Hobbs Act contains its own definition of extortion: "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U. S. C. § 1951(b)(2). In *Nardello* and *Scheidler*—where we were required to define generic extortion for purposes of the Travel Act and RICO, both of which leave the term undefined—we defined it as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." *Scheidler*, 537 U. S., at 409 (internal quotation marks omitted); see also *Nardello*, 393 U. S., at 290, 296 (agreeing with the Government that extortion means "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats").

text in which the word appears in the Travel Act, where it is one of a list of crimes "often used by organized crime to collect . . . revenue," *Nardello*, *supra*, at 291, n. 8, including bribery. And it differs from the context in which "extortion" appears in RICO, where it is part of a laundry list of nearly every federal crime under the sun. See 18 U. S. C. § 1961(1) (2000 ed., Supp. IV).[3]

What is suggested by the canon is reinforced by the fact that both the original common-law notion of extortion, and the full expanse of the modern definition, include crimes so inherently *unlikely* to cause physical harm that it would set the bar of the residual provision at a level that could embrace virtually any offense—making the limitation to "serious potential risk of physical injury to another" utterly incomprehensible.[4] See Part III, *infra*. I therefore assume that ex-

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[3] Two Courts of Appeals have also demonstrated the conundrum posed by Congress's inclusion of extortion in ACCA's list of enumerated violent felonies. See *United States* v. *DeLuca*, 17 F. 3d 6, 8 (CA1 1994) ("The linchpin of [appellant's] theory is the suggestion that all extortions are not equal. . . . [W]e give appellant high marks for ingenuity"); *United States* v. *Anderson*, 989 F. 2d 310, 312 (CA9 1993) (Kozinski, J.) ("[D]etermin[ing] whether a crime [is a violent felony] . . . is not, with regard to 'extortion,' an easy matter. In *Taylor* [v. *United States*, 495 U. S. 575 (1990)], the Court focused on the interstate consensus on the definition of 'burglary,' . . . but there's no such consensus on extortion. . . . It's impossible to know which definition the legislators who voted for [ACCA] had in mind. Quite likely most of them weren't thinking of any particular definition at all"). These Courts ultimately decided to use different definitions of extortion. See *DeLuca*, *supra*, at 9 (deciding on the Model Penal Code approach); *Anderson*, *supra*, at 313 (deciding on the Hobbs Act definition).

[4] The Court explains, for example, that modern extortion could include "an anonymous blackmailer threaten[ing] to release embarrassing personal information about the victim unless he is mailed regular payments," a crime involving a "risk of physical injury to another approach[ing] zero." *Ante*, at 208. Thus, were the complete modern notion of extortion adopted, it is clear that extortion would be the least risky of the four enumerated crimes. That would mean that any crime posing at least as much risk of physical injury as extortion would qualify under the ACCA residual provision. But virtually any crime could qualify, so that courts would have the power to subject almost any repeat offender to ACCA's

tortion under ACCA is: the obtaining of something of value from another, with his consent, induced by the wrongful use or threatened use of force against the person or property of another. Cf. *Leocal*, 543 U. S., at 13 (discussing the relationship between the "use of force against the person or property of another" and "crime[s] of violence under 18 U. S. C. § 16").

One final consideration is worthy of mention. I must make sure that my restricted definition of generic extortion does not render the inclusion of extortion in § 924(e)(2)(B)(ii) superfluous in light of § 924(e)(2)(B)(i). "It is our duty to give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (internal quotation marks omitted). Clause (i) already includes in ACCA's definition of "violent felony" any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." My narrow definition of extortion passes the surplusage test only if it includes crimes that would not be covered by this provision. That is not a problem, since my definition includes the use or threatened use of force against property, whereas clause (i) is limited to force against the person. Thus, the obtaining of someone else's money by threatening to wreck his place of business would fit within clause (ii) but not within clause (i).

Having defined burglary and extortion, I return to the question that launched this investigation in the first place: Which of the two poses the least "serious potential risk of physical injury to another"? Recall the definitions: burglary is the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime"; extortion is "the obtaining of something of value

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15-year mandatory minimum. Indeed, this seems to be the reality of what is taking place in the lower courts. See, *e. g.*, *United States* v. *Johnson*, 417 F. 3d 990 (CA8 2005) (operating a dump truck without consent of the owner is a violent felony under ACCA); *United States* v. *Springfield*, 196 F. 3d 1180 (CA10 1999) ("walkaway" escape from prison honor camp is a violent felony under ACCA).

from another, with his consent, induced by the wrongful use or threatened use of force against the person or property of another." Every victim of extortion is the object of a threat, to his person or his property; if he ignores that threat, or resists it by seeking to protect his property, he may be harmed. Burglary, on the other hand, involves only the *possibility* that a confrontation will take place while the crime is underway; the risk of physical harm can become a reality only if the property owner happens to be present, a situation which the burglar ordinarily seeks to avoid. The extortionist, moreover, has already expressed his willingness to commit a violent act; the burglar may be prepared to flee at the first sign of human presence. I think it obvious that burglary is less inherently risky than extortion, and thus the least inherently risky of the four crimes enumerated in § 924(e)(2)(B)(ii).

C

Having concluded in Part II–A that a crime may qualify under ACCA's violent felony residual provision only if it poses at least as much risk of physical injury to another as the least risky of the enumerated crimes; and in Part II–B that the least risky of the enumerated crimes is burglary; I am finally able to turn to the ultimate question posed by this case: Does *attempted* burglary categorically qualify as a violent felony under ACCA's residual provision? Or as my analysis has recast that question, does attempted burglary categorically involve conduct that poses at least as much risk of physical injury to another as completed burglary? Contrary to what the Court says, *ante*, at 203–207, the answer must be no.

In *Taylor*, we discussed the risks posed by the conduct involved in a completed burglary. We found it significant that a burglary involves "invasion of victims' homes or workplaces," 495 U. S., at 581 (internal quotation marks and brackets omitted), and we dwelled on such an invasion's "inherent potential for harm to persons," *id.*, at 588. In com-

paring attempted burglary to completed burglary, the Court focuses almost exclusively on "the possibility of a face-to-face confrontation between the burglar and a third party." *Ante*, at 203. But it ignores numerous other factors that make a completed burglary far more dangerous than a failed one: the closer proximity between burglar and victim where a confrontation takes place inside the confined space of the victim's home; the greater likelihood of the victim's initiating violence inside his home to protect his family and property; the greater likelihood that any confrontation inside the home will be between the burglar and the *occupant* of the home, rather than the *police*. The so-called "confrontation" the Court envisions between a would-be burglar and a third party while the burglar is still *outside* the home is likely to consist of nothing more than the occupant's yelling "Who's there?" from his window, and the burglar's running away. It is simply not the case, as the Court apparently believes, that would-be home entries are often reduced to *attempted* home entries by *physical confrontation* between homeowner and criminal while the latter is still outside the house. (One must envision a householder throwing open his front door, shotgun in hand, just as the would-be burglar is trying to pick the lock.)

As we have previously stated, it is "[t]he fact that an offender *enters* a building to commit a crime [that] creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Taylor*, *supra*, at 588 (emphasis added); see also *Leocal*, *supra*, at 10 ("[B]urglary, by its nature, involves a substantial risk that the burglar will use force against a victim *in completing the crime*" (emphasis added)). By definition, a perpetrator who has been convicted only of attempted burglary has failed to make it inside the home or workplace. (Indeed, a criminal convicted only of attempted burglary almost certainly injured no one; otherwise, he

would have been convicted of something far more serious, such as assault or murder.) Thus, the full extent of the risk that burglary poses—the entry into the home that makes burglary such a threat to the physical safety of its victim—is necessarily absent in attempted burglary, however "attempt" is defined.

Because attempted burglary categorically poses a less "serious potential risk of physical injury to another" than burglary, the least risky of ACCA's enumerated crimes, I would hold that it cannot be a predicate "violent felony" for purposes of ACCA's mandatory minimum sentencing enhancement, § 924(e) (2000 ed. and Supp. IV), regardless of how close a State's attempt statute requires the perpetrator come to completing the underlying offense.[5]

D

The Court observes, with undoubted accuracy, that my approach is not perfect. It leaves it to courts to decide, "[w]ithout hard statistics" to guide them, *ante,* at 210, the degree of risk of physical injury posed by various crimes. But this is an imponderable that cannot be avoided when dealing with a statute that turns upon "a serious potential risk of physical injury to another." It inheres in the Court's puny solution as well (how does the Court know that attempted burglary poses the same risk as burglary?). What this dissent must establish is not that my solution is perfect, but that it is substantially better than what the Court proposes. And there is little doubt of that. For *in addition* to

[5] There is no need to apply the modified categorical approach in this case. Under that approach, the most the Government could achieve would be to narrow the type of Florida burglary underlying James's conviction so that it falls within generic ACCA burglary. As I discussed above, however, even the attempt to commit a generic ACCA burglary could not qualify as a violent felony under ACCA. Thus, there is no need to remand; the Eleventh Circuit should simply be reversed.

leaving up in the air for judicial determination how much risk of physical injury each crime presents, the Court's uninformative opinion leaves open, to be guessed at by lower courts and by those subjected to this law: (1) whether the degree of risk covered by the residual provision is limited by the degrees of risk presented by the enumerated crimes;[6] (2) if so, whether extortion is to be given its broadest meaning, which would embrace crimes with virtually no risk of physical injury; and most importantly (3) where in the world to set the *minimum* risk of physical injury that will qualify. This indeed leaves the lower courts and those subject to this law to sail upon a virtual sea of doubt. The *only* thing the Court decides (and that, in my view, erroneously) is that attempted burglary poses the same risk of physical injury as burglary, and hence is covered without the need to address these other bothersome questions (how wonderfully convenient!).

It is only the Court's decision-averse solution that enables it to accuse me of "unnecessarily decid[ing]" the meaning of extortion, *ante*, at 209. The Court accurately, but quite irrelevantly, asserts the following:

> "[E]ven if an unenumerated offense could not qualify without presenting at least as much risk as the least risky of the enumerated offenses, it would not be necessary to identify the least risky of those offenses in order to decide this case. Rather, it would be sufficient to establish simply that the unenumerated offense pre-

[6] The Court plays with this question, but does not resolve it, merely stating that there is a "possibility that an offense may present 'a serious risk of physical injury to another' without presenting as great a risk as any of the enumerated offenses." *Ante*, at 209. Of course, in light of its ultimate conclusion regarding attempted burglary, the Court could *not* resolve this question without being guilty of what it accuses me of: "unnecessarily decid[ing] an important question," *ibid.;* any pronouncement on this point would be pure dictum.

> sented at least as much risk as *one* of the enumerated offenses." *Ante*, at 209–210 (emphasis added).

That is true enough, and I would be properly criticized for reaching an unnecessary question if, like the Court, I found attempted burglary to be as risky as burglary. Since I do not, however, it is unavoidable that I determine the meaning of extortion, in order to decide whether attempted burglary is less risky than *that*. The Court's criticism amounts to nothing more than a procedural quibble: Instead of deciding, as I have, (1) that arson and the use of explosives are the most risky of the enumerated crimes; (2) that as between burglary and extortion, burglary is the less risky (a determination requiring me to decide the *meaning* of extortion); and finally (3) that attempted burglary is less risky than burglary, I should have decided (1) that attempted burglary is less risky than arson, the use of explosives, and burglary; and only then (2) that attempted burglary is less risky than extortion (a determination requiring me to decide the *meaning* of extortion). Perhaps so, but it is surely a distinction without a real-world difference. Under either approach, determining the meaning of extortion is unquestionably *necessary*.

III

Congress passed ACCA to enhance punishment for gun-wielding offenders who have, *inter alia*, previously committed crimes that pose a "serious potential risk of physical injury to another." Congress provided examples of crimes that meet this eminently reasonable but entirely abstract condition. Unfortunately, however, the four examples have little in common, most especially with respect to the level of risk of physical injury they pose. Such shoddy draftsmanship puts courts to a difficult choice: They can (1) apply the ACCA enhancement to virtually all predicate offenses, see n. 4, *supra;* (2) apply it case by case in its pristine abstrac-

tion, finding it applicable whenever the particular sentencing judge (or the particular reviewing panel) believes there is a "serious potential risk of physical injury to another" (whatever that means); (3) try to figure out a coherent way of interpreting the statute so that it applies in a relatively predictable and administrable fashion to a smaller subset of crimes; or (4) recognize the statute for the drafting failure it is and hold it void for vagueness, see *Kolender*, 461 U. S., at 357; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939).

I would choose either the third option (which I have tried to implement) or the fourth, since I believe the first two to be impermissible. If Congress wanted the first—subjecting *all* repeat offenders to a 15-year mandatory minimum prison term—it could very easily have crafted a statute which said that. ACCA, with its tedious definition of "violent felony," was obviously not meant to have such an effect. The second option (the one chosen by the Court today)—essentially leaving it to the courts to apply the vague language in a manner that is *ex ante* (if not at the end of the day) highly unpredictable—violates, in my view, the constitutional prohibition against vague criminal laws.[7] Congress has simply abdicated its responsibility when it passes a criminal statute insusceptible of an interpretation that enables principled, predictable application; and this Court has abdicated its responsibility when it allows that. Today's opinion permits

[7] The Court contends that the provision at issue here, even when left entirely unexplained (as today's opinion skillfully accomplishes) cannot be unconstitutionally vague, because "[s]imilar formulations have been used in other federal and state criminal statutes." *Ante*, at 210, n. 6. None of the provisions the Court cites, however, is similar in the crucial relevant respect: None prefaces its judicially-to-be-determined requirement of risk of physical injury with the word "otherwise," preceded by four confusing examples that have little in common with respect to the supposedly defining characteristic. The phrase "shades of red," standing alone, does not generate confusion or unpredictability; but the phrase "fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red" assuredly does so.

an unintelligible criminal statute to survive uncorrected, unguided, and unexplained. I respectfully dissent.

JUSTICE THOMAS, dissenting.

For the reasons set forth in my opinion concurring in part and concurring in the judgment in *Shepard* v. *United States*, 544 U. S. 13, 27 (2005), I believe that "[t]he constitutional infirmity of § 924(e)(1) as applied to [James] makes today's decision an unnecessary exercise." *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and its progeny prohibit judges from "mak[ing] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *United States* v. *Booker*, 543 U. S. 220, 317–318 (2005) (THOMAS, J., dissenting in part). Yet that is precisely what the Armed Career Criminal Act, 18 U. S. C. § 924(e) (2000 ed. and Supp. IV), permits in this case.

Petitioner Alphonso James pleaded guilty to being a felon in possession of a firearm, in violation of § 922(g)(1) (2000 ed.), which exposed him to a maximum sentence of 10 years under § 924(a)(2). Section 924(e)(1) (2000 ed., Supp. IV), however, mandated a minimum 15-year sentence if James had three prior convictions for "a violent felony or a serious drug offense." James admitted he had been convicted of three prior felonies, but he argued that one of those felonies—his conviction for attempted burglary of a dwelling, in violation of Fla. Stat. §§ 810.02 and 777.04 (2006)—was not a "violent felony" for purposes of 18 U. S. C. § 924(e)(1) (2000 ed., Supp. IV). The District Court resolved this disputed fact in favor of the Government and increased James' sentence accordingly. Relying on the scheme we initially created in *Taylor* v. *United States*, 495 U. S. 575 (1990), the Court of Appeals affirmed.

Section 924(e)(1), in conjunction with *Taylor*, *Shepard*, and now today's decision, "explain[s] to lower courts how to conduct factfinding that is, according to the logic of this Court's

intervening precedents, unconstitutional in this very case." *Shepard*, *supra*, at 27 (THOMAS, J., concurring in part and concurring in judgment). For that reason, I respectfully dissent.

Syllabus

ABDUL-KABIR, FKA COLE *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 05–11284. Argued January 17, 2007—Decided April 25, 2007

Petitioner Abdul-Kabir (fka Cole) was convicted of capital murder. At sentencing, the trial judge asked the jury to answer two special issues, affirmative answers to which would require the judge to impose a death sentence: whether Cole's conduct was committed deliberately and with the reasonable expectation it would result in his victim's death and whether it was probable he would commit future violent acts constituting a continuing threat to society. Cole's mitigating evidence included family members' testimony describing his unhappy childhood as well as expert testimony which, to some extent, contradicted the State's claim he was dangerous, but primarily sought to reduce his moral culpability by explaining his violent propensities as attributable to neurological damage and childhood neglect and abandonment. However, the prosecutor discouraged jurors from taking these latter considerations into account, advising them instead to answer the special issues based only on the facts and to disregard any other views as to what might constitute an appropriate punishment for this particular defendant. After the trial judge's refusal to give Cole's requested instructions, which would have authorized a negative answer to either of the special issues on the basis of any evidence the jury perceived as mitigating, the jury answered both issues in the affirmative, and Cole was sentenced to death. The Texas Court of Criminal Appeals (CCA) affirmed on direct appeal, and Cole applied for habeas relief in the trial court, which ultimately recommended denial of the application. Adopting the trial court's findings of fact and conclusions of law with respect to all of Cole's claims, including his argument that the special issues precluded the jury from properly considering and giving effect to his mitigating evidence, the CCA denied Cole collateral relief.

Cole then filed a federal habeas petition, asserting principally that the sentencing jury was unable to consider and give effect to his mitigating evidence in violation of the Constitution. Recognizing that *Penry* v. *Lynaugh*, 492 U. S. 302 *(Penry I)*, required that juries be given instructions allowing them to give effect to a defendant's mitigating evidence and to express their reasoned moral response to that evidence in deter-

mining whether to recommend death, the District Court nevertheless relied on the Fifth Circuit's analysis for evaluating *Penry* claims, requiring a defendant to show a nexus between his uniquely severe permanent condition and the criminal act attributed to that condition. Ultimately, Cole's inability to do so doomed his *Penry* claim. After the Fifth Circuit denied Cole's application for a certificate of appealability (COA), this Court held that the Circuit's test for determining the constitutional relevance of mitigating evidence had "no foundation in the decisions of this Court," *Tennard* v. *Dretke*, 542 U. S. 274, 284, and therefore vacated the COA denial. On remand, the Fifth Circuit focused primarily on Cole's expert testimony rather than that of his family, concluding that the special issues allowed the jury to give full consideration and full effect to his mitigating evidence, and affirming the denial of federal habeas relief.

Held: Because there is a reasonable likelihood that the state trial court's instructions prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence, the CCA's merits adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this] Court," 28 U. S. C. § 2254(d)(1), and thereby warranted federal habeas relief. Pp. 246–265.

(a) This Court has long recognized that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future. See, *e. g.*, the plurality opinion in *Lockett* v. *Ohio*, 438 U. S. 586, 604. Among other things, however, the *Lockett* plurality distinguished the Ohio statute there invalidated from the Texas statute upheld in *Jurek* v. *Texas*, 428 U. S. 262, on the ground that the latter Act did not "clearly operat[e] at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," 438 U. S., at 607. Nevertheless, the Court later made clear that sentencing under the Texas statute must accord with the *Lockett* rule. In *Franklin* v. *Lynaugh*, 487 U. S. 164, 185, Justice O'Connor's opinion concurring in the judgment expressed the view of five Justices when she emphasized that "the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration" in imposing sentence. Justice O'Connor's opinion for the Court in *Penry I*, which unquestionably governs the facts of this case, endorsed the same views she had expressed in *Franklin*. In *Penry I*, the Court first held that in contending that his mental-

retardation and abusive-childhood mitigating evidence provided a basis for a life sentence rather than death and that the sentencing jury should have been instructed to consider that evidence, Penry was not asking the Court to make new law because he was relying on a rule "dictated" by earlier cases, 492 U. S., at 321, as defined by Justice O'Connor's concurrence in *Franklin* v. *Lynaugh*. Applying that standard, *Penry I* held that neither of Texas' special issues allowed the jury to give meaningful effect to Penry's mitigating evidence. The *Penry I* Court emphasized with respect to Texas' "future dangerousness" special issue (as composed at the time of both Penry's and Cole's sentencing proceedings) that Penry's mitigating evidence functioned as a "two-edged sword" because it might "diminish his blameworthiness . . . even as it indicate[d] a probability that he [would] be dangerous." 492 U. S., at 324. The Court therefore required an appropriate instruction directing a jury to consider fully the mitigating evidence as it bears on the extent to which a defendant is undeserving of death. *Id.*, at 323. Thus, where the evidence is double edged or as likely to be viewed as aggravating as it is as mitigating, the statute does not allow it to be given adequate consideration. Pp. 246–256.

(b) The Texas trial judge's recommendation to the CCA to deny collateral relief in this case was unsupported by either the text or the reasoning in *Penry I*. Under *Penry I*, Cole's family members' testimony, as well as the portions of his expert testimony suggesting that his dangerousness resulted from a rough childhood and neurological damage, were not relevant to either of the special verdict questions, except, possibly, as evidence of future dangerousness. Because this would not satisfy *Penry I*'s requirement that the evidence be permitted its mitigating force beyond the special issues' scope, it would have followed that those issues failed to provide the jury with a vehicle for expressing its "reasoned moral response" to Cole's mitigating evidence. In denying Cole relief, however, the Texas trial judge relied not on *Penry I*, but on three later Texas cases and *Graham* v. *Collins*, 506 U. S. 461, defining the legal issue whether the mitigating evidence could be sufficiently considered as one to be determined on a case-by-case basis, depending on the evidence's nature and on whether its consideration was enabled by other evidence in the record. The state court's primary reliance on *Graham* was misguided. In concluding that granting collateral relief to a defendant sentenced to death in 1984 would require the announcement of a new constitutional rule, the *Graham* Court, *id.*, at 468–472, relied heavily on the fact that in 1984 it was reasonable for judges to rely on the *Franklin* plurality's categorical reading of *Jurek*, which, in its view, expressly and unconditionally upheld the manner in which mitigating evidence is considered under the special issues. But

in both *Franklin* and *Penry I*, a majority ultimately rejected that interpretation. While neither *Franklin* nor *Penry I* was inconsistent with *Graham*'s narrow holding, they suggest that later decisions—including *Johnson* v. *Texas*, 509 U. S. 350, which refused to adopt the rule Graham sought—are more relevant to Cole's case. The relevance of those cases lies not in their results, but in their failure to disturb the basic legal principle that continues to govern such cases: The jury must have a "meaningful basis to consider the relevant mitigating qualities" of the defendant's proffered evidence. *Id.*, at 369. Several other reasons demonstrate that the CCA's ruling was not a reasonable application of *Penry I*. First, the ruling ignored the fact that Cole's mitigating evidence of childhood deprivation and lack of self-control was relevant to his moral culpability for precisely the same reason as Penry's: It did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing death. Second, the trial judge's assumption that it would be appropriate to look at other testimony to determine whether the jury could give mitigating effect to Cole's family testimony is neither reasonable nor supported by *Penry I*. Third, simply because the jury could give mitigating effect to the experts' predictions that Cole should become less dangerous as he aged does not mean that the jury understood it could give such effect to other portions of the experts' testimony or that of other witnesses. Pp. 256–260.

(c) Four of the Court's more recent cases support the conclusion that the CCA's decision was unsupported by *Penry I*'s text or reasoning. Although holding in *Johnson*, 509 U. S., at 368, that the Texas special issues allowed adequate consideration of petitioner's youth as a mitigating circumstance, the Court also declared that "*Penry* remains the law and must be given a fair reading," *id.*, at 369. Arguments like those of Cole's prosecutor that the special issues require jurors to disregard the force of evidence offered in mitigation and rely only on the facts are at odds with the *Johnson* Court's understanding that juries could and would reach mitigating evidence proffered by a defendant. Further, evidence such as that presented by Cole is not like the evidence of youth offered in *Johnson* and *Graham*, which easily could have supported a negative answer to the question of future dangerousness, and is instead more like the evidence offered in *Penry I*, which compelled an affirmative answer to the same question, despite its mitigating significance. That fact provides further support for the conclusion that in a case like Cole's, there is a reasonable likelihood that the special issues would preclude the jury from giving meaningful consideration to such mitigating evidence, as required by *Penry I*. In three later cases, the Court gave *Penry I* the "fair reading" *Johnson* contemplated, repudiating several Fifth Circuit precedents providing the basis for its narrow reading of

Penry I. Penry v. *Johnson*, 532 U. S. 782, 797 *(Penry II); Tennard*, 542 U. S., at 284; *Smith* v. *Texas*, 543 U. S. 37, 46. Pp. 260–263.

418 F. 3d 494, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *post*, p. 265. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ALITO, J., joined as to Part I, *post*, p. 280.

Robert C. Owen, by appointment of the Court, 549 U. S. 1029, argued the cause for petitioner. With him on the briefs were *Jordan M. Steiker* and *Raoul D. Schonemann*.

Edward L. Marshall, Assistant Attorney General of Texas, argued the cause for respondent. With him on the briefs were *Greg Abbott*, Attorney General, *Kent C. Sullivan*, First Assistant Attorney General, *Eric J. R. Nichols*, Deputy Attorney General, and *Gena Bunn* and *Carla E. Eldred*, Assistant Attorneys General.*

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Jalil Abdul-Kabir, formerly known as Ted Calvin Cole,[1] contends that there is a reasonable likelihood that the trial judge's instructions to the Texas jury that sentenced him to death prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence. He further contends that the judgment of the Texas Court of Criminal Appeals (CCA) denying his application for postconviction relief on November 24, 1999, misapplied the law as clearly established by earlier decisions of this Court, thereby warranting relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C.

*Briefs of *amici curiae* urging reversal were filed for the American Academy of Child and Adolescent Psychiatry et al. by *James W. Ellis*, *April Land*, and *Stephen K. Harper;* and for the Child Welfare League of America et al. by *Jeffrey J. Pokorak*, *Marsha Levick*, and *Pamela Harris*.

[1] For purposes of consistency with testimony given by witnesses at trial and sentencing, we refer to petitioner throughout the opinion by his given name, Ted Cole.

§ 2254. We agree with both contentions. Although the relevant state-court judgment for purposes of our review under AEDPA is that adjudicating the merits of Cole's state habeas application, in which these claims were properly raised, we are persuaded that the same result would be dictated by those cases decided before the state trial court entered its judgment affirming Cole's death sentence on September 26, 1990. Accordingly, we reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

I

In December 1987, Cole, his stepbrother Michael Hickey, and Michael's wife, Kelly, decided to rob and kill Kelly's grandfather, Raymond Richardson, to obtain some cash. Two days later they did so. Cole strangled Richardson with a dog leash; the group then searched the house and found $20 that they used to purchase beer and food. The next day, Michael and Kelly surrendered to the police and confessed. The police then arrested Cole who also confessed.

Cole was tried by a jury and convicted of capital murder. After a sentencing hearing, the jury was asked to answer two special issues:

> "Was the conduct of the defendant, TED CALVIN COLE, that caused the death of the deceased, RAYMOND C. RICHARDSON, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> . . . . . .
>
> "Is there a probability that the defendant, TED CALVIN COLE, would commit criminal acts of violence that would constitute a continuing threat to society?" App. 127, 128.[2]

[2] These were the two standard Texas special issues in place at the time of Cole's sentencing. In 1991, the Texas Legislature amended the special issues in response to this Court's decision in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) *(Penry I)*, to include language instructing the jury to decide

The trial judge instructed the jury to take into consideration evidence presented at the guilt phase as well as the sentencing phase of the trial but made no reference to mitigating evidence. Under the provisions of the Texas criminal code, the jury's affirmative answers to these two special issues required the judge to impose a death sentence. See Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon 2006).

At the sentencing hearing, the State introduced evidence that Cole pleaded guilty to an earlier murder when he was only 16. Shortly after being released on parole, Cole pleaded guilty to charges of aggravated sexual assault on two boys and was sentenced to 15 more years in prison. As evidence of Cole's propensity for future dangerousness, the State introduced Cole's diary which, according to the State's expert psychiatrist, Dr. Richard Coons, revealed a compulsive attraction to young boys and an obsession with criminal activity. Dr. Coons described Cole as a sociopath who lacked remorse and would not profit or learn from his experiences.

In response, Cole presented two categories of mitigating evidence. The first consisted of testimony from his mother and his aunt, who described his unhappy childhood. Cole's parents lived together "off and on" for 10 years, over the course of which they had two children, Cole, and his younger sister, Carla. App. 35. Shortly after Cole was born, his father was arrested for robbing a liquor store. Cole's father deserted the family several times, abandoning the family completely before Cole was five years old. On the last occasion that Cole saw his father, he dropped Cole off a block from where he thought Cole's mother lived, told Cole to "go

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"[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." Tex. Code Crim. Proc. Ann., Art. 37.071, § 2(e)(1) (Vernon 2006).

find her," and drove off. *Id.*, at 42. Cole had no contact with his father during the next 10 years. *Ibid.* After Cole's father left, his mother found herself unable to care for Cole and his sister and took the children to live with her parents in Oklahoma. Cole's grandparents were both alcoholics—Cole's mother was herself a self-described "drunk"—and lived miles away from other children. Eventually, because Cole's grandparents did not want their daughter or her children living with them, Cole's mother placed him in a church-run children's home, although she kept her daughter with her. Over the next five years Cole's mother visited him only twice. Cole's aunt, who visited him on holidays, testified that Cole seemed incapable of expressing any emotion and that his father never visited him at all.

The second category of mitigating evidence came from two expert witnesses—a psychologist and the former chief mental health officer for the Texas Department of Corrections—who discussed the consequences of Cole's childhood neglect and abandonment. Dr. Jarvis Wright, the psychologist, spent 8 to 10 hours interviewing Cole and administering an "extensive battery of psychological tests." *Id.*, at 63. He testified that Cole had "real problems with impulse control" apparently resulting from "central nervous damage" combined with "all the other factors of [his] background." *Id.*, at 69. He also testified that Cole had likely been depressed for much of his life, that he had a "painful" background, and that he had "never felt loved and worthwhile in his life." *Id.*, at 73, 86. Providing an analogy for Cole's early development, Dr. Wright stated that "the manufacturing process [had] botched the raw material horribly." *Id.*, at 73.

When specifically asked about future dangerousness, Dr. Wright acknowledged that "if Ted were released today on the street, there's a much greater probability of dangerous behavior than with the rest of us." *Id.*, at 74. Although he acknowledged the possibility of change or "burn out," he admitted that Cole would likely pose a threat of

future dangerousness until "years from now." *Ibid.* Except for his prediction that Cole would change as he grew older, Dr. Wright's testimony did not contradict the State's claim that Cole was a dangerous person, but instead sought to provide an explanation for his behavior that might reduce his moral culpability.

Dr. Wendell Dickerson, a psychologist who had not previously examined Cole, observed that it was difficult to predict future dangerousness, but that "violent conduct is predominantly, overwhelmingly the province of the young" with the risk of violence becoming rare as people grow older. *Id.*, at 95. On cross-examination, in response to a hypothetical question about a person with Cole's character and history, Dr. Dickerson acknowledged that he would be "alarmed" about the future conduct of such a person because "yes, there absolutely is a probability that they would commit . . . future acts of violence." *Id.*, at 113. In sum, the strength of Cole's mitigating evidence was not its potential to contest his immediate dangerousness, to which end the experts' testimony was at least as harmful as it was helpful. Instead, its strength was its tendency to prove that his violent propensities were caused by factors beyond his control—namely, neurological damage and childhood neglect and abandonment.

It was these latter considerations, however, that the prosecutor discouraged jurors from taking into account when formulating their answers to the special issues. During the *voir dire,* the prosecutor advised the jurors that they had a duty to answer the special issues based on the facts, and the extent to which such facts objectively supported findings of deliberateness and future dangerousness, rather than their views about what might be an appropriate punishment for this particular defendant. For example, juror Beeson was asked:

> "[I]f a person had a bad upbringing, but looking at those special issues, you felt that they *[sic]* met the standards regarding deliberateness and being a continuing threat

> to society, could you still vote 'yes,' even though you felt like maybe they'd *[sic]* had a rough time as a kid? If you felt that the facts brought to you by the prosecution warranted a 'yes' answer, could you put that out of your mind and just go by the facts?
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> . . . . .
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> "[T]hat would not keep you from answering 'yes,' just because a person had a poor upbringing, would it?" XI Voir Dire Statement of Facts filed in No. CR88–0043–A (Dist. Ct. Tom Green Cty., Tex., 51st Jud. Dist.), p. 1588.

The prosecutor began his final closing argument with a reminder to the jury that during the *voir dire* they had "promised the State that, if it met its burden of proof," they would answer "yes" to both special issues. App. 145. The trial judge refused to give any of several instructions requested by Cole that would have authorized a negative answer to either of the special issues on the basis of "any evidence which, in [the jury's] opinion, mitigate[d] against the imposition of the Death Penalty, including any aspect of the Defendant's character or record." *Id.*, at 115; see also *id.*, at 117–124. Ultimately, the jurors answered both issues in the affirmative, and Cole was sentenced to death.

On direct appeal, the sole issue raised by Cole was that the evidence was insufficient to support the jury's verdict. The CCA rejected Cole's claim and affirmed the judgment of the trial court on September 26, 1990.

II

On March 2, 1992, the lawyer who then represented Cole filed an application for a writ of habeas corpus in the Texas trial court, alleging 21 claims of error.[3] Counsel later with-

[3] Although Cole had not raised any of the 21 claims presented in his state habeas application on direct appeal—including his claim that the jury heard significant mitigating evidence which it could neither consider nor give effect to under the Texas sentencing statute, in violation of *Penry I*—under state law, his *Penry* claim remained cognizable on state habeas review. See *Ex parte Kunkle*, 852 S. W. 2d 499, 502, n. 3 (Tex. Crim. App.

drew, and after delays caused in part by a letter from Cole to the trial judge stating that he wished to withdraw his "appeal," the judge ultimately "had petitioner bench warranted" to a hearing on September 4, 1998. *Id.*, at 152–153. During that hearing, Cole advised the court that he wished to proceed with his habeas proceedings and to have the CCA appoint counsel to represent him. Without counsel having been appointed to represent Cole, and without conducting an evidentiary hearing, the trial court entered its findings and conclusions recommending denial of the application.

Three of Cole's 21 claims related to the jury's inability to consider mitigating evidence. The trial judge rejected the first—"that his mitigating evidence was not able to be properly considered and given effect by the jury under the special issues," *id.*, at 157—because he concluded that the record, and "especially" the testimony of the two expert witnesses, "provide[d] a basis for the jury to sufficiently consider the mitigating evidence offered by petitioner,"[4] *id.*, at 161. With respect to Cole's second claim, the judge agreed that appellate counsel had been ineffective for failing to assign error based on "the trial court's failure to instruct the jury on mitigating evidence as contemplated by the *Pendry [sic]* decision." *Id.*, at 166. He nevertheless found that the result on appeal would have been the same had the point been raised. *Ibid.* On the third claim relating to mitigating evidence, the judge rejected Cole's argument that the trial court's failure to specifically instruct the jury to consider

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1993) (en banc) (holding that "we have held that [allegations of *Penry* error occurring in cases tried before *Penry*] are cognizable via habeas corpus despite an applicant's failure to raise them on direct appeal"). Nor did Cole's failure to raise this claim on direct appeal affect its later review under AEDPA by the United States Court of Appeals for the Fifth Circuit. See *Jackson* v. *Johnson*, 150 F. 3d 520, 523 (CA5 1998) (holding that Texas' postconviction procedures provide petitioners "adjudication on the merits" sufficient to satisfy 28 U. S. C. § 2254(d)).

[4] The trial judge also noted that there were "no controverted, previously unresolved factual issues regarding petitioner's *Pendry [sic]* claim." App. 161.

mitigating evidence and offer a definition of "mitigating" was error. *Id.*, at 173.

Over the dissent of two members of the court, and after adopting the trial court's findings of fact and conclusions of law with only minor changes, the CCA denied Cole's application for state collateral relief. *Ex parte Cole,* No. 41,673–01 (Nov. 24, 1999) *(per curiam),* App. 178–179.

III

After the Federal District Court granted Cole's motion for the appointment of counsel, he filed a timely petition for a federal writ of habeas corpus pursuant to 28 U. S. C. § 2254. His principal claim then, as it is now, was that the sentencing jury "was unable to consider and give effect to the mitigating evidence in his case," in violation of the Constitution. *Cole* v. *Johnson,* Civ. Action No. 6:00–CV–014–C (ND Tex., Mar. 6, 2001), p. 5, App. 184.

In its opinion denying relief, the District Court began by summarizing Cole's mitigating evidence, highlighting his "destructive family background." *Ibid.* The court then correctly described our decision in *Penry I,* 492 U. S. 302 (1989), in these words:

> "In *[Penry]* the Supreme Court found that when the defendant places mitigating evidence before the jury, Texas juries must be given instructions which allow the jury to give effect to that mitigating evidence and to express its reasoned moral response to that evidence in determining whether to impose the death penalty."[5] Civ. Action No. 6:00–CV–014–C, at 8–9, App. 188.

The court next noted that the Fifth Circuit had formulated its own analysis for evaluating *Penry* claims. Under that

[5] The contrast between the District Court's succinct statement of *Penry I*'s holding and the prosecutor's explanation at *voir dire* of the jurors' duty to answer the special issues on the basis of the facts presented and not their views about Cole's moral culpability, see Part I, *supra,* could not be more stark.

analysis, for mitigating evidence to be constitutionally relevant, it "must show (1) a *uniquely severe permanent handicap* with which the defendant is burdened through no fault of his own, . . . and (2) that the *criminal act was attributable to this severe permanent condition*." Civ. Action No. 6:00–CV–014–C, at 9, App. 189 (quoting *Davis* v. *Scott*, 51 F. 3d 457, 460–461 (CA5 1995); internal quotation marks omitted; emphasis added). Ultimately, Cole's inability to show a "nexus" between his troubled family background and his commission of capital murder doomed his *Penry* claim. Civ. Action No. 6:00–CV–014–C, at 13, App. 193.

The Court of Appeals denied Cole's application for a certificate of appealability (COA), *Cole* v. *Dretke*, 99 Fed. Appx. 523 (CA5 2004), holding that "reasonable jurists would not debate the district court's conclusion that Cole's evidence was not constitutionally relevant mitigating evidence," *Cole* v. *Dretke*, 418 F. 3d 494, 498 (CA5 2005). Shortly thereafter, however, we held that the Fifth Circuit's "screening test" for determining the "'constitutional relevance'" of mitigating evidence had "no foundation in the decisions of this Court." *Tennard* v. *Dretke*, 542 U. S. 274, 284 (2004). Accordingly, we vacated its order denying a COA in this case and remanded for further proceedings. *Abdul-Kabir* v. *Dretke*, 543 U. S. 985 (2004). On remand, the Court of Appeals reviewed Cole's *Penry* claim on the merits and affirmed the District Court's judgment denying the writ.

Focusing primarily on the testimony of petitioner's two experts rather than that of his mother and his aunt, the Court of Appeals reviewed our recent decisions and concluded "that the Texas special issues allowed the jury to give 'full consideration and full effect' to the mitigating evidence that Cole presented at the punishment phase of his trial."[6]

[6] The Court of Appeals distinguished *Penry I* on the ground that Penry's evidence of mental retardation could only have been considered as aggravating, whereas this "record does not suggest that the jury viewed Cole's mitigating evidence as an aggravating factor only . . . . [T]his evidence

418 F. 3d, at 511. With two judges dissenting, the court denied the petition for rehearing en banc.[7] We consolidated this case with *Brewer* v. *Quarterman*, *post*, p. 286, and granted certiorari, 549 U. S. 974 (2006).

IV

Because Cole filed his federal habeas petition after the effective date of AEDPA, the provisions of that Act govern the scope of our review. We must therefore ask whether the CCA's adjudication of Cole's claim on the merits "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). We conclude that it did.

A careful review of our jurisprudence in this area makes clear that well before our decision in *Penry I*, our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future. Three of the five cases decided on the same day in 1976—*Woodson* v. *North Carolina*, 428 U. S. 280, *Proffitt* v. *Florida*, 428 U. S. 242, and *Jurek* v. *Texas*, 428 U. S. 262—identified the background principles we would apply in later cases to evaluate specific rules inhibiting the jury's ability to give meaningful effect to such mitigating evidence.

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fits well within the broad scope of the future dangerousness special issue . . . ." 418 F. 3d, at 506–507, and n. 54.

[7] In his dissent, Judge Dennis argued that the panel had improperly "used another Fifth Circuit gloss upon a Supreme Court decision, i. e., the double edged evidence limitation of *Penry I*, that has no basis in the Supreme Court decisions, to avoid confronting the real issue." *Cole* v. *Dretke*, 443 F. 3d 441, 442 (CA5 2006).

In *Woodson* v. *North Carolina*, we invalidated a statute that made death the mandatory sentence for all persons convicted of first-degree murder. One of the statute's constitutional shortcomings was its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." 428 U. S., at 303 (plurality opinion).[8] In *Proffitt* v. *Florida* and *Jurek* v. *Texas*, the joint opinions rejected facial challenges to the sentencing statutes enacted in Florida and Texas, assuming in both cases that provisions allowing for the unrestricted admissibility of mitigating evidence would ensure that a sentencing jury had adequate guidance in performing its sentencing function.[9] As a majority of the Court later acknowledged, our holding in *Jurek* did not preclude the possibility that the Texas sentencing statute might be found unconstitutional *as applied* in a particular case. See n. 15, *infra*.

Two years later, in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), a plurality concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defend-

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[8] The opinion also referred to a proposition that "cannot fairly be denied—that death is a punishment different from all other sanctions in kind rather than degree," and continued on to conclude that "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson*, 428 U. S., at 303–304.

[9] "By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Jurek*, 428 U. S., at 276 (joint opinion of Stewart, Powell, and STEVENS, JJ.); see also *Proffitt*, 428 U. S., at 257–258 (same).

ant proffers as a basis for a sentence less than death." *Id.*, at 604 (footnote omitted). Because Ohio's death penalty statute was inconsistent with this principle, it was declared unconstitutional. The plurality noted the possible tension between a holding that the Ohio statute was invalid and our decisions in *Proffitt* and *Jurek* upholding the Florida and Texas statutes, but distinguished those cases because neither statute "clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." 438 U. S., at 607.

While Chief Justice Burger's opinion in *Lockett* was joined by only three other Justices, the rule it announced was endorsed and broadened in our subsequent decisions in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). In those cases, we emphasized the severity of imposing a death sentence and that "the sentencer in capital cases must be permitted to consider *any* relevant mitigating factor."[10] *Eddings*, 455 U. S., at 112 (emphasis added).

In the wake of our decision in *Lockett*, Ohio amended its capital sentencing statute to give effect to *Lockett*'s holding.[11] Neither Florida nor Texas did so, however, until after our unanimous decision in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987), unequivocally confirmed the settled quality of the *Lockett* rule. As JUSTICE SCALIA's opinion for the Court

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[10] In *Penry I* itself, the Court noted that the rule sought by Penry—"that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed—is not a 'new rule' under *Teague* [v. *Lane*, 489 U. S. 288 (1989),] because it is dictated by *Eddings* and *Lockett*." 492 U. S., at 318–319.

[11] See Ohio Rev. Code Ann. § 2929.04(B)(7) (Anderson 1982) (amended 1981) (adding, as a mitigating circumstance, "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death").

explained, the defendant had introduced some rather atypical mitigating evidence that was not expressly authorized by the Florida statute:

> "In the sentencing phase of this case, petitioner's counsel introduced before the advisory jury evidence that as a child petitioner had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers." 481 U. S., at 397.

As the opinion further explained, the Florida courts had construed the state statute to preclude consideration of mitigating factors unmentioned in the statute. Accordingly, despite our earlier decision in *Proffitt* upholding the statute against a facial challenge, it was necessary to set aside Hitchcock's death sentence. We explained:

> "We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid. See *Skipper*, *supra* (evidence that defendant had adapted well to prison life); *Eddings*, *supra* (evidence of 16-year-old defendant's

> troubled family history and emotional disturbance)." 481 U. S., at 398–399.

Of course, our reference to "exclusion" of the evidence did not refer to its admissibility, but rather to its exclusion from meaningful consideration by the jury. Had *Jurek* and *Proffitt* truly stood for the proposition that the mere availability of relevant mitigating evidence was sufficient to satisfy the Constitution's requirements, *Hitchcock* could never have been decided as it was.[12]

In the year following our decision in *Hitchcock*, we made clear that sentencing under the Texas statute, like that under the Florida statute, must accord with the *Lockett* rule. In *Franklin* v. *Lynaugh*, 487 U. S. 164, 172, 177, 183 (1988), the plurality rejected the claim that the judge's instructions did not allow the jury to give adequate weight to whatever "'residual doubts'" it may have had concerning the defendant's guilt, or to evidence of the petitioner's good behavior while in prison. That particular holding is unremarkable because we have never held that capital defendants have an

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[12] To the extent that *Jurek* implied at the time it was decided that all that was required by the Constitution was that the defense be authorized to introduce all relevant mitigating circumstances, and that such information merely be before the jury, it has become clear from our later cases that the mere ability to present evidence is not sufficient. The only mitigating evidence presented in *Jurek*—offered to rebut the State's witnesses' testimony about Jurek's bad reputation in the community—appears to have consisted of Jurek's father's testimony that Jurek had "always been steadily employed since he had left school and that he contributed to his family's support." 428 U. S., at 267. Therefore, the question presented in our later cases—namely, whether the jury was precluded from giving meaningful effect to mitigating evidence, particularly that which may go to a defendant's lack of moral culpability—was not at issue in that case. When we deemed the Texas sentencing scheme constitutionally adequate in *Jurek*, we clearly failed to anticipate that when faced with various other types of mitigating evidence, the Texas special issues would not provide the sentencing jury with the requisite "adequate guidance."

Eighth Amendment right to present "residual doubt" evidence at sentencing, see *Oregon* v. *Guzek*, 546 U. S. 517, 523–527 (2006), and in most cases evidence of good behavior in prison is primarily, if not exclusively, relevant to the issue of future dangerousness. What makes *Franklin* significant, however, is the separate opinion of Justice O'Connor, and particularly those portions of her opinion expressing the views of five Justices, see *infra,* at 253, and n. 15. After summarizing the cases that clarified *Jurek*'s holding,[13] she wrote:

> "In my view, the principle underlying *Lockett*, *Eddings*, and *Hitchcock* is that punishment should be directly related to the personal culpability of the criminal defendant.
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> "'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or

[13] "In *Jurek* v. *Texas*, 428 U. S. 262 (1976), this Court held that the Texas capital sentencing procedures satisfied the Eighth Amendment requirement that the sentencer be allowed to consider circumstances mitigating against capital punishment. It was observed that even though the statute did not explicitly mention mitigating circumstances, the Texas Court of Criminal Appeals had construed the special verdict question regarding the defendant's future dangerousness to permit jury consideration of the defendant's prior criminal record, age, mental state, and the circumstances of the crime in mitigation. *Id.*, at 271–273. Since the decision in *Jurek*, we have emphasized that the Constitution guarantees a defendant facing a possible death sentence not only the right to introduce evidence mitigating against the death penalty but also the right to *consideration* of that evidence by the sentencing authority. *Lockett* v. *Ohio*, 438 U. S. 586 (1978), established that a State may not prevent the capital sentencing authority 'from giving *independent mitigating weight* to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation.' *Id.*, at 605 (plurality opinion). We reaffirmed this conclusion in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987)." *Franklin*, 487 U. S., at 183–184 (emphasis added).

> to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.' *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original).
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> "In light of this principle it is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. *Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.*
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> "Under the sentencing procedure followed in this case the jury could express its views about the appropriate punishment only by answering the special verdict questions regarding the deliberateness of the murder and the defendant's future dangerousness. To the extent that the mitigating evidence introduced by petitioner was relevant to one of the special verdict questions, the jury was free to give effect to that evidence by returning a negative answer to that question. If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence." 487 U. S., at 184–185 (opinion concurring in judgment) (emphasis added).

Justice O'Connor's opinion for the Court in *Penry I* endorsed the views she had expressed in *Franklin* and unques-

tionably governs the facts of this case.[14] Penry contended that his mitigating evidence of mental retardation and an abusive childhood provided a basis for a sentence of life imprisonment rather than death and that the jury should have been instructed that it could consider that evidence when making its sentencing decision. In response to that contention, our opinion first held that Penry was not asking us to make new law because he was relying on a rule that was "dictated" by earlier cases, see n. 10, *supra*, and explained why Justice O'Connor's separate opinion in *Franklin* correctly defined the relevant rule of law.[15] In *Franklin*, we

[14] THE CHIEF JUSTICE's dissent incorrectly assumes that our holding today adopts the rule advocated by the petitioner in *Graham* v. *Collins*, 506 U. S. 461 (1993), namely, that "'a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues.'" *Post*, at 271 (quoting *Graham*, 506 U. S., at 476; emphasis in *Graham*). The rule that we reaffirm today—a rule that has been clearly established since our decision in *Penry I*—is this: Special instructions are necessary when the jury could not otherwise give *meaningful effect* to a defendant's mitigating evidence. The rule is narrower than the standard urged by Graham because special instruction is not required when mitigating evidence has only a tenuous connection—"*some* arguable relevance"—to the defendant's moral culpability. But special instruction is necessary when the defendant's evidence may have meaningful relevance to the defendant's moral culpability "beyond the scope of the special issues." *Penry I*, 492 U. S., at 322–323. Despite the dissent's colorful rhetoric, it cites no post-*Penry I* cases inconsistent with this reading of its holding.

[15] "In *Franklin*, however, the five concurring and dissenting Justices did not share the plurality's categorical reading of *Jurek*. In the plurality's view, *Jurek* had expressly and unconditionally upheld the manner in which mitigating evidence is considered under the special issues. [487 U. S.,] at 179–180, and n. 10. In contrast, five Members of the Court read *Jurek* as not precluding a claim that, in a particular case, the jury was unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues. 487 U. S., at 183 (O'CONNOR, J., concurring in judgment); *id.*, at 199–200 (STEVENS, J., dissenting). Indeed, both the concurrence and the dissent understood *Jurek* as resting fundamentally on the express assurance that the special issues would permit the jury to fully consider all the mitigating evidence a defendant introduced that was rele-

noted, "both the concurrence and the dissent stressed that 'the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration' in imposing sentence." 492 U. S., at 321 (citing *Franklin*, 487 U. S., at 185 (O'Connor, J., concurring in judgment); *id.*, at 199 (STEVENS, J., dissenting)).

Applying that standard, we held that neither the "deliberateness" nor the "future dangerousness" special issue provided the jury with a meaningful opportunity to give effect to Penry's mitigating evidence. With respect to the former, we explained:

> "In the absence of jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. Without such a special instruction, a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.' Thus, we cannot be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to Penry's mitigating evidence." 492 U. S., at 323.

With respect to the future dangerousness issue, we emphasized the fact that Penry's evidence of mental retardation was relevant only as an aggravating factor. *Id.*, at 323–324.

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vant to the defendant's background and character and to the circumstances of the offense." *Id.*, at 320–321; see also *id.*, at 318 ("[T]he facial validity of the Texas death penalty statute had been upheld in *Jurek* on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present").

More broadly, we noted that the evidence of Penry's mental retardation and childhood abuse functioned as a "two-edged sword," because it "may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.*, at 324. We therefore held that, in the absence of an appropriate instruction directing the "jury to consider fully" mitigating evidence as it bears on the extent to which a defendant is undeserving of a death sentence, "we cannot be sure" that it did so. *Id.*, at 323. As our discussion of the deliberateness issue demonstrates, we did not limit our holding in *Penry I* to mitigating evidence that can only be viewed as aggravating. When the evidence proffered is double edged, or is as likely to be viewed as aggravating as it is as mitigating, the statute most obviously fails to provide for adequate consideration of such evidence.[16]

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[16] It is also clear that *Penry I* applies in cases involving evidence that is neither double edged nor purely aggravating, because in some cases a defendant's evidence may have mitigating effect beyond its ability to negate the special issues. See, *e. g.*, *Tennard* v. *Dretke*, 542 U. S. 274, 288–289 (2004) (holding that petitioner was entitled to a COA on his *Penry* claim where his evidence of low IQ and impaired intellectual functioning had "mitigating dimension beyond the impact it has on the individual's ability to act deliberately"). In *Tennard*, the majority declined to accept the dissent's argument that the petitioner's evidence of low intelligence did "not necessarily create the *Penry I* 'two-edged sword,'" and therefore could be given adequate mitigating effect within the context of the future dangerousness special issue. 542 U. S., at 293 (Rehnquist, C. J., dissenting). Cf. *Johnson* v. *Texas*, 509 U. S. 350, 386 (1993) (O'Connor, J., dissenting) ("The Court today holds that 'the constitutionality turns on whether the [special] questions allow mitigating factors not only to be considered . . . , *but also to be given effect in all possible ways, including ways that the questions do not permit*'" (quoting *Penry I*, 492 U. S., at 355 (SCALIA, J., concurring in part and dissenting in part); emphasis in original)); cf. also *Smith* v. *Texas*, 543 U. S. 37, 41, 46–48 (2004) *(per curiam)* (reversing the CCA's denial of postconviction relief because the special issues did not provide an adequate vehicle for expressing a "'reasoned moral response'" to petitioner's evidence of low IQ and a troubled upbringing).

The former special issues (as composed at the time of both Penry's and Cole's sentencing proceedings) provided an adequate vehicle for the evaluation of mitigating evidence offered to disprove deliberateness or future dangerousness. As Judge Reavley noted in his opinion for the Court of Appeals in *Penry I*, however, they did not tell the jury as to what "to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed." *Id.*, at 324 (internal quotation marks omitted).

V

In recommending denial of Cole's application for collateral relief, the Texas trial judge did not analyze *Penry I* itself. Under the framework set forth in *Penry I*,[17] the testimony of Cole's mother and aunt, as well as the portions of the expert testimony suggesting that his dangerous character may have been the result of his rough childhood and possible neurological damage, were not relevant to either of the special ver-

[17] The linchpin of THE CHIEF JUSTICE's dissent is his assumption that Justice O'Connor's opinions in *Franklin* and *Penry I* merely described two ad hoc judgments—see *post*, at 269–270—rather than her understanding of the governing rule of law announced in *Lockett*, *Eddings*, and *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). In his view, our line of cases in this area has flip-flopped, depending on the composition of the majority, rather than slowly defining core principles by eliminating those interpretations of the rule that are unsupportable. The fact that Justice O'Connor's understanding of the law was confirmed by the Court in *Penry I* in 1989—well before AEDPA was enacted—is a sufficient response to most of the rhetoric in the dissent. Neither Justice O'Connor's opinion for the Court in *Penry I*, nor any other opinion she joined, ever endorsed the "'*some* arguable relevance'" position described by THE CHIEF JUSTICE, see *post*, at 271, 279, which mistakenly interprets our opinion as adopting the rule that the dissenters in *Franklin* and *Saffle* v. *Parks*, 494 U. S. 484 (1990), would have chosen, see *post*, at 271, 279. The fact that the Court never endorsed that broader standard is fully consistent with our conclusion that the narrower rule applied in *Penry I* itself is "clearly established." Arguments advanced in later dissenting opinions do not affect that conclusion.

dict questions, except, possibly, as evidence supporting the State's argument that Cole would be dangerous in the future. This would not satisfy the requirement of *Penry I*, however, that the evidence be permitted its mitigating force beyond the scope of the special issues. Therefore, it would have followed that those questions failed to provide the jury with a vehicle for expressing its "reasoned moral response" to that evidence.

Instead of relying on *Penry I*, the trial judge relied on three later Texas cases and on our opinion in *Graham* v. *Collins*, 506 U. S. 461 (1993), as having held that nine different categories of mitigating evidence—including a troubled family background, bipolar disorder, low IQ, substance abuse, paranoid personality disorder, and child abuse—were sufficiently considered under the Texas special issues.[18] App. 159–160. Applying those cases, the judge defined the legal issue "whether the mitigating evidence can be sufficiently considered" as one that "must be determined on a case by case basis, depending on the nature of the mitigating evidence offered and whether there exists other testimony in the record that would allow consideration to be given." *Id.*, at 160. As we have noted, in endorsing this formulation of

[18] The Texas cases relied upon by the court were *Garcia* v. *State*, 919 S. W. 2d 370, 398–399 (Crim. App. 1996) (holding that, in light of the fact that Garcia received a "*Penry*" instruction (included in the amended Texas special issues), which instructed the jury to consider the defendant's character and background in determining whether to impose life rather than death, he was not entitled to any special instructions requiring the jury to consider his drug use, alcoholism, and family background as mitigating evidence); *Mines* v. *State*, 888 S. W. 2d 816, 818 (Crim. App. 1994) (holding, on remand after *Johnson*, that Mines' mitigating evidence of bipolar disorder was "well within the effective reach of the jury"); and *Zimmerman* v. *State*, 881 S. W. 2d 360, 362 (Crim. App. 1994) (holding, also on remand after *Johnson*, that Zimmerman's "mitigating" evidence of low IQ, past substance abuse, a diagnosis of paranoid personality disorder, and a disruptive family environment did not warrant an additional instruction under *Johnson* or *Penry I*).

the issue, neither the trial judge nor the CCA had the benefit of any input from counsel representing petitioner. See Part II, *supra.* In our view, denying relief on the basis of that formulation of the issue, while ignoring the fundamental principles established by our most relevant precedents, resulted in a decision that was both "contrary to" and "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).

The state court's primary reliance on *Graham*, to the exclusion of our other cases in this line of jurisprudence, was misguided. In *Graham*, we held that granting collateral relief to a defendant who had been sentenced to death in 1984 would require the announcement of a new rule of constitutional law in contravention of *Teague* v. *Lane*, 489 U. S. 288 (1989). In reaching that conclusion we relied heavily on the fact that in 1984 it was reasonable for judges to rely on the interpretation of *Jurek* that the plurality had espoused in *Franklin.* See 506 U. S., at 468–472; see also n. 15, *supra.* But as we have explained, in both *Franklin* and *Penry I*, a majority of the Court ultimately rejected the plurality's interpretation of *Jurek.* Neither *Franklin* nor *Penry I* was inconsistent with *Graham*'s narrow holding, but they do suggest that our later decisions—including *Johnson* v. *Texas*, 509 U. S. 350 (1993), in which we refused to adopt the rule that Graham sought[19]—are of more relevance to Cole's case than *Graham.* The relevance of those cases lies not in their results—in several instances, we concluded, after applying the relevant law, that the special issues provided for adequate consideration of the defendant's mitigating evi-

[19] Graham claimed that the Texas system had not "allowed for adequate consideration of mitigating evidence concerning his youth, family background, and positive character traits"; in *Johnson*, we declined to adopt such a rule, even without the *Teague* bar that prevented us from doing so in *Graham.* 509 U. S., at 365–366.

dence[20]—but in their failure to disturb the basic legal principle that continues to govern such cases: The jury must have a "meaningful basis to consider the relevant mitigating qualities" of the defendant's proffered evidence.[21] *Johnson*, 509 U. S., at 369; see also *Graham*, 506 U. S., at 474 (explaining that Penry was entitled to additional instructions "[b]ecause it was impossible [for the jury] to give meaningful mitigating effect to Penry's evidence by way of answering the special issues").

Before turning to those more recent cases, it is appropriate to identify the reasons why the CCA's ruling was not a reasonable application of *Penry I* itself. First, the ruling ignored the fact that even though Cole's mitigating evidence may not have been as persuasive as Penry's, it was relevant to the question of Cole's moral culpability for precisely the same reason as Penry's. Like Penry's evidence, Cole's evidence of childhood deprivation and lack of self-control did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence. Second, the judge's assumption that it would be appropriate to look at "other testimony in the record" to determine whether the jury could give mitigating effect to the testimony of Cole's mother and aunt is neither reasonable nor supported by the *Penry* opinion. App. 160. Third, the fact that the jury could give mitigating effect to some of the experts' testimony, namely, their predictions that Cole could be expected to become less dangerous as he aged, provides no support for the conclusion

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[20] This fact should be reassuring to those who fear that the rule we endorse today—and which we have endorsed since *Penry I*—"would require a new sentencing in every case." *Post*, at 271 (ROBERTS, C. J., dissenting).

[21] A jury may be precluded from doing so not only as a result of the instructions it is given, but also as a result of prosecutorial argument dictating that such consideration is forbidden. See Part VI, *infra*.

that the jury understood it could give such effect to other portions of the experts' testimony or that of other witnesses. In sum, the judge ignored our entire line of cases establishing the importance of allowing juries to give meaningful effect to any mitigating evidence providing a basis for a sentence of life rather than death. His recommendation to the CCA was therefore unsupported by either the text or the reasoning in *Penry I*.

VI

The same principles originally set forth in earlier cases such as *Lockett* and *Eddings* have been articulated explicitly by our later cases, which explained that the jury must be permitted to "consider fully" such mitigating evidence and that such consideration "would be meaningless" unless the jury not only had such evidence available to it, but also was permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence. *Penry I*, 492 U. S., at 321, 323 (internal quotation marks omitted); *Graham*, 506 U. S., at 475 (acknowledging that a "constitutional defect" has occurred not only when a jury is "precluded from even considering certain types of mitigating evidence," but also when "the defendant's evidence [i]s placed before the sentencer but the sentencer ha[s] no reliable means of giving mitigating effect to that evidence").

Four of our more recent cases lend support to the conclusion that the CCA's decision was unsupported by either the text or the reasoning of *Penry I*.[22] In *Johnson* v. *Texas*, we held that the Texas special issues allowed adequate consideration of the petitioner's youth as a mitigating circumstance. Indeed, we thought it "strain[ed] credulity to suppose that

[22] Because THE CHIEF JUSTICE's only concern is with the proper application of AEDPA, he finds it unnecessary to define the rule that he thinks post-*Penry I* cases either did or should have applied. What is most relevant under AEDPA, however, is the holdings set forth in majority opinions, rather than the views of dissenters who supported a different understanding of the law at the time those opinions were written.

the jury would have viewed the evidence of petitioner's youth as outside its effective reach" because its relevance was so obvious. 509 U. S., at 368. There is of course a vast difference between youth—a universally applicable mitigating circumstance that every juror has experienced and which necessarily is transient—and the particularized childhood experiences of abuse and neglect that *Penry I* and *Cole* described—which presumably most jurors have never experienced and which affect each individual in a distinct manner.

Evidence of youth, moreover, has special relevance to the question of future dangerousness. A critical assumption motivating the Court's decision in *Johnson* was that juries would in fact be able to give mitigating effect to the evidence, albeit within the confines of the special issues. See 509 U. S., at 370 ("If any jurors believed that the transient qualities of petitioner's youth made him less culpable for the murder, there is no reasonable likelihood that those jurors would have deemed themselves foreclosed from considering that in evaluating petitioner's future dangerousness"). Prosecutors in some subsequent cases, however, have undermined this assumption, taking pains to convince jurors that the law compels them to disregard the force of evidence offered in mitigation. Cole's prosecution is illustrative: The State made jurors "promise" they would look only at the questions posed by the special issues, which, according to the prosecutor, required a juror to "put . . . out of [his] mind" Cole's mitigating evidence and "just go by the facts." *Supra*, at 242. Arguments like these are at odds with the Court's understanding in *Johnson* that juries could and would reach mitigating evidence proffered by a defendant. Nothing in *Johnson* forecloses relief in these circumstances. See 509 U. S., at 369 ("*Penry* remains the law and must be given a fair reading").

This conclusion derives further support from the fact that, in *Johnson*, the Court understood that the defendant's evidence of youth—including testimony from his father that

"his son's actions were due in large part to his youth," *id.*, at 368, and counsel's corresponding arguments that the defendant could change as he grew older—was "readily comprehended as a mitigating factor," *id.*, at 369, in the context of the special issues. The evidence offered in this case, however, as well as that offered by the petitioner in *Brewer*, *post*, at 289–290, and n. 1, is closer in nature to that offered by the defendant in *Penry I* than that at issue in *Johnson*. While the consideration of the defendant's mitigating evidence of youth in *Johnson* could easily have directed jurors toward a "no" answer with regard to the question of future dangerousness, a juror considering Cole's evidence of childhood neglect and abandonment and possible neurological damage or Brewer's evidence of mental illness, substance abuse, and a troubled childhood could feel compelled to provide a "yes" answer to the same question, finding himself without a means for giving *meaningful* effect to the mitigating qualities of such evidence.[23] In such a case, there is a reasonable likelihood that the special issues would preclude that juror from giving meaningful consideration to such mitigating evidence, as required by *Penry I*. See *Johnson*, 509 U. S., at 367 (explaining that in *Boyde* v. *California*, 494 U. S. 370,

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[23] We came to the same conclusion in *Graham*, after distinguishing the defendant's mitigating evidence in that case from that offered by the defendant in *Penry I:*

"The jury was not forbidden to accept the suggestion of Graham's lawyers that his brief spasm of criminal activity in May 1981 was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated. Even if Graham's evidence, like Penry's, had significance beyond the scope of the first special issue, it is apparent that Graham's evidence—*unlike* Penry's—had mitigating relevance to the second special issue concerning his likely future dangerousness. Whereas Penry's evidence compelled an affirmative answer to that inquiry, despite its mitigating significance, Graham's evidence quite readily could have supported a negative answer." 506 U. S., at 475–476.

380 (1990), "we held that a reviewing court must determine 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence' ").

In three later cases, we gave *Penry I* the "fair reading" required by *Johnson* and repudiated several Fifth Circuit precedents providing the basis for its narrow reading of that case. First, in our review of Penry's resentencing, at which the judge had supplemented the special issues with a nullification instruction, we again concluded that the jury had not been provided with an adequate " 'vehicle for expressing its "reasoned moral response" ' " to his mitigating evidence. *Penry* v. *Johnson*, 532 U. S. 782, 797 (2001) *(Penry II)*. Indeed, given that the resentencing occurred after the enactment of AEDPA, we concluded (contrary to the views of the Fifth Circuit, which had denied Penry a COA) that the CCA's judgment affirming the death sentence was objectively unreasonable. *Id.*, at 803–804. Second, and as we have already noted, in *Tennard* we held that the Fifth Circuit's test for identifying relevant mitigating evidence was incorrect. 542 U. S., at 284. Most recently, in *Smith* v. *Texas*, 543 U. S. 37 (2004) *(per curiam)*, and again contrary to the views of the Fifth Circuit, we held that a nullification instruction that was different from the one used in Penry's second sentencing hearing did not foreclose the defendant's claim that the special issues had precluded the jury from "expressing a 'reasoned moral response' to *all* of the evidence relevant to the defendant's culpability." *Id.*, at 46.

VII

Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history

and characteristics and the circumstances of the offense.[24] As Chief Justice Burger wrote in *Lockett:*

> "There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." 438 U. S., at 605.

Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a "reasoned moral response" to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed.[25] For that reason, our post-*Penry* cases

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[24] In *Graham*, we acknowledged that *Penry I* did not "effec[t] a sea change in this Court's view of the constitutionality of the former Texas death penalty statute." *Graham*, 506 U. S., at 474. The reason, of course, that this was not the case is because the rule set forth in *Penry I* was merely an application of the settled *Lockett-Eddings-Hitchcock* rule described by Justice O'Connor in her opinions.

[25] Without making any attempt to explain how the jury in either this case or in *Brewer* v. *Quarterman*, *post*, p. 286, could have given "meaningful effect" or a "reasoned moral response" to either defendant's mitigating evidence, THE CHIEF JUSTICE concludes his dissent by lamenting the fact that the views shared by Justice O'Connor's concurrence and the dissenters in *Franklin* in 1988—and later endorsed in *Penry I*—"actually represented 'clearly established' federal law at that time." *Post*, at 280. To his credit, his concluding sentence does not go so far as to state that he favors a "*tunc pro nunc*" rejection of those views, an endorsement of the views expressed by the four dissenters in *Penry I*, or even agreement with the Fifth Circuit's recently rejected test for identifying relevant miti-

are fully consistent with our conclusion that the judgment of the Court of Appeals in this case must be reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.*

A jury imposed a sentence of death in each of these cases, despite hearing mitigating evidence from the defendants about their troubled backgrounds. The convictions and sentences were upheld on direct review. On state collateral review, each defendant claimed that the jury instructions did not allow sufficient consideration of the mitigating evidence. This Court had considered similar challenges to the *same* instructions no fewer than five times in the years before the state habeas courts considered the challenges at issue here. See *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988); *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*); *Graham* v. *Collins*, 506 U. S. 461 (1993); *Johnson* v. *Texas*, 509 U. S. 350 (1993). Four of the cases rejected the defendant's challenge. Only one—*Penry I*—upheld it. The guidance the Court gave in these five cases on whether the jury instructions at issue allowed sufficient consideration of mitigating evidence amounted to—it depends. It depends on the particular characteristics of the evidence in a specific case. The state courts here rejected

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gating evidence. See *Nelson* v. *Quarterman*, 472 F. 3d 287, 291–293 (2006) (en banc) (recognizing the "now-defunct" nature of the Fifth Circuit's "'constitutional-relevance' test" post-*Tennard* and that a "'full-effect'" standard—meaning that "a juror be able to express his reasoned moral response to evidence that has mitigating relevance beyond the scope of the special issues"—was "clearly established" for purposes of AEDPA in 1994, when Nelson's conviction became final).

*[This opinion applies also to No. 05–11287, *Brewer* v. *Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division*, *post*, p. 286.]

the claim as applied to the particular mitigating evidence in these cases, and the defendants sought federal habeas review.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), however, a state-court decision can be set aside on federal habeas review only if it is "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). When this Court considers similar challenges to the same jury instructions five separate times, it usually is not because the applicable legal rules are "clearly established." The Court today nonetheless picks from the five precedents the *one* that ruled in favor of the defendant—*Penry I*—and anoints *that* case as the one embodying "clearly established Federal law." In doing so the Court fails to give any meaningful weight to the two pertinent precedents *subsequent* to *Penry I*—*Graham* and *Johnson*—even though those cases adopted a more "limited view" of *Penry I* than the Court embraces today. *Johnson*, *supra*, at 365. Indeed, the reading of *Penry I* in *Graham* and *Johnson* prompted every one of the remaining Justices who had been in the majority in *Penry I* on the pertinent question to dissent in *Graham* and *Johnson*, on the ground that the Court was failing to adhere to *Penry I*.

I suppose the Court today is free to ignore the import of *Graham* and *Johnson* on the question of what *Penry I* means, but in 1999 or 2001, respectively—when petitioners were denied collateral relief—the state courts did not have that luxury. They should not be faulted today for concluding—exactly as the *Graham* and *Johnson* dissenters did—that the Court had cut back significantly on *Penry I*.

We give ourselves far too much credit in claiming that our sharply divided, ebbing and flowing decisions in this area gave rise to "clearly established" federal law. If the law were indeed clearly established by our decisions "as of the

time of the relevant state-court decision," *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000), it should not take the Court more than a dozen pages of close analysis of plurality, concurring, and even dissenting opinions to explain what that "clearly established" law was. *Ante*, at 246–260. When the state courts considered these cases, our precedents did not provide them with "clearly established" law, but instead a dog's breakfast of divided, conflicting, and ever-changing analyses. That is how the Justices on *this* Court viewed the matter, as they shifted from being in the majority, plurality, concurrence, or dissent from case to case, repeatedly lamenting the failure of their colleagues to follow a consistent path. Whatever the law may be today, the Court's ruling that 'twas always so—and that state courts were "objectively unreasonable" not to know it, *Williams*, *supra*, at 409—is utterly revisionist.

I

In 1987, Jalil Abdul-Kabir—referred to by his given name, Ted Calvin Cole, throughout this opinion, *ante*, at 237, n. 1—was convicted of capital murder after he confessed to strangling 66-year-old Raymond Richardson with a dog leash to steal $20 from him. Among the 21 claims Cole raised on state collateral review was a challenge under *Penry I*, *supra*, to the application of Texas's special issue jury instructions. In evaluating Cole's challenge, the state habeas trial court stated:

> "The issue is whether the sentencing jury had been unable to give effect to [Cole's] mitigating evidence within the confines of the statutory 'special issues.' While [*Penry I*] held that evidence of a defendant's mental retardation and abused childhood could not be given mitigating effect by a jury within the framework of the special issues, the cases that followed such as *Graham v. Collins*, [506 U. S. 461] (1993), *Garcia v. State*, 919 S. W. 2d 370 (1996), *Mines v. State*, 888 S. W. 2d 816

> (1994), and *Zimmerman v. State*, 881 S. W. 2d 360 (1994) held that the mitigating evidence of alcoholism, drug abuse, bad family background, bipolar disorder, low I.Q., substance abuse, head injury, paranoid personality disorder and child abuse were sufficiently considered under the special issues. The issue of whether the mitigating evidence can be sufficiently considered must be determined on a case by case basis, depending on the nature of the mitigating evidence offered and whether there exists other testimony in the record that would allow consideration to be given." App. in No. 05–11284, pp. 159–160.

Applying that standard, the state court concluded that "[t]he evidence presented at the punishment stage of the trial, especially evidence from [Cole's] expert witnesses, provide[d] a basis for the jury to sufficiently consider the mitigating evidence." *Id.*, at 161. The Texas Court of Criminal Appeals adopted the trial court's findings without substantive comment, and denied Cole's application for habeas corpus relief on November 24, 1999. *Id.*, at 178–179.

In finding that the state court's decision was objectively unreasonable, the Court begins by stating that the principle the state court violated was "firmly established," based on "[a] careful review of our jurisprudence in this area." *Ante*, at 246. The only thing clear about our jurisprudence on the pertinent question in 1999, however, is that it was unsettled and confused.

In *Jurek*, the Court upheld Texas's use of the special issues as facially constitutional, with the controlling opinion noting that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U. S., at 272 (joint opinion of Stewart, Powell, and STEVENS, JJ.). In so doing, *Jurek* left open the possibility that some mitigating evidence might not be within the reach of the jury under the special issues; other types of mitigating evidence, of course, would

be. Cf. *id.*, at 272–273 (suggesting that the future dangerousness special issue allowed the jury to consider prior criminal conduct, age, duress, and whether the defendant was under extreme mental pressure).

The next occasion the Court had to consider mitigating evidence under the Texas special issues arose in *Franklin*, in which the Court concluded that the defendant's mitigating evidence of good behavior in prison was taken into account under the future dangerousness special issue. 487 U. S., at 178–179 (plurality opinion); *id.*, at 186–187 (O'Connor, J., concurring in judgment). A plurality of the Court also rejected the argument that a jury must be permitted to give "independent" effect to mitigating evidence—beyond the special issues—concluding that "this submission is foreclosed by *Jurek*" and rejecting the dissent's argument to the contrary. *Id.*, at 179–180, and n. 10; see also *id.*, at 199–200 (STEVENS, J., dissenting).

The Court today places great weight on the opinion by Justice O'Connor concurring in the judgment in *Franklin*, an opinion joined only by Justice Blackmun. *Ante*, at 251–254. That separate opinion expressed "doubts" about the plurality's view that mitigating evidence need not be given effect beyond the special issues, noting that *if* the petitioner in *Franklin* had introduced evidence not covered by the special issues, "we would have to decide whether the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation." 487 U. S., at 183, 185. The separate opinion concluded, however, that "this is not such a case." *Id.*, at 185. According to the Court today, a discerning state judge should have seen that federal law was "clearly established" on the point by the concurring and dissenting opinions, not the plurality. *Ante*, at 251–254.

Penry I, decided the following Term, concluded that *in that case* the Texas instructions did not allow the jury to give mitigating effect to evidence of Penry's mental retardation and abusive childhood. 492 U. S., at 328, 315 ("Penry

does not . . . dispute that some types of mitigating evidence can be fully considered by the sentencer in the absence of special jury instructions. Instead, Penry argues that, *on the facts of this case,* the jury was unable to fully consider and give effect to the mitigating evidence . . . in answering the three special issues" (emphasis added; citations omitted)). In granting relief, the Court, quoting the *Franklin* concurrence, noted that Penry's evidence "'had relevance to [his] moral culpability beyond the scope of the special verdict questions,'" 492 U. S., at 322 (quoting 487 U. S., at 185 (O'Connor, J., concurring in judgment); some alterations deleted), and that it was relevant to the special issues "only as an *aggravating* factor," 492 U. S., at 323 (emphasis in original). According to the Court today, the views of the *Franklin* concurrence and dissent were thus elevated to the opinion of the Court in *Penry I*, again clearly establishing federal law. *Ante,* at 252–254, and n. 15. The four dissenters in *Penry I* complained that the Court's holding "flatly contradict[ed]" *Jurek,* and that in finding a constitutional violation, the Court was "throwing away *Jurek* in the process." 492 U. S., at 355, 354 (SCALIA, J., concurring in part and dissenting in part).

A state court looking at our pertinent precedents on the Texas special issue instructions would next have to consider the significance of *Saffle* v. *Parks,* 494 U. S. 484 (1990). That case—issued less than nine months after *Penry I*—considered Oklahoma instructions, but extensively analyzed *Penry I* in doing so. See 494 U. S., at 491–492. The Court concluded that the mitigating evidence in that case could be adequately considered by the jury under the instructions given. The four dissenters in *Saffle*—including the author of today's opinion—complained that the majority's discussion of *Penry I* was "strangely reminiscent" of the position of the *Penry I* dissenters. 494 U. S., at 504 (opinion of Brennan, J.). The *Saffle* dissenters asserted that the majority's failure to reject the position of the *Penry I* dissenters "creates considerable

ambiguity about which *Lockett* [v. *Ohio*, 438 U. S. 586 (1978)] claims a federal court may hereafter consider on habeas corpus review." 494 U. S., at 504–505.

In *Graham*, decided three years later, the Court sought to clarify the interplay between *Jurek*, *Franklin*, and *Penry I*:

> "It seems to us, however, that reading *Penry* as petitioner urges—and thereby holding that a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues—would be to require in all cases that a fourth 'special issue' be put to the jury: '"Does any mitigating evidence before you, whether or not relevant to the above [three] questions, lead you to believe that the death penalty should not be imposed?"' The *Franklin* plurality rejected precisely this contention, finding it irreconcilable with the Court's holding in *Jurek*, and *we affirm that conclusion today.*" 506 U. S., at 476–477 (citation omitted; second emphasis added).

Thus, in *Graham* the Court rejected the reading of *Franklin* and *Penry I* that the Court today endorses, reasoning that it would require a new sentencing in every case, and would be impossible to square with *Jurek*.[1]

Although the Court today tells us it was clear that the applicable federal law was established by the *Franklin* concurrence and dissent, and that *Penry I* had to be read in that light, *ante*, at 252–254, the Court majority in *Graham* specifically relied instead upon the *Franklin* plurality in re-

[1] In evaluating the state court's analysis, the Court criticizes its reliance on *Graham* because *Graham* primarily addressed retroactivity under *Teague* v. *Lane*, 489 U. S. 288 (1989). *Ante*, at 258. But in considering whether the rule requested was dictated by precedent, *Graham* of course had to evaluate the scope of that precedent—including *Penry I*—and did so extensively. See 506 U. S., at 467–477. Moreover, as explained below, the Court in *Johnson* v. *Texas*, 509 U. S. 350, 370–372 (1993), adopted the same reading of *Penry I* adopted in *Graham*, without considering the issue under *Teague*.

jecting the same broad reading of *Penry I* the Court resuscitates today, *nunc pro tunc*. *Graham*, *supra*, at 476–477. The dissenters in *Graham*—including every remaining Member of the *Penry I* majority—were adamant that *Penry I* should have been controlling in *Graham*. See, *e. g.*, 506 U. S., at 507 (opinion of SOUTER, J., joined by Blackmun, STEVENS, and O'Connor, JJ.) ("Our description of Penry's claim applies . . . almost precisely to Graham's claim"); *id.*, at 508 ("[Graham's] position is identical to that of Penry"); *id.*, at 512 ("*Penry* controls in this respect, and we should adhere to it"); *id.*, at 520 ("[T]he case is controlled by *Penry*"). The issue is not whether the majority or the dissenters in *Graham* were right about how to read *Penry I*, but whether it was reasonable for a state court in 1999 to read it the way the majority in *Graham* plainly did.

Later the same Term, in *Johnson*, the Court reaffirmed the "limited view of *Penry*" it had adopted in *Graham*. 509 U. S., at 365. Once again the Court majority specifically relied on the *Franklin* plurality—not the concurrence and dissent. See 509 U. S., at 370–371. And once again the dissenters—including every remaining Member of the *Penry I* majority—lamented the Court's asserted failure to adhere to *Penry I*. 509 U. S., at 385–386 (opinion of O'Connor, J., joined by Blackmun, STEVENS, and SOUTER, JJ.). The dissent—by the *Penry I* author—made precisely the same point made by the Court today about how to read the *Franklin* concurrence and dissent. 509 U. S., at 385–386. The difference, of course, was that in *Johnson* the point was made in dissent. It cannot have been "objectively unreasonable" for a state court, in 1999, to have been guided by the *Johnson* majority on this question, rather than by the dissent.

In short, a state court reading our opinions would see an ongoing debate over the meaning and significance of *Penry I*. That state court would see four dissenters in *Graham* and *Johnson*—including every remaining Member of the *Penry I* majority—arguing that the Court was failing to fol-

low or sharply limiting *Penry I* in those cases. On the flip side, the state court would see four dissenters in *Penry I*—every one later joining the majorities in *Graham* and *Johnson*—suggesting that the *Penry I* majority departed from *Jurek*. It is in that context that the Court today tells us that the state courts should have regarded *Penry I* as "clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1).

The Court asserts that *Graham* and *Johnson* did not "disturb the basic legal principle" at issue, *ante*, at 259, and that we cite no post-*Penry I* cases inconsistent with its reading of that case, *ante*, at 253, n. 14. I do not understand how the author of today's opinion can say that *Graham* did not disturb the principle of *Penry I*, however, when he joined a dissent in *Graham* stating that "[Graham's] position is *identical* to that of Penry" and that Graham's case "is controlled by *Penry*." 506 U. S., at 508, 520 (opinion of SOUTER, J.) (emphasis added). That would seem to suggest that *Graham* was inconsistent with *Penry I*. I do not understand how the author of today's opinion can say that *Johnson* had no effect on *Penry I*, when he joined a dissent in *Johnson* stating that the majority opinion "upset our settled Eighth Amendment jurisprudence." 509 U. S., at 382 (opinion of O'Connor, J.). Now *Johnson* is dismissed as just an application of "basic legal principle[s]," over which Justices can disagree, *ante*, at 259; back then it "upset our settled Eighth Amendment jurisprudence." And what of *Saffle*? There the author of today's opinion joined a dissent claiming that the majority was adopting the rule rejected in *Penry I*. 494 U. S., at 504 (opinion of Brennan, J.). Again, that would seem to suggest inconsistency with *Penry I*.[2]

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[2] The Court is correct that "[w]hat is most relevant under AEDPA . . . is the holdings set forth in majority opinions, rather than the views of dissenters . . . at the time those opinions were written." *Ante*, at 260, n. 22. But that must include the majority opinions in all the pertinent cases, not just the lone one of the bunch that ruled in favor of the defend-

In fact, *Penry I* is not even consistent with the reading the Court ascribes to it—in that case the Court concluded that a jury could only view Penry's mitigating evidence as aggravating, and thus could not give the evidence *any* mitigating effect. 492 U. S., at 323 (Penry's evidence was "relevant only as an *aggravating* factor" (emphasis in original)); see also *Graham*, *supra*, at 473 ("Although Penry's evidence of mental impairment and childhood abuse indeed had relevance to the 'future dangerousness' inquiry, its relevance was *aggravating* only" (emphasis in original)). The Court concedes that Cole's evidence in the present case was not purely aggravating, see *ante*, at 259 ("[T]he jury could give mitigating effect to some of the experts' testimony"), thus drawing into even starker contrast the rule that was established by a fair reading of *Penry I* in 1999 versus the rule the Court today reads *Penry I* to have "clearly established."

As might be expected in light of the foregoing, judges called upon to apply these precedents were confused by the ambiguity of this Court's pronouncements. See, *e. g.*, *Mines* v. *Texas*, 888 S. W. 2d 816, 820 (Tex. Crim. App. 1994) (Baird, J., concurring) ("The Supreme Court's holdings in *Penry*, *Graham* and *Johnson* do not provide an analytical framework to determine when our capital sentencing scheme fails to allow the jury to consider and give effect to mitigating evidence . . . "); see also *Brewer* v. *Dretke*, 442 F. 3d 273, 279, n. 16 (CA5 2006) (*per curiam*) (remarking, in applying *Graham* and *Penry I*, that "[t]here is no easy way to locate [the defendant] at either pole"). Commentators at the time likewise concluded that *Graham* and *Johnson* "put a cap on *Penry*'s principles." Denno, Testing *Penry* and Its Progeny,

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ant. Here it must include the subsequent majority opinions in *Saffle*, *Graham*, and *Johnson*, as well as in *Penry I*, and it was not objectively unreasonable for a state court to view *Saffle*, *Graham*, and *Johnson* the same way today's author did at the time—or at least to conclude that the Court's current view of *Penry I* was not as clearly established as the Court would have it today.

22 Am. J. Crim. L. 1, 10 (1994) ("In *Graham*, the Court made clear that it did not interpret *Penry* 'as effecting a sea change' in its evaluation of the constitutionality of the former Texas death penalty statute . . . "). See also Twenty-Eighth Annual Review of Criminal Procedure, 87 Geo. L. J. 1756, 1770 (1999) ("The possible reach of *Penry* has been circumscribed by [*Graham*] and [*Johnson*]").

It is a familiar adage that history is written by the victors, but it goes too far to claim that the meaning and scope of *Penry I* was "clearly established" in 1999, especially in the wake of *Graham* and *Johnson*. In applying AEDPA, we have recognized that "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell* v. *Esparza*, 540 U. S. 12, 17 (2003) (*per curiam*); see also *Lockyer* v. *Andrade*, 538 U. S. 63, 72–73 (2003) (declining to find federal law "clearly established" when "our precedents in [the] area have not been a model of clarity").

When the state court rejected Cole's claim, it knew that mitigating evidence of mental retardation and severe childhood abuse could not be given effect under the special issues, *Penry I*, 492 U. S., at 328, but that evidence of youth and a transient upbringing could be, *Graham*, *supra*, at 476; *Johnson*, *supra*, at 368. The court concluded that Cole's mitigating evidence—a troubled childhood and "impulse control" disorder—was more like that considered in *Johnson* and *Graham* than in *Penry I*. And because Cole's mitigating evidence was not as troubling as that at issue in *Penry I*, the state court did not act unreasonably in concluding that the collateral damage of his upbringing and impulse control disorder would, like youth in *Johnson*, dissipate over time, so that Cole would be less of a danger in the future. It is irrelevant that the ill effects of Cole's upbringing and impulse control disorder might not wear off for some time—there was no suggestion in *Johnson* that the petitioner in that case would become less dangerous any time soon.

In other words, our precedents—which confirmed that the permanence of a mitigating feature was highly relevant, and that the correct answer was a case-specific matter turning on the particular facts—did not provide a clear answer, because the particular evidence before the court fell somewhere between the guideposts established by those precedents. As we have recognized, "the range of reasonable judgment can depend in part on the nature of the relevant rule. . . . [Some] rules are more general, and their meaning must emerge in application over the course of time." *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004). See also *Brown* v. *Payton*, 544 U. S. 133, 143 (2005) (reviewing state-court application of Supreme Court precedent "to similar but not identical facts" and concluding that "[e]ven on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review").

The state court's approach to the question was plainly correct; indeed, we engaged in a similar comparison in *Graham* itself in determining that the evidence presented in that case was cognizable under the special issues:

> "*Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light. Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse." 506 U. S., at 476.

The state court thought that Cole's evidence "more closely resemble[d]" *Johnson* and *Graham* than *Penry I*. That cannot be said to be "contrary to, or . . . an unreasonable applica-

tion of, clearly established Federal law." § 2254(d)(1). See *Brown*, *supra*, at 143, 147; *Williams*, 529 U. S., at 411.

The Court further holds that the jury instructions did not permit Cole's evidence to have "mitigating force beyond the scope of the special issues," *ante*, at 257, as it now reads *Penry I* to require. At the time the state court ruled, however, *Graham* and *Johnson*, decided after *Penry I*, had expressly rejected the notion that a jury must "be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant," so long as the jury could consider "in some manner all of a defendant's relevant mitigating evidence." *Johnson*, 509 U. S., at 372–373. The state court found that Cole's mitigating evidence could be "sufficiently consider[ed]" by the jury "within the confines of the statutory 'special issues,' " App. in No. 05–11284, at 161, 159, a holding consistent with this Court's precedents as of 1999—and certainly not contrary to clearly established federal law.

In reaching today's result, the Court also takes advantage of eight years of hindsight and relies on three cases that postdate the state court's ruling. *Ante*, at 263 (citing *Penry* v. *Johnson*, 532 U. S. 782 (2001) (*Penry II*), *Tennard* v. *Dretke*, 542 U. S. 274 (2004), and *Smith* v. *Texas*, 543 U. S. 37 (2004) (*per curiam*)). What is pertinent under AEDPA, however, is whether federal law was clearly established by our decisions when the state court acted. *Williams*, *supra*, at 412.[3] AEDPA requires state courts to reasonably apply

[3] The Court criticizes this dissent for failing "to define the rule" that our post-*Penry I* cases either did or should have applied. *Ante*, at 260, n. 22. But the whole point is that "the rule," far from being "clearly established" by our decisions, was—at the very least—unsettled and confused. Under AEDPA, those defending the finality of a state-court judgment challenged on federal habeas review do not have to show that the state-court judgment was consistent with some version of "clearly established Federal law" other than that offered by the challenger; AEDPA obviously contemplates that there *may not be* "clearly established Federal law." The

clearly established federal law. It does not require them to have a crystal ball.

II

In 1991, petitioner Brent Ray Brewer was convicted of murder committed during the course of a robbery. Like Cole, Brewer claims that the Texas special issues prevented the jury from giving effect to mitigating evidence that he suffered from depression and had been abused as a teenager. The Texas courts rejected these claims on both direct and collateral review.

In evaluating Brewer's claim, the Court focuses on the so-called "two-edged sword" nature of the evidence found to be beyond the jury's reach in *Penry I*, and concludes that Brewer's mitigating evidence is similarly double edged. The state court distinguished *Penry I*, however, stating that "a stay in a mental hospital does not evidence a long term mental illness which would affect appellant's ability to conform to the requirements of society," App. in No. 05–11287, p. 141 (internal quotation marks omitted), in contrast to Penry's "organic brain disorder . . . which made it impossible for him to appreciate the wrongfulness of his conduct or to conform his conduct to the law," *Penry I*, 492 U. S., at 309. The state court determined that the nature of Brewer's evidence allowed the jury to find that he would not be a future danger, whereas Penry's did not.

The Court rejects this distinction, noting that while Brewer's mitigating evidence may have been less compelling than Penry's, "that difference does not provide an acceptable justification for refusing to apply the reasoning in *Penry I* to this case." *Brewer* v. *Quarterman*, *post*, at 293, and n. 5. This misses the point. The state court's distinction goes not to the relative strength of the mitigating evidence, but rather its character—an episodic rather than permanent

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Court's criticism only underscores how far the reasoning employed today strays from AEDPA's mandate.

mental disorder. As discussed in the context of Cole, see *supra*, at 276, the distinction was not a "refus[al] to apply the reasoning in *Penry I*," *Brewer*, *post*, at 293, but rather an application of *Penry I* that can hardly be said to be "objectively unreasonable" based on this Court's decisions as of 2001. Indeed, in considering future dangerousness, it is difficult to imagine a more pertinent distinction than whether a mental condition is or is not permanent.

The Court concedes that "[t]he transient quality of [Brewer's] mitigating evidence may make it more likely to fall in part within the ambit of the special issues," and yet still finds the state court's decision unreasonable because the evidence may have had relevance beyond the special issues. *Brewer*, *post*, at 294. As in Cole's case, this conclusion squarely conflicts with the Court's rejection in *Graham* of the proposition that "a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues." 506 U. S., at 476 (emphasis in original). That rejection was confirmed in *Johnson*, see 509 U. S., at 372–373 (rejecting a rule that "would require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant" in favor of the rule "that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence"). Once again, the Court rejects the state court's reasonable reading of existing cases in favor of its own revisionist reading of this Court's doctrine, heavily informed by subsequent decisions that the state court had no means to predict.

III

In AEDPA, Congress "work[ed] substantial changes" to the power of federal courts to grant habeas corpus relief. *Felker* v. *Turpin*, 518 U. S. 651, 654 (1996). In today's decisions, the Court trivializes AEDPA's requirements and overturns decades-old sentences on the ground that they were contrary to clearly established federal law at the time—even

though the same Justices who form the majority today were complaining at that time that *this* Court was changing that "clearly established" law.

Still, perhaps there is no reason to be unduly glum. After all, today the author of a dissent issued in 1988 writes two majority opinions concluding that the views expressed in that dissent actually represented "clearly established" federal law at that time. So there is hope yet for the views expressed in *this* dissent, not simply down the road, but *tunc pro nunc*. Encouraged by the majority's determination that the future can change the past, I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE ALITO joins as to Part I, dissenting.*

I remain of the view "that limiting a jury's discretion to consider all mitigating evidence does not violate the Eighth Amendment." *Ayers* v. *Belmontes*, 549 U. S. 7, 24 (2006) (SCALIA, J., concurring) (citing *Walton* v. *Arizona*, 497 U. S. 639, 673 (1990) (SCALIA, J., concurring in part and concurring in judgment)).

I

But even under this Court's precedents to the contrary, the state-court decisions in these two cases were hardly objectively unreasonable under the Antiterrorism and Effective Death Penalty Act of 1996, as THE CHIEF JUSTICE's dissenting opinion demonstrates. That is all which is needful to demonstrate the error of today's judgments. The full truth is worse than that, however. There was in fact clearly established law that governed these cases, and it favored the State. When the state courts rendered their decisions, *Johnson* v. *Texas*, 509 U. S. 350 (1993), was this Court's most recent pronouncement on the Texas special issues. And in that case, the Court unambiguously drew back from the

*[This opinion applies also to No. 05–11287, *Brewer* v. *Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division*, *post*, p. 286.]

broader implications of its prior decision in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) *(Penry I)*. Reiterating what it had recently said in *Graham* v. *Collins*, 506 U. S. 461, 475 (1993), the Court made clear that "'[i]n *Penry*, the defendant's evidence was placed before the sentencer but the sentencer had *no reliable means* of giving mitigating effect to that evidence.'" *Johnson*, *supra*, at 366 (emphasis added). *Penry I*, said *Johnson*, stood for the proposition that habeas relief was appropriate where jurors had been unable to give *any* mitigating effect to the evidence at issue. 509 U. S., at 369; see also *Graham*, *supra*, at 475. *Penry I* in no way meant to imply, *Johnson* warned, "that a jury [must] be able to give effect to mitigating evidence in *every conceivable manner* in which the evidence might be relevant." 509 U. S., at 372 (emphasis added). *Johnson* thus established, in no uncertain terms, that jurors need only "be able to consider *in some manner* all of a defendant's relevant mitigating evidence." *Ibid.* (emphasis added); see generally *id.*, at 372–373.

The dissenters in *Johnson* very much disagreed with that analysis. They read *Penry I* for the more expansive proposition that "the Texas special issues violated the Eighth Amendment to the extent they prevented the jury from giving *full* consideration and effect to a defendant's relevant mitigating evidence." 509 U. S., at 385 (opinion of O'Connor, J.) (citing *Penry I*, *supra;* emphasis added and deleted). "[H]aving *some* relevance to [a special] issue," the dissent said, "was not sufficient." 509 U. S., at 385. And because youth (the mitigating feature in *Johnson*) had obvious relevance *beyond* the special issues, an additional instruction was needed. *Id.*, at 375. The differences between the *Johnson* majority and dissenters could not have been more pronounced.

Today the Court overrules *Johnson sub silentio*, and reinstates the "full effect" interpretation of *Penry I*. For as THE CHIEF JUSTICE explains, *ante*, at 275–276, 279 (dissent-

ing opinion), it was not objectively unreasonable for the state courts to conclude that the ill effects of petitioners' mental illnesses and difficult childhoods would wear off in due time, allowing the jury to give that mitigating evidence *some effect* through the future dangerousness instruction—just as could be done for the mitigating factor of youth in *Johnson*. The Court nonetheless reverses these sentences because the juries were unable to give effect to "any independent concern" (independent, that is, of the Texas special issues) that the defendants "may not be deserving of a death sentence," *Brewer* v. *Quarterman*, *post*, at 294, or to consider the evidence's "relevance to the defendant's moral culpability beyond the scope of the special verdict questions," *ibid.* (internal quotation marks omitted). The Court does not acknowledge that it is overruling *Johnson*, but makes the Court of Appeals the scapegoat for its change of heart.

The Fifth Circuit in both of these cases relied heavily on *Johnson* when denying relief. See *Cole* v. *Dretke*, 418 F. 3d 494, 505 (2005); *Brewer* v. *Dretke*, 442 F. 3d 273, 278, 281 (2006) *(per curiam)* (relying on *Cole*). How does the Court manage to distinguish it? The Court tries two main lines of argument. First, the Court explains:

> "A critical assumption motivating the Court's decision in *Johnson* was that juries would in fact be able to give mitigating effect to the evidence, albeit within the confines of the special issues. . . . Prosecutors in some subsequent cases, however, have undermined this assumption, taking pains to convince jurors that the law compels them to disregard the force of evidence offered in mitigation." *Ante*, at 261.

Because *Johnson*'s "critical assumption" has now been "undermined," the Court says, *Johnson* cannot be said to "foreclos[e] relief in these circumstances." *Ante*, at 261.

This attempt to "distinguish" *Johnson* wilts under even the mildest scrutiny. Since when does this Court craft con-

stitutional rules that depend on the beneficence of the prosecutor? (Never mind that this "critical assumption" of *Johnson* was not so critical as to be mentioned in the case.) And more importantly, how can prosecutorial style have *any* bearing on whether the Eighth Amendment requires a jury to be able to give "some effect," as opposed to "full effect," to a defendant's mitigating evidence? It is of course true that a prosecutor's arguments may be relevant evidence in the final analysis of *whether* a capital trial has met the "some effect" test. But it has absolutely no relevance to *which test* is selected in the first place.*

Second, the Court explains that "the consideration of the defendant's mitigating evidence of youth in *Johnson* could easily have directed jurors toward a 'no' answer with regard to the question of future dangerousness," whereas a juror considering petitioners' mitigating evidence "could feel compelled to provide a 'yes' answer to the same question." *Ante*, at 262. But it is quite apparent that jurors considering youth in *Johnson* could also have "fe[lt] compelled to provide a 'yes' answer" to the future dangerousness question. While one can believe that "the impetuousness and recklessness that may dominate in younger years can subside," *Johnson*, 509 U. S., at 368, one can also believe that a person who kills even in his younger years is fundamentally depraved, and more prone to a life of violent crime. *Johnson* itself explicitly recognized this point, denying relief despite "the fact that a juror might view the evidence of youth as aggravating, as opposed to mitigating." *Ibid.*

As the Court's opinion effectively admits, nothing of a legal nature has changed since *Johnson*. What *has* changed

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*Relatedly, the Court thinks *Johnson* distinguishable because jurors have "experienced" youth but "have never experienced" the "particularized childhood experiences of abuse and neglect" at issue here. *Ante*, at 261. It is again quite impossible to understand, however, how that can have any bearing upon whether "some effect" or "full effect" is the required test.

are the moral sensibilities of the majority of the Court. For those in Texas who have already received the ultimate punishment, this judicial moral awakening comes too late. *Johnson* was the law, until today. And in the almost 15 years in between, the Court today tells us, state and lower federal courts in countless appeals, and this Court in numerous denials of petitions for writ of certiorari, have erroneously relied on *Johnson* to allow the condemned to be taken to the death chamber. See, *e. g.*, *Robison* v. *Johnson*, 151 F. 3d 256, 269 (CA5 1998) (denying petition for rehearing), cert. denied, 526 U. S. 1100 (1999) (petitioner executed Jan. 21, 2000); *Motley* v. *Collins*, 18 F. 3d 1223, 1233–1235 (CA5), cert. denied *sub nom. Motley* v. *Scott*, 513 U. S. 960 (1994) (petitioner executed Feb. 7, 1995).

II

The individuals duly tried and executed between *Johnson* and today's decisions were not, in my view (my view at the time of *Johnson*, and my view now), entitled to federal judicial invalidation of their state-imposed sentences. That is because in my view the meaning of the Eighth Amendment is to be determined not by the moral perceptions of the Justices *du jour*, but by the understanding of the American people who adopted it—which understanding did not remotely include any requirement that a capital jury be permitted to consider all mitigating factors. If, however, a majority of the Justices are going to govern us by their moral perceptions, in this area at least they ought to get their moral perceptions right the first time. Whether one regards improvised death-is-different jurisprudence with disdain or with approval, no one can be at ease with the stark reality that this Court's vacillating pronouncements have produced grossly inequitable treatment of those on death row. Relief from sentence of death because of the jury's inability to give

"full effect" to all mitigating factors has been made available only to those who have managed to drag out their habeas proceedings until today. This is not justice. It is caprice.

Syllabus

BREWER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 05–11287. Argued January 17, 2007—Decided April 25, 2007

Petitioner Brewer was convicted of murder committed during the course of a robbery. At sentencing, he introduced mitigating evidence of his mental illness, his father's extensive abuse of him and his mother, and his substance abuse. His counsel made the strategic decision not to present any expert psychological or psychiatric testimony. The trial judge rejected all of Brewer's proposed instructions designed to give effect to the mitigating evidence he presented, instructing the jury instead to answer only two special issues: whether his conduct was committed deliberately and with the reasonable expectation it would result in his victim's death and whether it was probable he would commit future violent acts constituting a continuing threat to society. In closing argument, the prosecutor emphasized that Brewer's violent response to physical abuse by his father supported an affirmative answer to the "future dangerousness" special issue; he deemphasized any mitigating effect such evidence should have, stressing that the jurors lacked the power to exercise moral judgment and, in determining Brewer's sentence, must answer the questions according to the evidence. Ultimately, the jury answered both special issues in the affirmative, and Brewer was sentenced to death. The Texas Court of Criminal Appeals (CCA) affirmed on direct appeal and denied Brewer's application for state postconviction relief. He then filed a federal habeas petition. Following supplemental briefing concerning *Tennard* v. *Dretke*, 542 U. S. 274, the District Court granted conditional relief, but the Fifth Circuit reversed and rendered its own judgment denying the petition.

Held: Because the Texas capital sentencing statute, as interpreted by the CCA, impermissibly prevented Brewer's jury from giving meaningful consideration and effect to constitutionally relevant mitigating evidence, the CCA's decision denying Brewer relief under *Penry* v. *Lynaugh*, 492 U. S. 302 *(Penry I)*, was both "contrary to" and "involved an unreasonable application of, clearly established Federal law, as determined by [this] Court," 28 U. S. C. § 2254(d). Pp. 292–296.

(a) Brewer's trial was infected with the same constitutional error that occurred in *Penry I*, where the Court held that jury instructions that

merely articulated the Texas special issues, without directing the sentencing jury "to consider fully Penry's mitigating evidence as it bears on his personal culpability," did not provide an adequate opportunity for the jury to decide whether that evidence might provide a legitimate basis for imposing a sentence other than death. 492 U. S., at 323. The Court characterized Penry's mental-retardation and childhood-abuse evidence as a "two-edged sword" that "diminish[ed] his blameworthiness for his crime even as it indicate[d] a probability" of future dangerousness. *Id.*, at 324. Brewer's mitigating evidence similarly served as a "two-edged sword." Even if his evidence was less compelling than Penry's, that does not justify the CCA's refusal to apply *Penry I* here. It is reasonably likely the jurors accepted the prosecutor's argument to limit their decision to whether Brewer had acted deliberately and was likely a future danger, disregarding any independent concern that his troubled background might make him undeserving of death. Also unpersuasive is the Fifth Circuit's explanation that Brewer's lack of expert evidence and that court's precedents holding that mental retardation, but not mental illness, can give rise to a *Penry I* violation prompted the Circuit's reversal of the grant of habeas relief. This Court has never suggested that the question whether the jury could have adequately considered mitigating evidence is a matter purely of quantity, degree, or immutability. Rather, the Court has focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability for the crime. See *id.*, at 322. Pp. 292–294.

(b) Under the narrowest possible reading of *Penry I*, Texas' special issues do not provide for adequate jury consideration of mitigating evidence that functions as a "two-edged sword." The Fifth Circuit's mischaracterization of the law as demanding only that such evidence be given "sufficient mitigating effect," and improperly equating "sufficient effect" with "full effect," is not consistent with the reasoning of *Penry* v. *Johnson*, 532 U. S. 782 *(Penry II)*, which issued after Penry's resentencing (and before the Fifth Circuit's opinion in this case). Like the "constitutional relevance" standard rejected in *Tennard*, a "sufficient effect" standard has "no foundation" in this Court's decisions. 542 U. S., at 284. For the reasons explained in this case and in *Abdul-Kabir*, *ante*, p. 233, the Circuit's conclusions that Brewer's mental-illness and substance-abuse evidence could not constitute a *Penry* violation, and that troubled-childhood evidence may, because of its temporary character, fall sufficiently within the special issues' ambit, fail to heed this Court's repeated warnings about the extent to which the jury must be allowed not only to consider mitigating evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner

and assign it weight in deciding whether a defendant truly deserves death. Pp. 294–296.

442 F. 3d 273, reversed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, THOMAS, and ALITO, JJ., joined, *ante*, p. 265. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ALITO, J., joined as to Part I, *ante*, p. 280.

Robert C. Owen, by appointment of the Court, 549 U. S. 1029, argued the cause for petitioner. With him on the briefs were *Jordan M. Steiker* and *John King*.

Edward L. Marshall, Assistant Attorney General of Texas, argued the cause for respondent. With him on the briefs were *Greg Abbott*, Attorney General, *Kent C. Sullivan*, First Assistant Attorney General, *Eric J. R. Nichols*, Deputy Attorney General, and *Gena Bunn* and *Carla E. Eldred*, Assistant Attorneys General.*

JUSTICE STEVENS delivered the opinion of the Court.

This is a companion case to *Abdul-Kabir* v. *Quarterman*, *ante*, p. 233. Like the petitioner in that case, petitioner Brent Ray Brewer claims that the former Texas capital sentencing statute impermissibly prevented his sentencing jury from giving meaningful consideration to constitutionally relevant mitigating evidence.

In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) *(Penry I)*, we held that jury instructions that merely articulated the Texas "special issues," without directing the jury "to consider fully Penry's mitigating evidence as it bears on his personal culpability," did not provide his sentencing jury with an adequate opportunity to decide whether that evidence might provide

*Briefs of *amici curiae* urging reversal were filed for the American Academy of Child and Adolescent Psychiatry et al. by *James W. Ellis*, *April Land*, and *Stephen K. Harper;* and for the Child Welfare League of America et al. by *Jeffrey J. Pokorak*, *Marsha Levick*, and *Pamela Harris*.

a legitimate basis for imposing a sentence other than death. *Id.*, at 323. We characterized the evidence of Penry's mental retardation and history of childhood abuse as a "two-edged sword," because "it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.*, at 324.

As an overview of the cases both preceding and following *Penry I* demonstrates, we have long recognized that a sentencing jury must be able to give a "'reasoned moral response'" to a defendant's mitigating evidence—particularly that evidence which tends to diminish his culpability—when deciding whether to sentence him to death. *Id.*, at 323; see also *Abdul-Kabir*, *ante*, at 246–256, 260–263. This principle first originated in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), in which we held that sentencing juries in capital cases "must be permitted to consider *any* relevant mitigating factor," *id.*, at 112 (emphasis added). In more recent years, we have repeatedly emphasized that a *Penry* violation exists whenever a statute, or a judicial gloss on a statute, prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence. See *Abdul-Kabir*, *ante*, at 260–263. We do so again here, and hold that the Texas state court's decision to deny relief to Brewer under *Penry I* was both "contrary to" and "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).

I

In 1991, Brewer was convicted of murder committed during the course of a robbery. At sentencing, he introduced several different types of mitigating evidence, including

> "that he had a bout with depression three months before the murder; that he was briefly hospitalized for that depression; that his co-defendant, a woman with whom he

> was apparently obsessed, dominated and manipulated him; that he had been abused by his father; that he had witnessed his father abuse his mother; and that he had abused drugs." *Brewer* v. *Dretke*, 442 F. 3d 273, 275 (CA5 2006) *(per curiam)* (footnotes omitted).[1]

As a result of a strategic decision on his counsel's part, Brewer neither secured nor presented any expert psychological or psychiatric testimony.

At the conclusion of the sentencing hearing, Brewer submitted several additional instructions designed to give effect to the mitigating evidence he did present. App. 81–87. The trial judge rejected all of his proposed instructions and instead instructed the jury to answer only two special issues:

> "'Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, BRENT RAY BREWER, that caused the death of the deceased, Robert Doyle Laminack, was committed deliberately and with the reasonable expectation that the death of the deceased would result?
>
> . . . . .

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[1] On direct appeal, the Texas Court of Criminal Appeals (CCA) summarized the same evidence as follows:

"1) Appellant was not mentally retarded, but was involuntarily committed on January 1, 1990, for 'major depression, single episode, without psychotic features, polysubstance abuse.' The examining physician based his opinion on a suicide note appellant wrote to his mother. On January 25, appellant signed a request for voluntary admission to Big Springs State Hospital for fourteen days.

"2) Appellant came from an abused background where he was ignored by both his father and step-father. He did not have a relationship or live with his real father until after he was fifteen-years old. Appellant's father hit him on several occasions, once with the butt of a pistol and once with a flashlight. Appellant's father frequently beat his mother. Appellant's father had once told him, 'If you ever draw your hand back, you'd better kill me because I'll kill you.'

"3) Appellant had smoked marijuana when he was a teenager." *Brewer* v. *State*, No. 71,307 (June 22, 1994), p. 15, App. 140 (footnotes omitted).

> "'Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRENT RAY BREWER, would commit criminal acts of violence that would constitute a continuing threat to society?'" 442 F. 3d, at 277.

In closing argument, the prosecutor emphasized that Brewer's violent response to his father's extensive physical abuse of both Brewer and his mother supported an affirmative answer to the "future dangerousness" special issue. In contrast, he deemphasized any mitigating effect that such evidence should have on the jury's determination of Brewer's fate:

> "And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason.
>
> "Whatever got him to this point, he is what he is today. And that will never change. That will never change.
>
> "All that's happened to this time or all those years cannot change the violence and the cold, cold-bloodedness that he's exhibited right here. Not one tear. Not one tear, because life means nothing to him. Zero.
>
> "You go back, you look at the evidence and you decide, not because of a poor family and not because of the survivors, because of the evidence that you see that he has shown." App. 118.

The prosecutor stressed that the jurors lacked the power to exercise moral judgment in determining Brewer's sentence, admonishing them that "[y]ou don't have the power to say whether [Brewer] lives or dies. You answer the questions according to the evidence, mu[ch] like you did at the guilt or innocence *[sic]*. That's all." *Id.*, at 114. Ultimately, the jury answered both special issues in the affirmative, and Brewer was sentenced to death.

Brewer's conviction and sentence were affirmed on direct appeal.[2] *Brewer* v. *State*, No. 71,307 (Tex. Crim. App., June 22, 1994) (en banc), App. 122–171. He then filed an application for state postconviction relief, which the CCA denied on January 31, 2001, over the dissent of three judges.[3] *Ex parte Brewer*, 50 S. W. 3d 492 (2001) (*per curiam* order).

Brewer subsequently filed a federal habeas petition in the United States District Court for the Northern District of Texas. After requesting supplemental briefing concerning *Tennard* v. *Dretke*, 542 U. S. 274 (2004), the District Court granted conditional relief. *Brewer* v. *Dretke*, No. Civ.A.2:01–CV–0112–J (Aug. 2, 2004), App. 185–213. On March 1, 2006, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and rendered its own judgment denying the petition. 442 F. 3d, at 282. We granted certiorari. 549 U. S. 974 (2006).

II

Like the petitioner in *Abdul-Kabir*, Brewer contends that the same constitutional error that infected Penry's sentencing hearing occurred in his trial. We agree. As did Penry's, Brewer's mitigating evidence served as a "two-edged

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[2] The CCA's opinion on direct appeal provides the only meaningful explanation by a Texas state court as to why Brewer's *Penry I* claim was denied. See n. 5, *infra*. When Brewer raised the same claim in his state postconviction proceedings, the trial court set forth, and the CCA adopted, a one-sentence ruling embracing the holding previously made on direct appeal: "The . . . special issues . . . were an adequate vehicle for the jury's consideration of the mitigating evidence . . . ." App. 176; *Ex parte Brewer*, 50 S. W. 3d 492, 493 (2001) *(per curiam)*.

[3] Judge Price filed a dissent to the order dismissing Brewer's postconviction application for relief, joined by Judges Johnson and Holcomb. *Id.*, at 493–495. In the dissenters' view, Brewer had alleged a colorable claim of ineffective assistance of counsel, based on his counsel's failure to procure a mental health expert who could have examined him in preparation for trial. *Id.*, at 493.

sword" because it tended to confirm the State's evidence of future dangerousness as well as lessen his culpability for the crime.[4] *Penry I,* 492 U. S., at 324. It may well be true that Brewer's mitigating evidence was less compelling than Penry's, but, contrary to the view of the CCA, that difference does not provide an acceptable justification for refusing to apply the reasoning in *Penry I* to this case.[5] There is surely a reasonable likelihood that the jurors accepted the prosecutor's argument at the close of the sentencing hearing that all they needed to decide was whether Brewer had acted deliberately and would likely be dangerous in the future,[6]

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[4] For example, the prosecution introduced the testimony of a police officer who had been called to quell a family dispute as evidence of Brewer's violent character. App. 6–15. The prosecution also introduced testimony from a doctor who treated Brewer's father after Brewer struck him with a broom handle in response to his father's attack on his mother. *Id.*, at 23–25.

[5] The CCA's opinion purporting to distinguish *Penry I* simply stated: "We conclude the second punishment issue provided an adequate vehicle for the jurors to give effect to appellant's mitigating evidence. We have held a stay in a mental hospital does not evidence a 'long term mental illness which would affect appellant's ability to conform to the requirements of society.' *Joiner* [v. *State,* 825 S. W. 2d 701, 707 (1992) (en banc)]. As in *Joiner,* the evidence shows no more than appellant's threat to commit suicide and a stay at a hospital on one occasion. *Id.* Further, appellant's evidence of drug abuse and an abusive homelife was given effect within the scope of the punishment issues. *Ex parte Ellis,* 810 S. W. 2d 208, 211–212 (Tex. Cr. App. 1991) (drug addiction); *Goss v. State,* 826 S. W. 2d 162, 166 (Tex. Cr. App. 1992) (abusive household)." No. 71,307, at 15, App. 141.

In neither its opinion in this case nor in *Joiner* did the CCA explain why Brewer's evidence was not the same kind of "two-edged sword" as Penry's, other than to suggest that it was less persuasive. 492 U. S., at 324.

[6] "It's not a matter of life and death. It's whether it was deliberate. Was this act deliberate? Will he continue to commit violent acts? That's all you answer. And every one of you people told me you would base that not upon the result, but upon what the evidence dictates you must do." App. 115 (paragraph break omitted).

necessarily disregarding any independent concern that, given Brewer's troubled background, he may not be deserving of a death sentence.

Also unpersuasive in distinguishing the instant case from others to which *Penry I* applies is the Fifth Circuit's explanation regarding the lack of expert evidence in Brewer's case (as compared to that presented by the petitioner in *Abdul-Kabir*) and its distinction between mental illness and mental retardation. In its opinion reversing the District Court's conditional grant of habeas relief, the Court of Appeals noted that, under its precedents, "[t]he only instances in which mental illness has given rise to *Penry I* violations involve those where the illness in question is chronic and/or immutable [as in the case of mental retardation]." 442 F. 3d, at 280. The court also emphasized the lack of expert psychiatric evidence in this case, contrasting the record below with that in *Abdul-Kabir*, and concluded that Brewer "came nowhere near to producing evidence sufficient for us to grant relief." 442 F. 3d, at 281. Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability. Rather, we have focused on whether such evidence has mitigating relevance to the special issues and the extent to which it may diminish a defendant's moral culpability for the crime. The transient quality of such mitigating evidence may make it more likely to fall in part within the ambit of the special issues; however, as we explained in *Penry I*, such evidence may still have "relevance to the defendant's moral culpability beyond the scope of the special verdict questions." 492 U. S., at 322 (citing and quoting *Franklin* v. *Lynaugh*, 487 U. S. 164, 185 (1988) (O'Connor, J., concurring in judgment)).

III

Under the narrowest possible reading of our opinion in *Penry I*, the Texas special issues do not provide for adequate

consideration of a defendant's mitigating evidence when that evidence functions as a "two-edged sword." As the District Court explained in its opinion granting habeas corpus relief in this case:

> "The mitigating evidence presented may have served as a basis for mercy even if a jury decided that the murder was committed deliberately and that Petitioner posed a continuing threat. Without an instruction, much less a special issue on mitigation, this evidence was out of the jury's reach. Given the nature of the mitigating evidence before the jury and the lack of any instruction on mitigation, there is a reasonable likelihood that the jury applied its instructions in a way that prevented the consideration of the mitigating evidence. Reviewing the evidence in light of the special issues, a jury would be very hard pressed to see the evidence presented as anything but aggravating. Failure to submit an instruction on mitigation evidence was an unreasonable application of federal law and Supreme Court precedent. Accordingly, habeas relief on this issue is conditionally granted." No. Civ.A.2:01–CV–0112–J, at 9, App. 196.

In reversing the District Court's grant of habeas relief, and rejecting that court's conclusion that Brewer's mitigating evidence was effectively "out of the jury's reach," the Court of Appeals mischaracterized the law as demanding only that such evidence be given "sufficient mitigating effect," and improperly equated "sufficient effect" with "full effect."[7] This is not consistent with the reasoning of our

[7] The Court of Appeals explained: "For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect. Whether that sufficiency requires that the evidence be given 'full,' or merely 'some,' mitigating effect has been the subject of considerable discussion in this court, but ultimately the distinction is only one of semantics, because regardless of what label is put on the word 'effect,' it is indisputable that the effect must be consti-

opinion issued after Penry's resentencing (and before the Fifth Circuit's opinion in this case). See *Penry* v. *Johnson*, 532 U. S. 782 (2001) *(Penry II)*. Like the "'constitutional relevance'" standard that we rejected in *Tennard*, a "sufficient effect" standard has "no foundation in the decisions of this Court." 542 U. S., at 284.

For reasons not supported by our prior precedents, but instead dictated by what until quite recently has been the Fifth Circuit's difficult *Penry* jurisprudence, the Court of Appeals concluded that Brewer's evidence of mental illness and substance abuse could not constitute a *Penry* violation. It further concluded that "evidence of a troubled childhood may, as a result of its temporary character, fall sufficiently within the ambit of" the special issues. 442 F. 3d, at 280. For the reasons explained above, as well as in our opinion in *Abdul-Kabir*, these conclusions fail to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

[For dissenting opinion of THE CHIEF JUSTICE, see *ante*, p. 265; for dissenting opinion of JUSTICE SCALIA, see *ante*, p. 280.]

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tutionally 'sufficient.' Even if the requirement is called 'full,' it means nothing more than 'sufficient.'" *Brewer* v. *Dretke*, 442 F. 3d 273, 278–279 (CA5 2006) *(per curiam)* (footnote omitted).

Syllabus

SMITH *v.* TEXAS

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 05–11304. Argued January 17, 2007—Decided April 25, 2007

Smith's trial took place in the interim between *Penry* v. *Lynaugh*, 492 U. S. 302 *(Penry I)*, and *Penry* v. *Johnson*, 532 U. S. 782 *(Penry II)*. At that time, Texas capital juries were still given the special-issue questions found constitutionally inadequate in *Penry I*. Texas courts attempted to cure that inadequacy by instructing the jury that if it felt death should not be imposed but also felt the special issues satisfied, it should falsely answer "no" to one of the special-issue questions, thus nullifying the special issues. This nullification charge was later found inadequate to cure the special issues in *Penry II*. Before his trial, Smith objected to the constitutionality of the special issues, but his challenges were denied. At sentencing, Smith's jury received the special issues and the nullification charge. The jury sentenced Smith to death. In his appeal and postconviction state proceedings, Smith continued to argue his sentencing was unconstitutional because of the defects in the special issues. At each stage, the argument was either rejected on the merits, or else held procedurally barred because it had already been addressed on direct appeal. The Texas Court of Criminal Appeals (hereinafter appeals court) affirmed the denial of relief, distinguishing Smith's case from the *Penry* precedents. This Court reversed, *Smith* v. *Texas*, 543 U. S. 37 *(per curiam) (Smith I)*, finding there was *Penry* error and that the nullification charge was inadequate under *Penry II*. On remand, the appeals court denied relief once more. Relying on its *Almanza* decision, it held that Smith had not preserved a *Penry II* challenge to the nullification charge, since he only made a *Penry I* challenge at trial; and that this procedural defect required him to show not merely some harm, but egregious harm, a burden he could not meet.

Held:

1. The appeals court made errors of federal law that cannot be the predicate for requiring Smith to show egregious harm. *Smith I* confirmed that the special issues did not meet constitutional standards and that the nullification charge did not cure that error. The basis for relief was error caused by the special issues, not some separate error caused by the nullification charge. On remand from *Smith I*, the appeals court mistook this Court's holding as granting relief in light of an error caused by the nullification charge and concluded that Smith had not preserved that claim because he never objected to the nullification charge. Al-

though Smith's second state habeas petition included an argument that the nullification charge itself prevented the jury from considering his mitigating evidence, that was not the only, or even the primary, argument he presented to the appeals court and this Court. The parties' post-trial filings, the state courts' judgments, and *Smith I* make clear that Smith challenged the special issues before trial and did not abandon or transform that claim during lengthy post-trial proceedings. Regardless of how the State now characterizes it, Smith's pretrial claim was treated by the appeals court as a *Penry* challenge to the adequacy of the special issues in his case, that is how this Court treated it in *Smith I*, and that was the error on which this Court granted relief. The appeals court's misinterpretation of federal law on remand from *Smith I* cannot form the basis for the imposition of an adequate and independent state procedural bar. *Ake* v. *Oklahoma*, 470 U. S. 68, 75. Pp. 312–315.

2. The state courts that reviewed Smith's case did not indicate that he failed to preserve his claim that the special issues were inadequate in his case. Under the appeals court's application of *Almanza*, preserved error is subject only to normal harmless-error review. The appeals court has indicated elsewhere that so long as there is a reasonable likelihood the jury believed it was not permitted to consider relevant mitigating evidence, the lower *Almanza* standard is met. Because the state court must defer to this Court's finding of *Penry* error, which is a finding that there is a reasonable likelihood the jury believed it was not permitted to consider Smith's relevant mitigating evidence, *Johnson* v. *Texas*, 509 U. S. 350, 367, it appears Smith is entitled to relief under the state harmless-error framework. Pp. 315–316.

185 S. W. 3d 455, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, *post*, p. 316. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 316.

Jordan M. Steiker, by appointment of the Court, 549 U. S. 1029, argued the cause for petitioner. With him on the briefs were *Carol S. Steiker* and *Maurie A. Levin*.

R. Ted Cruz, Solicitor General of Texas, argued the cause for respondent. With him on the brief were *Greg Abbott*, Attorney General, *Kent C. Sullivan*, First Assistant Attorney General, *Eric J. R. Nichols*, Deputy Attorney General, *Sean D. Jordan*, Deputy Solicitor General, *Adam W. Aston*

and *Michael P. Murphy*, Assistant Solicitors General, and *Kimberly A. Schaefer*.

Gene C. Schaerr argued the cause for the State of California et al. as *amici curiae* urging affirmance. With him on the brief were *Bill Lockyer*, Attorney General, *Ward A. Campbell*, Supervising Deputy Attorney General, *Steffen N. Johnson*, and *Kevin T. Kane*, Chief State's Attorney of Connecticut, and the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *John W. Suthers* of Colorado, *Charlie Crist* of Florida, *Thurbert E. Baker* of Georgia, *Phill Kline* of Kansas, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *George J. Chanos* of Nevada, *Jim Petro* of Ohio, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Mark L. Shurtleff* of Utah, *Robert F. McDonnell* of Virginia, and *Rob McKenna* of Washington.*

JUSTICE KENNEDY delivered the opinion of the Court.

The jury in a Texas state court convicted petitioner LaRoyce Lathair Smith of first-degree murder and determined he should receive a death sentence. This Court now reviews a challenge to the sentencing proceeding for a second time.

The sentencing took place in the interim between our decisions in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) *(Penry I)*, and *Penry* v. *Johnson*, 532 U. S. 782 (2001) *(Penry II)*. In *Penry I* the Court addressed the special-issue questions then submitted to Texas juries to guide their sentencing determinations in capital cases. The decision held that the Texas special issues were insufficient to allow proper consideration

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**Seth P. Waxman* and *Virginia E. Sloan* filed a brief for the Constitution Project as *amicus curiae* urging reversal.

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

of some forms of mitigating evidence. Following a pretrial challenge to the special issues by Smith, the trial court issued a charge instructing the jury to nullify the special issues if the mitigating evidence, taken as a whole, convinced the jury Smith did not deserve the death penalty. After Smith's trial, *Penry II* held a similar nullification charge insufficient to cure the flawed special issues. Smith, on state collateral review, continued to seek relief based on the inadequacy of the special issues, arguing that the nullification charge had not remedied the problem identified in his pretrial objection. The Texas Court of Criminal Appeals affirmed the denial of relief, distinguishing Smith's case from the *Penry* precedents. *Ex parte Smith*, 132 S. W. 3d 407 (2004).

This Court, by summary disposition, reversed. *Smith* v. *Texas*, 543 U. S. 37 (2004) *(per curiam) (Smith I)*. On remand the Court of Criminal Appeals again denied Smith relief. It held, for the first time, that Smith's pretrial objections did not preserve the claim of constitutional error he asserts. Under the Texas framework for determining whether an instructional error merits reversal, the state court explained, this procedural default required Smith to show egregious harm—a burden the court held he did not meet. *Ex parte Smith*, 185 S. W. 3d 455, 467–473 (2006). The requirement that Smith show egregious harm was predicated, we hold, on a misunderstanding of the federal right Smith asserts; and we therefore reverse.

I

A

The Special Issues

Under Texas law the jury verdict form provides special-issue questions to guide the jury in determining whether the death penalty should be imposed. At the time of Smith's trial, Texas law set forth three special issues. The first addressed deliberateness; the second concerned future dan-

gerousness; and the third asked whether the killing was an unreasonable response to provocation by the victim. Provocation was not applicable to Smith's case so the third question was not included in the instructions. If the jury answered the two applicable special-issue questions in the affirmative, the death penalty would be imposed.

In *Penry I*, the Court held that neither of these special-issue instructions was "broad enough to provide a vehicle for the jury to give mitigating effect" to the evidence at issue in that case. *Penry II*, *supra*, at 798 (citing, and characterizing, *Penry I*, *supra*, at 322–325). We refer to the inadequacy of the special-issue instructions as "*Penry* error."

For the brief period between *Penry I* and the Texas Legislature's addition of a catchall special issue, Texas courts attempted to cure *Penry* error with a nullification charge. In Smith's case the trial court instructed that if a juror was convinced the correct answer to each special-issue question was "yes," but nevertheless concluded the defendant did not deserve death in light of all the mitigating evidence, the juror must answer one special-issue question "no." The charge was not incorporated into the verdict form. See, *e. g.*, 1 App. 123–124. In essence the jury was instructed to misrepresent its answer to one of the two special issues when necessary to take account of the mitigating evidence.

In *Penry II*, the Court concluded that a nullification charge created an ethical and logical dilemma that prevented jurors from giving effect to the mitigating evidence when the evidence was outside the scope of the special issues. As the Court explained, "because the supplemental [nullification] instruction had no practical effect, the jury instructions . . . were not meaningfully different from the ones we found constitutionally inadequate in *Penry I*." 532 U. S., at 798. In other words, *Penry II* held that the nullification charge did not cure the *Penry* error.

Penry II and *Smith I* recognized the ethical dilemma, the confusion, and the capriciousness introduced into jury delib-

erations by directing the jury to distort the meaning of an instruction and a verdict form. *Penry II*, *supra*, at 797–802; *Smith I*, *supra*, at 45–48. These are problems distinct from *Penry* error and may be grounds for reversal as an independent matter; but we need not reach that issue here, just as the Court did not need to reach it in *Penry II* or *Smith I*.

When this Court reversed the Court of Criminal Appeals in *Smith I*, it did so because the nullification charge had not cured the underlying *Penry* error. See *Smith I*, 543 U. S., at 48 (holding that "the burden of proof . . . was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with" the mitigating evidence). While the ethical and logical quandary caused by the jury nullification charge may give rise to distinct error, this was not the basis for reversal in *Smith I*. On remand the Court of Criminal Appeals misunderstood this point. Its interpretation of federal law was incorrect.

In light of our decision in *Smith I*, our review of the facts need not restate the brutality of the murder Smith committed or the evidence he offered in mitigation. See *id.*, at 38–43. We need only address the conclusion of the Court of Criminal Appeals that the constitutional error asserted by Smith was caused by the nullification charge and that, having failed to alert the trial court to that error, Smith was required to demonstrate egregious harm to obtain relief.

B

The Trial

Before *voir dire*, Smith filed three written motions addressing the jury instructions. In the first, he argued that *Jurek* v. *Texas*, 428 U. S. 262 (1976), and *Penry I* established the constitutional inadequacy of the special issues. The motion maintained that Texas law denied the trial court power to cure the problem because "[t]he exclusive methodology for submission to the jury of special issues with regard to infliction of the death penalty [is] contained in" Article 37.071 of

the Texas Code of Criminal Procedure Annotated (Vernon 2006 Supp. Pamphlet), which did not authorize the trial court to add an additional special issue on mitigation. 1 App. 9. The trial court, the objection stated, would not be able to provide "any instruction with regard to mitigating evidence which would permit the jury to make a moral reasoned response to" mitigating evidence not covered by the special issues. *Ibid.* Smith would offer such evidence.

The second pretrial motion raised a related but distinct argument. Smith began by noting that in *Jurek* the Supreme Court had found Article 37.071 constitutional on its face. He argued, however, it did so with the understanding that the Texas courts would give broad construction to terms in the special issues such as "'deliberately.'" 1 App. 12. They had not done so and therefore "[t]here [was] no provision in Texas for the jury to decide the appropriateness of the death penalty taking into consideration the personal moral culpability of the [d]efendant balanced by mitigating evidence which is not directly or circumstantially probative in answering the special issues." *Id.*, at 13. Smith therefore reasoned that Article 37.071 was unconstitutional.

The third pretrial motion asked the court to state the contents of the mitigation charge prior to *voir dire* so Smith could exercise his jury challenges intelligently. *Id.*, at 17–19.

The trial court denied the first two motions. *Id.*, at 21. In response to the third it provided Smith a copy of its proposed mitigation charge. That charge, which we will refer to as "the nullification charge," defined mitigating evidence broadly before explaining to the jury, in relevant part:

> "[I]f you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are 'Yes,' and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues 'No' in order to give effect to your belief that the

> death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you." *Smith I*, *supra*, at 40 (internal quotation marks omitted).

The nullification charge did not define or describe the special issues. 1 App. 105–110. The judge told counsel: "If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea. So if you come up with something you like better, just let me know and I'll look at it." *Id.*, at 21. Smith raised no additional objection and did not suggest alternative wording for the nullification charge.

The jury received the nullification charge from the judge, but the verdict form did not incorporate it. The form was confined to the special issues of deliberateness and future dangerousness. *Id.*, at 123–124. The jury unanimously answered "yes" to both special-issue questions, and Smith was sentenced to death.

C

Post-Trial Proceedings

The State does not contest the validity of Smith's challenge to the special issues in his pretrial motion. It does contend that since Smith did not object to the nullification charge, his state habeas petition rests on an unpreserved claim, namely, that the nullification charge excluded his mitigating evidence. The State's formulation of the federal right claimed by Smith, a formulation accepted by the Court of Criminal Appeals, is based on an incorrect reading of federal law and this Court's precedents. Considering Smith's first two pretrial motions together, as the trial court did, it

is evident Smith's objection was that the special-issue framework violated the Eighth Amendment because it prevented the court from formulating jury instructions that would ensure adequate consideration of his mitigating evidence. This framework failed because the special issues were too narrow, the trial court was unable to promulgate a new catchall special issue, and the Texas courts did not define "deliberately" in broad terms. The State is correct that this was an objection based on *Penry* error, not one based on the confusion caused by the nullification instruction.

A review of Smith's post-trial proceedings shows that the central argument of his habeas petition, and the basis for this Court's decision in *Smith I*, is the same constitutional error asserted at trial.

1

Direct Appeal

On direct appeal from the trial court, Smith renewed his argument that the special issues were unconstitutional:

> "[I]n *[Penry I]*, the Supreme Court held that there was an Eighth Ame[n]dment violation where there was mitigating evidence not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, and the jury instructions would have provided the jury with no vehicle for expressing its reasoned moral response to that evidence.
>
> . . . . .
>
> "By its extremely narrow interpretation of the requirements of *Penry*, this Court has unconstitutionally narrowed the sentencer's discretion to consider relevant mitigating evidence . . . . The special issues . . . do not in reality provide a vehicle for individualized consideration of the appropriateness of assessment of the death penalty and [the article establishing them] is unconstitutional as applied." 1 App. 133–134.

Both the Court of Criminal Appeals, in its most recent opinion, and the State, in its brief on direct appeal, recognized Smith's pretrial motions preserved this argument. 185 S. W. 3d, at 462, and n. 9 (holding Smith's direct-appeal argument that "the jury was unable to give effect to his mitigating evidence in answering the special issues" was "based upon his pretrial motion"); Brief for Texas in No. 71,333 (Tex. Crim. App.), p. 62, Record 674 ("[Smith] reiterates his [pretrial] claim that the statute is unconstitutional as applied since it fails to provide an effective vehicle for the jury to apply mitigating evidence").

In its opinion affirming the sentence on direct review the Court of Criminal Appeals held that the "instruction complied with *Penry* and provided a sufficient vehicle for the jury to consider any mitigating evidence [Smith] offered." *Smith* v. *State*, No. 71,333 (June 22, 1994), p. 11, 1 App. 147.

2

First and Second State Habeas

In 1998, Smith sought state habeas relief. Under state law the petition was untimely. The Court of Criminal Appeals, over a dissent, rejected an argument that neglect by Smith's counsel merited equitable tolling. *Ex parte Smith*, 977 S. W. 2d 610 (1998) (en banc); see *id.*, at 614 (Overstreet, J., dissenting). Texas then amended its filing rules to allow the exception the Court of Criminal Appeals had declined to create. The statutory change permitted Smith to file for habeas relief.

Smith filed his second habeas petition before this Court's decision in *Penry II*. He argued once more that the special issues were inadequate: "In *Penry [I]*, the Supreme Court . . . held that the former Texas capital sentencing statute did not provide an adequate vehicle for expressing its reasoned moral response to [mitigating] evidence in rendering its sentencing decision." Application for Writ of Habeas

Corpus Pursuant to Section 4A of Article 11.071 of the Texas Code of Criminal Procedure in No. W91–22803–R(A) (Tex. Crim. App.), p. 191, Record 193 (internal quotation marks omitted). Smith acknowledged the trial court tried to solve the problem with the nullification charge, but he explained that "[i]t confounds common sense to suggest jurors—who are sworn to tell the truth—would ever understand that they were authorized to answer [special-issue] questions falsely." *Id.*, at 193, Record 195. Smith continued:

> "Nothing in the special issues themselves linked the 'nullification' instruction to the specific questions asked; nothing in the special issues themselves authorized the jury to consider mitigating evidence when answering the questions; nothing in the special issues themselves authorized the jury to answer the questions 'no' when the truthful answer was 'yes'; in short, nothing in the special issues permitted the jury to apply the 'nullification' instruction." *Id.*, at 194, Record 196.

Smith conceded he had not objected to the nullification charge but confirmed that he had challenged the special-issues statute and that the Court of Criminal Appeals had reached the merits of this claim on direct review.

The State, relying upon a procedural bar different from and indeed contradictory to the one it now raises, responded that "[t]his claim [was] procedurally barred as it was both raised and decided on the merits on direct appeal." 1 App. 156; see also *id.*, at 157 (describing Smith's position as an "identical complaint" and an "identical argument" to his claim on direct appeal). The State contended, in the alternative, that Smith's position was meritless because the nullification charge cured any problem with the special issues. Respondent's Original Answer and Response to Applicant's Application for Writ of Habeas Corpus in No. W91–22803–R(A) (Tex. Crim. App.), pp. 136–139, Record 467–470.

The state trial court denied habeas relief on the ground Smith was procedurally barred from raising the same claim denied on direct review absent "a subsequent change in the law so as to render the judgment void . . . ." *Ex parte Smith*, No. W91–22803–R, pp. 86–87 (265th Dist. Ct. of Dallas Cty., Tex., Apr. 5, 2001).

3

Appeal from the Denial of State Habeas Relief

While Smith's appeal from the state trial court's denial of his second habeas petition was pending, this Court decided *Penry II*. Smith filed a brief in the Court of Criminal Appeals explaining the relevance of *Penry II* to his habeas claim. He noted that the special-issue questions in his case were for all relevant purposes the same as those in *Penry II*. Applicant's Brief for Submission in View of the United States Supreme Court's Opinion in *Penry v. Johnson* in No. W91–22803–R, pp. 4–5. He maintained the nullification charges were also indistinguishable, *id.*, at 5–6, and had in *Penry II* been held insufficient "to cure the error created by the Special Issues," Applicant's Brief for Submission, at 6–7. Smith concluded by explaining that the procedural bar for raising an issue already resolved on direct review did not apply "where an intervening legal decision renders a previously rejected claim meritorious." *Id.*, at 12 (citing *Ex parte Drake*, 883 S. W. 2d 213, 215 (Tex. Crim. App. 1994) (en banc)). (We note the Court of Criminal Appeals recently adopted this position. See *Ex parte Hood*, 211 S. W. 3d 767, 775–778 (2007).)

The Court of Criminal Appeals ordered supplemental briefing on the relevance of *Penry II*. Given that *Penry II* addressed the sufficiency of a nullification charge as a cure for inadequate special issues, Smith's supplemental brief concentrated on the same issue. Nevertheless, his central argument remained that he "presented significant mitigating evidence that was virtually indistinguishable from Penry's

and thus undeniably beyond the scope of the special issues." Applicant's Supplemental Briefing on Submission in No. 74,228, p. 12 (hereinafter Applicant's Supp. Briefing). The nullification charge was inadequate as well, in his view, because, based on the ethical dilemma, "there is a reasonable probability that the nullification instruction . . . precluded [a juror who found that Smith's personal culpability did not warrant a death sentence] from expressing that conclusion." *Id.*, at 13. Alternatively, Smith argued he was "also entitled to relief under *Penry II*" because "[e]ven if the jury might have been able to give effect to some of [his] mitigating evidence within the scope of [the] special issues, the confusing nullification instruction itself" may have prevented the jury from doing so. *Id.*, at 14. As such, the nullification charge was "worse than no instruction at all." *Id.*, at 15–16 (emphasis deleted).

The State responded that the special issues were adequate and, furthermore, that the nullification charge, unlike the charge in *Penry II*, cured any problem. State's Brief in No. 74,228 (Tex. Crim. App.), pp. 2–11. In response to Smith's second argument the State contended "it tests the bounds of reason to grant [Smith] relief based on a good-faith attempt to give him a supplemental instruction to which he was not constitutionally entitled." *Id.*, at 11. In reply Smith reiterated his two distinct arguments, devoting most of the brief to his original trial objection. Applicant's Reply to Respondent's Response to Applicant's Brief for Submission in No. 74,228 (Tex. Crim. App.).

The Court of Criminal Appeals denied the habeas petition. It found no *Penry* error, reasoning that the special issues were adequate to consider the mitigating evidence. *Ex parte Smith*, 132 S. W. 3d, at 412–415. Any evidence excluded from the purview of the jury, the court indicated, was not "constitutionally significant." *Id.*, at 413, n. 21. In the alternative the court held the nullification charge and the argument at trial were distinguishable from those at issue in

Penry II. In Smith's case, the court reasoned, the nullification charge would have been an adequate cure even if the special issues were too narrow. 132 S. W. 3d, at 416–417.

The majority did not adopt or address the reasoning of the two concurring opinions, which argued that Smith had procedurally defaulted his "*Penry II* claim" because while he had objected to the special issues at trial, he had not objected separately to the nullification charge. *Id.*, at 423–424 (opinion of Hervey, J.); *id.*, at 428 (opinion of Holcomb, J.).

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Smith I

The ruling of the Court of Criminal Appeals in Smith's second state habeas proceeding was reversed by this Court in *Smith I*. The Court's summary disposition first rejected as unconstitutional the Texas court's screening test for "constitutionally significant" evidence. 543 U. S., at 43–48; see also *Tennard* v. *Dretke*, 542 U. S. 274 (2004).

The *Smith I* Court next observed that although Smith had presented relevant mitigating evidence, the jury's consideration was "tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with" that evidence. 543 U. S., at 45, 48. There was, in other words, a *Penry* error. As a final matter, despite differences between the nullification charges in *Smith I* and *Penry II*, the variances were "constitutionally insignificant" because "*Penry II* identified a broad and intractable problem." 543 U. S., at 46, 47 (citing *Penry II*, 532 U. S., at 799–800). The nullification charge was therefore inadequate under *Penry II*. The judgment was reversed and the case remanded. 543 U. S., at 48–49.

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Remand Following Smith I

On remand Smith's brief urged that harmless-error review was inappropriate because under the nullification charge the

jury proceedings became capricious. See Applicant's Brief on Remand in No. 74,228 (Tex. Crim. App.), pp. 8–18. The State responded that Smith was procedurally barred because he waited to raise his allegation of "jury charge error" under *Penry II* until the second state habeas petition nine years after his conviction. State's Brief on Remand in No. 74,228 (Tex. Crim. App.), pp. 1, 2 (hereinafter State's Brief on Remand). The State maintained this was an adequate and independent state ground for denying relief. *Ibid.* Smith's motion and direct appeal, the State said, had been based on a challenge to the statute setting forth the special issues, not to the jury charge. *Id.*, at 5–6. The State also maintained that this Court had not addressed whether the special issues were "a sufficient vehicle for the jury to give effect to [Smith's] mitigation evidence." *Id.*, at 12–16.

Smith replied to the procedural-bar argument by noting he had "consistently raised his claim regarding the inadequacy of the special issues to permit constitutionally adequate consideration of his mitigating evidence and this Court has consistently addressed the merits of [that] claim." Applicant's Reply Brief on Remand in No. 74,228 (Tex. Crim. App.), p. 1.

The Court of Criminal Appeals denied relief. The court's confusion with the interplay between *Penry I* and *Penry II* is evident from the beginning. Reasoning that "[t]he Supreme Court did not address our conclusion that the two special issues provided [Smith's] jury with a constitutionally sufficient vehicle to give effect to his mitigating evidence," 185 S. W. 3d, at 463 (internal quotation marks omitted), the court again concluded that the special issues were adequate, *id.*, at 464–467. Nevertheless, because of its "uncertainty" regarding this Court's *Penry II* jurisprudence, the Court of Criminal Appeals went on to "assume, for the sake of argument, that at least some of [Smith's] evidence was not fully encompassed by the two special issues" and that "the jury

charge in this case was constitutionally deficient under *Penry II*." 185 S. W. 3d, at 467.

The Court then applied the framework of *Almanza* v. *State*, 686 S. W. 2d 157 (Tex. Crim. App. 1984) (en banc), to Smith's claim of error. Under *Almanza*, Smith needed first to show instructional error. Having assumed Smith had done so, the court next asked whether the error was preserved for review. If so, Smith would need to establish some "actual," not merely theoretical, harm resulting from the error. If Smith had not preserved the error, by contrast, he would need to establish not merely some harm but also that the harm was egregious. 185 S. W. 3d, at 467.

The court found Smith had not preserved his claim of instructional error. Smith's only objection at trial, reasoned the state court, was that the statute authorizing the special issues was unconstitutional in light of *Penry I*. 185 S. W. 3d, at 461–462, and n. 8. This objection did not preserve a challenge to the nullification charge based on *Penry II*, so Smith was required to show egregious harm. That showing had not been addressed by this Court's holding in *Smith I*, the Court of Criminal Appeals indicated, because this Court only required that Smith demonstrate a reasonable probability of harm. In the view of the Court of Criminal Appeals there was little likelihood that Smith's jury had failed to consider the mitigating evidence. 185 S. W. 3d, at 468–473. On this basis the court concluded Smith had failed to show egregious harm and, as such, habeas relief was foreclosed.

We granted certiorari. 549 U. S. 948 (2006).

II

A

The special issues through which Smith's jury sentenced him to death did not meet constitutional standards, as held in *Penry I;* and the nullification charge did not cure that error, as held in *Penry II*. This was confirmed in *Smith I*. The Court of Criminal Appeals on remand denied relief,

nonetheless, based on two determinations: first, that Smith's federal claim was not preserved; second, as a result, that Smith was required by *Almanza* to show egregious harm. As a general matter, and absent some important exceptions, when a state court denies relief because a party failed to comply with a regularly applied and well-established state procedural rule, a federal court will not consider that issue. *Ford* v. *Georgia*, 498 U. S. 411, 423–424 (1991).

Smith disputes that the application of *Almanza* on state habeas review is a "firmly established and regularly followed state practice." *James* v. *Kentucky*, 466 U. S. 341, 348–349 (1984). The State argues it is. We may assume the State is correct on this point, for in our view the predicate finding of procedural failure that led the Court of Criminal Appeals to apply the heightened *Almanza* standard is based on a misinterpretation of federal law.

The State and the Court of Criminal Appeals read *Smith I* as having reversed because the nullification charge "prevented giving effect to [Smith's] mitigating evidence because it placed the jurors in an unconstitutional ethical quandary." Brief for Respondent 28. It is true Smith's second state habeas petition included an argument that the nullification charge itself prevented the jury from considering his mitigating evidence. This, however, was not the only, or even the primary, argument he presented to the Court of Criminal Appeals and this Court. As detailed above, Smith's central objection at each stage has been to the special issues.

In *Smith I*, this Court agreed the special issues were inadequate and so reversed the Court of Criminal Appeals. In challenging the special issues Smith did contend that the nullification charge was flawed. This Court engaged in much the same analysis. That analysis was only necessary, however, because the Court of Criminal Appeals had twice rejected Smith's claim of *Penry* error based on the mistaken idea that "regardless of whether [Smith's] mitigating evidence was beyond the scope of the two statutory special is-

sues, the judge's extensive supplemental [nullification] instruction provided a sufficient vehicle for the jury to consider all of [Smith's] mitigating evidence." *Ex parte Smith*, 132 S. W. 3d, at 410. In other words, Smith argued, and this Court agreed, that the special issues prevented the jury from considering his mitigating evidence; and the nullification charge failed to cure that error. In its opposition to certiorari in *Smith I*, the State understood that under *Penry II* it was the special issues, not the nullification charge, that created the error. See Brief in Opposition in *Smith* v. *Texas*, O. T. 2004, No. 04–5323, p. 17 ("In essence, the [nullification] instruction did not *create* new error; rather, the instruction simply *failed to correct* the error identified in *Penry I*").

The Court of Criminal Appeals' mistaken belief that *Penry II*, and by extension *Smith I*, rested on a separate error arising from the nullification charge may have stemmed from Smith's use of the term "*Penry II* error" in his supplemental brief and from this Court's citation to *Penry II*, rather than *Penry I*, in *Smith I*. Applicant's Supp. Briefing 11. Smith's labeling of the claim in his supplemental brief, however, did not change its substance. See *Ex parte Caldwell*, 58 S. W. 3d 127, 130 (Tex. Crim. App. 2000); *Rawlings* v. *State*, 874 S. W. 2d 740, 742 (Tex. App. Fort Worth 1994). And this Court's reference to *Penry II*, rather than *Penry I*, has been explained above. As the parties' post-trial filings, the state courts' judgments, and this Court's decision in *Smith I* make clear, Smith challenged the special issues under *Penry I* at trial and did not abandon or transform that claim during his lengthy post-trial proceedings.

After *Smith I*, the State argued for the first time that Smith's pretrial motions, and his argument on direct appeal, raised a "statutory" complaint about the entire Texas death penalty scheme different from his current theory. State's Brief on Remand 6. The State expanded on that claim in its arguments to this Court, in which it suggested Smith made a strategic decision to launch a broad attack on the state sys-

tem rather than attempt to obtain adequate instructions in his own case. Brief for Respondent 28, 32–33; Tr. of Oral Arg. 40. Regardless of how the State now characterizes it, Smith's claim was treated by the Court of Criminal Appeals as a *Penry* challenge to the adequacy of the special issues in his case, and that is how it was treated by this Court in *Smith I*.

The Court of Criminal Appeals on remand misunderstood the interplay of *Penry I* and *Penry II*, and it mistook which of Smith's claims furnished the basis for this Court's opinion in *Smith I*. These errors of federal law led the state court to conclude Smith had not preserved at trial the claim this Court vindicated in *Smith I*, even when the Court of Criminal Appeals previously had held Smith's claim of *Penry* error was preserved. The state court's error of federal law cannot be the predicate for requiring Smith to show egregious harm. *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985).

B

Under *Almanza*, once Smith established the existence of instructional error that was preserved by a proper objection, he needed only to show he suffered "*some* harm" from that error. In other words, relief should be granted so long as the error was not harmless. 686 S. W. 2d, at 171. It would appear this lower standard applies to Smith's preserved challenge to the special issues.

The Court of Criminal Appeals explained in its recent decision in *Penry* v. *State*, 178 S. W. 3d 782 (2005), that once a state habeas petitioner establishes "a reasonable likelihood that the jury believed that it was not permitted to consider" some mitigating evidence, he has shown that the error was not harmless and therefore is grounds for reversal. *Id.*, at 786–788 (citing *Boyde* v. *California*, 494 U. S. 370 (1990)). We note that the Court of Criminal Appeals stated in dicta in this case that even assuming Smith had established that there was a reasonable probability of error, he had not shown

"'actual' harm," 185 S. W. 3d, at 468, and therefore would not even satisfy the lower *Almanza* standard. We must assume that this departure from the clear rule of *Penry* v. *State* resulted from the state court's confusion over our decision in *Smith I*.

The Court of Criminal Appeals is, of course, required to defer to our finding of *Penry* error, which is to say our finding that Smith has shown there was a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of his mitigating evidence. See *Johnson* v. *Texas*, 509 U. S. 350, 367 (1993). Accordingly, it appears Smith is entitled to relief under the state harmless-error framework.

* * *

In light of our resolution of this case, we need not reach the question whether the nullification charge resulted in a separate jury-confusion error, and if so whether that error is subject to harmless-error review.

For the reasons we have stated, the judgment of the Court of Criminal Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SOUTER, concurring.

I join the Court's opinion. In some later case, we may be required to consider whether harmless-error review is ever appropriate in a case with error as described in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). We do not and need not address that question here.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The issue in this case is less complicated than the opinion of the Court suggests. The federal constitutional error that occurred at the penalty phase of petitioner's trial and that

was identified in *Smith* v. *Texas*, 543 U. S. 37 (2004) *(per curiam) (Smith I)*, concerned a flaw in the jury instructions: Specifically, the instructions did not give the jury an adequate opportunity to take some of petitioner's mitigating evidence into account. This error could have been avoided by changing the instructions. Indeed, our opinion in *Penry* v. *Lynaugh*, 492 U. S. 302, 322–323 (1989) *(Penry I)*, rather pointedly discussed how proper instructions might be crafted. But defense counsel—facing evidence of aggravating factors that might have led the jury to return a death verdict no matter what instructions were given—never objected to the text of the instructions and declined the trial judge's invitation to suggest modifications, choosing instead to argue that *Penry I* precluded Texas from applying its death penalty statute to petitioner at all.

As a result of this failure to object, the Texas Court of Criminal Appeals (TCCA), in the decision now under review, *Ex parte Smith*, 185 S. W. 3d 455 (2006), held that petitioner could not overturn his death sentence without surmounting a Texas rule that is analogous to the federal "plain error" rule. See *United States* v. *Olano*, 507 U. S. 725, 731 (1993). Under this Texas rule, adopted in *Almanza* v. *State*, 686 S. W. 2d 157, 171 (Tex. Crim. App. 1984) (en banc), a criminal defendant who fails to object to a jury instruction cannot obtain a reversal simply on the grounds that the instruction was erroneous and the error was not harmless. Rather, the defendant must meet the heightened standard of "egregious harm." *Id.*, at 174. Finding that the error in petitioner's case did not meet this heightened standard, the TCCA held that petitioner's sentence must stand. 185 S. W. 3d, at 467.

Because petitioner failed to raise an objection to the trial court's attempt to cure the federal constitutional defect in the "special issues," the TCCA was entitled to apply its stricter *Almanza* rule, an altogether commonplace type of procedural rule that represents an adequate and independ-

ent state-law ground for the TCCA's decision. Accordingly, I would dismiss for want of jurisdiction.

I

A

At the time of petitioner's trial, Texas statutes provided that the jury at the penalty phase of a capital case had to answer two (and in some cases, three) questions, known as the "special issues."[1] The two questions that had to be answered in every case were

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann., Art. 37.0711, §§ 3(b)(1) and (2) (Vernon 2006).

If the jury found unanimously that the answer to all the "special issues" was "yes," then the death sentence was imposed; otherwise, the sentence was life imprisonment. Art. 37.071, § 2(e).

In *Jurek* v. *Texas*, 428 U. S. 262 (1976), the Court upheld the facial constitutionality of this scheme, but in *Penry I*, decided in 1989, the Court held that use of this scheme in Penry's case violated the Eighth Amendment because evidence of Penry's mental retardation and severe childhood abuse did not fit adequately into any of the "special issues" as submitted to the jury. With respect to the first of the "special issues," the Court discussed at some length the pos-

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[1] A third "special issue" applies when the evidence raises the question whether the killing was provoked by the deceased. See Tex. Code Crim. Proc. Ann., Art. 37.071, § (2)(b) (Vernon Supp. 1992). In petitioner's case, that "special issue" was inapplicable.

sibility that an instruction broadly defining the requirement of deliberateness might have permitted sufficient consideration of Penry's mental retardation and abuse. The Court wrote:

> "*In the absence of jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability,* we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. *Without such a special instruction,* a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.' Thus, we cannot be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to Penry's mitigating evidence." 492 U. S., at 322–323 (emphasis added).

Petitioner's trial took place in 1991—that is, after *Penry I* but before *Penry* v. *Johnson*, 532 U. S. 782 (2001) *(Penry II)*. At the guilt phase, petitioner was found to have committed an exceptionally brutal and coldblooded murder. Petitioner, a former employee of a fast food restaurant, went with some friends to the restaurant after closing hours when the employees were cleaning up and asked to be admitted to use the phone. The teenage shift manager, Jennifer Soto, let him in and greeted him with a hug. Petitioner followed her to her office and demanded the combination of the safe. Soto told him she did not know the combination, but petitioner beat her on the head with the butt of a gun, demanding the combination and continuing until the gun handle fell off. Petitioner then shot Soto in the back, grabbed a knife from the kitchen and inflicted what were described at trial

as numerous "'torture' wounds," and finally slit her throat. Brief for Respondent 1.

At the penalty phase, the prosecution relied on evidence showing the brutal nature of the murder, as well as petitioner's history of violence. The defense offered mitigation evidence, including some that loosely resembled Penry's, specifically low IQ and evidence of possible organic learning and speech disorders.

As the Court relates, prior to trial petitioner's attorney contemporaneously filed three motions. The first, citing *Penry I*, argued that the "special issues" provided the jury with an inadequate vehicle to consider the mitigating effect of petitioner's age, and asked the court to declare the Texas capital sentencing scheme unconstitutional as applied to petitioner. 1 App. 7–10. The second motion, also citing *Penry I*, likewise argued that the Texas death penalty was "unconstitutional because it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues." 1 App. 13. Neither motion requested that the trial judge give jury instructions bringing the Texas scheme into compliance with the Eighth Amendment. Rather, petitioner's counsel argued that the judge could not provide "*any instruction* with regard to mitigating evidence" that would obviate the constitutional problem. *Id.*, at 9 (emphasis added). The trial judge denied both these motions.

In the third motion, petitioner's counsel asked for a copy of the "mitigation instructio[n]" that the court planned to give. *Id.*, at 17–19. This motion anticipated that the trial court would issue an instruction to "attempt to resolve the *[Penry I]* problem." *Id.*, at 18. The court granted this motion and invited defense counsel to offer suggested revisions. But although *Penry I* had explained how the jury instructions might be modified to obviate the error found in that case—*i. e.*, by broadly defining the term "deliberately" in the first "special issue," 492 U. S., at 322–323—and despite the

fact that all involved understood that the trial judge's proposed instruction was intended to cure the *Penry I* problem, petitioner's counsel did not object that the proposed mitigation instructions were inadequate to cure the defect in the "special issues." Rather, faced with the aggravating factors noted above, petitioner maintained that any submission of the "special issues" to the jury, regardless of any additional instructions given, would violate *Penry I*.

Hearing no objection to the instructions, the trial judge went ahead and gave the instructions that he had proposed. After instructing the jury on the relevant "special issues," the judge also gave a supplemental "mitigation" or "nullification" instruction. This instruction told the jurors that they should take into account any evidence that they viewed as mitigating and that if this evidence convinced them that the defendant should not be sentenced to death, they should answer "no" to one of the "special issues." Instructed in this way, the jury returned a death verdict.

As our subsequent opinions in *Penry II* and *Smith I* held, the "nullification" instruction did not obviate the problem found in *Penry I*. Similar instructions were at issue in both *Penry II* and *Smith I*, and in both cases the Court held that this approach was flawed, noting that the instructions on the "special issues" and the supplemental or "nullification" instructions were conflicting and that the conflict created an "ethical problem" for the jurors because they were "'essentially instructed to return a false answer to a special issue in order to avoid a death sentence.'" *Smith I*, 543 U. S., at 47–48 (quoting *Penry II*, *supra*, at 801).

On remand after *Smith I*, the TCCA, in the relevant portion of its opinion, addressed the question whether petitioner was entitled to reversal of his death sentence based on the federal constitutional error found in this Court's *per curiam* opinion. 185 S. W. 3d, at 467–468. The TCCA, having noted that petitioner did not object to the nullification instruction, *id.*, at 461, applied the unpreserved error prong of

its *Almanza* rule, which represents the TCCA's interpretation of a provision of the Texas Criminal Code addressing the review of claimed errors in jury instruction. 185 S. W. 3d, at 467–468. Under *Almanza*, once it is established that there was error in a jury instruction,

> "'the next step is to make an evidentiary review . . . as well as a review of any other part of the record as a whole which may illuminate the actual, not just theoretical, harm to the accused.' If the defendant failed to object to the jury charge, he must show that the error caused him such egregious harm that he did not have 'a fair and impartial trial.'" 185 S. W. 3d, at 464 (quoting *Almanza*, 686 S. W. 2d, at 174).

Finding that the error in this case had not produced the requisite "egregious harm," the TCCA held that petitioner's death sentence must stand.

B

The Court today concludes that the federal constitutional error that we identified in *Smith I* was the very error that petitioner asserted in his pretrial motions, *ante*, at 305, but this holding is incorrect. While petitioner did argue that the "special issues" precluded the jury from considering his mitigating evidence, he never argued that the trial judge's proposed instructions were insufficient to cure that defect. It was perfectly reasonable for the TCCA to hold that, by failing to object to the cure, petitioner has not preserved a claim that the cure was ineffective.

This case perfectly illustrates the wisdom of such a rule. We have never held that *no instruction* is capable of curing the *Penry I* problem with the "special issues." Indeed, we have suggested that the problem could have been avoided if the trial judge had not instructed the jury to give a false answer to one of the "special issues" but had instead taken the course discussed in *Penry I*—defining the term "deliber-

ately" as used in the first "special issue" in a way that was broad enough to permit consideration of the relevant mitigating evidence. 492 U. S., at 322–323. However, the trial court never thought to take this route because petitioner never argued that the nullification instruction was inadequate to satisfy federal law. Preventing the TCCA from applying plain-error review in these circumstances is tantamount to holding that petitioner had a federal right to sandbag the trial court.

II

Once it is recognized that petitioner did not preserve an objection to the federal adequacy of the trial judge's proposed instructions, there are several remaining questions that must be considered. Because the Court does not address these, I address them in abbreviated form.

A

The first is whether the TCCA was precluded from applying the *Almanza* rule in the decision now under review because the TCCA did not invoke that state-law ground in *Ex parte Smith*, 132 S. W. 3d 407 (2004), the decision that was reversed by this Court in *Smith I*. Petitioner accuses the TCCA of engaging in "an impermissible 'bait and switch,'" "an unacceptable manipulation of its procedural rules to defeat this Court's adjudication of [petitioner's] *Penry* claim," and "nothing less than an opportunistic invocation of state law to avoid compliance with this Court's decision." Brief for Petitioner 43–44.

This argument unjustifiably impugns the good faith of the TCCA and rests on a fundamentally flawed premise, namely, that the majority of the TCCA in its 2004 decision tacitly held that petitioner's claim regarding the jury instructions had been fully preserved. In the 2004 decision, however, the TCCA majority said nothing whatsoever on this point, choosing instead to reject the claim on the merits. While four concurring judges argued that petitioner had procedur-

ally defaulted this claim, *Ex parte Smith*, 132 S. W. 3d, at 423–424 (opinion of Hervey, J.); *id.*, at 428 (opinion of Holcomb, J.), the majority did not respond and was under no obligation to do so. Nor was the majority under any obligation to decide the preservation issue before addressing the merits. There are a few nonmerits issues that a court must address before proceeding to the merits, see, *e. g.*, *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83 (1998) (holding that a federal court generally must assure itself of its jurisdiction before proceeding to the merits), but petitioner does not argue that error preservation is regarded in this way under Texas law.

In the absence of any legal obligation to consider a preliminary nonmerits issue, a court may choose in some circumstances to bypass the preliminary issue and rest its decision on the merits. See, *e. g.*, 28 U. S. C. § 2254(b)(2) (federal habeas court may reject claim on merits without reaching question of exhaustion). Among other things, the court may believe that the merits question is easier, and the court may think that the parties and the public are more likely to be satisfied that justice has been done if the decision is based on the merits instead of what may be viewed as a legal technicality. Thus, the TCCA's 2004 opinion cannot be read as holding that petitioner's jury instructions argument was unencumbered with procedural defects or limitations.

Even if that earlier TCCA decision did not hold that petitioner's jury instructions argument was properly preserved, petitioner suggests that where a state court originally rejects a federal claim on the merits and that decision is reversed by this Court, the state court may not impose the state-law procedural bar on remand to reach the same result. But whether it may be advisable for state courts to apply state law before reaching federal constitutional questions, see *Massachusetts* v. *Upton*, 466 U. S. 727, 736 (1984) (STEVENS, J., concurring in judgment), we have never held that

States are required to follow this sequence. And in cases in which this Court has reversed a state-court decision based on a possible federal constitutional violation, it is not uncommon for the state court on remand to reinstate the same judgment on state-law grounds. See *id.*, at 735, n. 2. See also *State* v. *Wedgeworth*, 281 Kan. ——, 127 P. 3d 1033 (2006) *(per curiam)* (concluding on reconsideration that hearsay statements were unobjected to and harmless); *Saldano* v. *State*, 70 S. W. 3d 873, 890 (Tex. Crim. App. 2002) (en banc) (concluding on remand that error confessed in this Court had not been preserved for appellate review); *State* v. *Hallum*, 606 N. W. 2d 351, 353 (Iowa 2000) (concluding on remand that defendant had forfeited his right to invoke the confrontation clause because he had procured the witness' unavailability at trial in the first instance); *Gaskin* v. *State*, 615 So. 2d 679, 680 (Fla. 1993) (holding on remand in a capital proceeding that defendant had failed to object properly to unconstitutionally vague aggravating factors instruction); *Happ* v. *State*, 618 So. 2d 205, 206 (Fla. 1993) *(per curiam)* (same); *Booker* v. *State*, 511 So. 2d 1329, 1331 (Miss. 1987) (holding on remand that defendant failed to object contemporaneously to prosecutor's statements).

B

The second question is whether the *Almanza* "egregious harm" standard is an adequate and independent state ground sufficient to support a state judgment that precludes consideration of a federal right. *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991). I am satisfied that it is.

In order to be "adequate," a state rule must be a "firmly established and regularly followed state practice," and should further a legitimate state interest. *James* v. *Kentucky*, 466 U. S. 341, 348–349 (1984). The *Almanza* "egregious harm" rule meets these requirements. In *Almanza*, the TCCA exhaustively reviewed the history of the Texas

statute[2] governing objections to jury-charge error. 686 S. W. 2d, at 160–161. The court concluded that the statute imposed a two-part standard: If there was a timely objection at trial, the objecting party need show only "some harm"; but if no proper objection was made the party claiming error must demonstrate that the "error is so egregious and created such harm that he has not had a fair and impartial trial—in short, egregious harm." *Id.*, at 171 (internal quotation marks omitted; emphasis deleted).

Petitioner argues that the *Almanza* standard is not adequate but rather is arbitrary and discretionary for three reasons: that it was intended to be applied on direct review, not on habeas review; that it was intended to control only nonconstitutional claims; and that it has not been applied to *Penry* claims. Brief for Petitioner 47, n. 16. None of these grounds is borne out.

Immediately following *Almanza*, the TCCA applied it in state habeas proceedings. See *Ex parte Tuan Van Truong*, 770 S. W. 2d 810, 813 (1989) (en banc) *(per curiam); Ex parte Patterson*, 740 S. W. 2d 766, 776–777 (1987) (en banc); *Ex parte White*, 726 S. W. 2d 149, 150 (1987) (en banc); *Ex parte Maldonado*, 688 S. W. 2d 114, 116 (1985) (en banc).[3]

[2] At the time of *Almanza*, the Texas Code of Criminal Procedure of 1965 Annotated, Article 36.19, provided: "Whenever it appears by the record in any criminal action upon appeal that any requirement [regarding certain jury instructions] has been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of defendant, or unless it appears from the record that the defendant has not had a fair and impartial trial. All objections to the charge and to the refusal of special charges shall be made at the time of the trial." This provision continues in effect unamended through the present day. See *ibid.* (Vernon 1991).

[3] Petitioner argues that Texas has not applied *Almanza* in habeas proceedings more recently. But petitioner fails to cite any case where Texas has applied a more permissive form of review to such a claim in state habeas proceedings, nor would it be logical for Texas to afford more deferential review in habeas proceedings than on direct review.

Moreover, the TCCA has applied *Almanza* in cases raising *Penry*-type claims, which are, of course, based on the Eighth Amendment. See, *e. g.*, *Turner* v. *State*, 87 S. W. 3d 111, 117 (2002) (showing of "egregious harm" required by statute to support claim that unobjected-to jury-charge error restricted jury's consideration of mitigating evidence); *Ovalle* v. *State*, 13 S. W. 3d 774, 786 (2000) (en banc) *(per curiam)* (applying *Almanza* to preserved mitigation charge error); *Cantu* v. *State*, 939 S. W. 2d 627, 647–648 (1997) (en banc) (citing *Almanza* for requirement that unobjected-to claim of mitigation charge error is waived but for "egregious error"); *Coleman* v. *State*, 881 S. W. 2d 344, 356–357 (1994) (en banc) (citing *Almanza* in rejecting claim of *Penry* error); *Flores* v. *State*, 871 S. W. 2d 714, 723 (1993) (en banc) (citing *Almanza* in connection with a reverse-*Penry* error claim, that giving a mitigation charge was inappropriate where defendant intentionally forewent introducing any mitigating evidence).

The *Almanza* rule was adopted in 1986, six years prior to petitioner's 1991 trial. That the TCCA has not cited *Almanza* in every single case regarding jury-charge error is not dispositive. Unlike the jurisprudential novelties at issue in *Ford* v. *Georgia*, 498 U. S. 411 (1991), and *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457–458 (1958), it was unremarkable at the time of petitioner's trial, and equally unremarkable today, that the TCCA would apply those standards to govern his claim of instructional error.

Finally, the *Almanza* rule, in imposing a contemporaneous-objection requirement, serves a well-recognized and legitimate state interest: avoiding flawed trials and minimizing costly retrials. See *Coleman*, *supra*, at 746; *United States* v. *Young*, 470 U. S. 1 (1985). Accord, Fed. Rules Crim. Proc. 51(b) and 52(b). This case itself bears out the basis for such a rule. Despite being directly solicited for suggested changes by the trial judge, petitioner never once objected to the text of the jury instructions. Knowing full well that the

trial court believed that the nullification charge had cured the *Penry I* error inherent in the "special issues," petitioner's attorney elected to sit quietly by. Because the *Almanza* rule is regularly followed and serves important state interests, it is an "adequate" state ground.

The *Almanza* rule is also "independent" of federal law. The determination by the TCCA that petitioner failed to object to the nullification instruction, and was therefore required to prove "egregious harm," rested purely on state statutory law.

C

Finally, I consider petitioner's argument that the grounds on which the TCCA relied in concluding that petitioner was not entitled to relief under *Almanza* were inconsistent with the *Smith I* mandate, most notably because, while *Smith I* held that the "nullification" instruction did not eliminate the Eighth Amendment problem identified in *Penry I*, the TCCA noted on remand that the jurors' statements during *voir dire* suggested that they would be able to take all mitigating evidence into account in rendering their verdict. See 185 S. W. 3d, at 468.

Petitioner's argument confuses the question decided in *Smith I* (whether the jury instructions violated the Eighth Amendment) with the separate question decided by the TCCA on remand (whether the instructions caused "egregious harm"). A penalty phase instruction violates the Eighth Amendment if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde* v. *California*, 494 U. S. 370, 380 (1990). But as we made clear in *Calderon* v. *Coleman*, 525 U. S. 141, 147 (1998) *(per curiam)*, "[t]he *Boyde* analysis does not inquire into the actual effect of the error on the jury's verdict; it merely asks whether constitutional error has occurred." Texas law similarly bifurcates these inquiries. In *Almanza*, the TCCA held that

> "finding error in the court's charge to the jury begins—not ends—the inquiry; the next step is to make an evidentiary review [of the whole record to] illuminate the actual, not just [the] theoretical, harm to the accused." 686 S. W. 2d, at 174.[4]

At this stage, Texas law may well be more forgiving than federal law. Under *Almanza*, a petitioner seeking a reversal for unpreserved instructional error must show that the error deprived him of a "fair and impartial trial," working "egregious harm." *Ibid.* By contrast, under *Olano*, 507 U. S., at 734–735, in federal court unpreserved error merits reversal only when it constitutes "plain error." But whatever the standard, it is clear that this Court's finding of constitutional penalty phase error in *Smith I* in no way foreclosed the second and subsequent step, undertaken by the TCCA on remand, of determining whether that error required reversal. Accordingly, the TCCA's *Almanza* analysis does not conflict with the *Smith I* mandate.

For these reasons, I would dismiss for want of jurisdiction.

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[4] Reading the TCCA's more recent decision in *Penry* v. *State*, 178 S. W. 3d 782 (2005), to mean that Texas law requires resentencing upon a finding of preserved jury instruction error, the Court in this case effectively orders the TCCA to require petitioner to be resentenced. *Ante*, at 315–316. Because the TCCA is better equipped than are we to analyze and apply Texas law, I would leave application of its procedural default rules to that court.

Syllabus

UNITED HAULERS ASSOCIATION, INC., ET AL. *v.* ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY ET AL.

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

No. 05–1345. Argued January 8, 2007—Decided April 30, 2007

Traditionally, municipalities in respondent Counties disposed of their own solid wastes, often via landfills that operated without permits and in violation of state regulations. Facing an environmental crisis and an uneasy relationship with local waste management companies, the Counties requested and the State created respondent Authority. The Counties and the Authority agreed that the Authority would manage all solid waste in the Counties. Private haulers could pick up citizens' trash, but the Authority would process, sort, and send it off for disposal. The Authority would also provide other services, including recycling. If the Authority's operating costs and debt service were not recouped through the "tipping fees" it charged, the Counties must make up the difference. To avoid such liability, the Counties enacted "flow control" ordinances requiring private haulers to obtain permits to collect solid waste in the Counties and to deliver the waste to the Authority's sites.

Petitioners, a trade association and individual haulers, filed suit under 42 U. S. C. § 1983, alleging that the flow control ordinances violate the Commerce Clause by discriminating against interstate commerce. They submitted evidence that without the ordinances and the associated tipping fees, they could dispose of solid waste at out-of-state facilities for far less. Ruling in the haulers' favor, the District Court held that nearly all flow control laws had been categorically rejected in *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383, where this Court held that an ordinance forcing haulers to deliver waste to a particular private facility discriminated against interstate commerce. Reversing, the Second Circuit held that *Carbone* and other of this Court's so-called "dormant" Commerce Clause precedents allow for a distinction between laws that benefit public, as opposed to private, facilities.

Held: The judgments are affirmed.

261 F. 3d 245 and 438 F. 3d 150, affirmed.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II–A, II–B, and II–C, concluding that the Counties' flow control ordinances, which treat in-state private business interests exactly

the same as out-of-state ones, do not discriminate against interstate commerce. Pp. 338–345.

(a) To determine whether a law violates the dormant Commerce Clause, the Court first asks whether it discriminates on its face against interstate commerce. In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99. Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually *per se* rule of invalidity," *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624, which can only be overcome by a showing that there is no other means to advance a legitimate local purpose, *Maine* v. *Taylor*, 477 U. S. 131, 138. Pp. 338–339.

(b) *Carbone* does not control this case. *Carbone* involved a flow control ordinance requiring that all nonhazardous solid waste within a town be deposited, upon payment of an above-market tipping fee, at a transfer facility run by a private contractor under an agreement with the town. See 511 U. S., at 387. The dissent there opined that the ostensibly private transfer station was "essentially a municipal facility," *id.*, at 419, and that this distinction should have saved the ordinance because favoring local government is different from favoring a particular private company. The majority's failure to comment on the public-private distinction does not prove, as the haulers' contend, that the majority agreed with the dissent's characterization of the facility, but thought there was no difference under the dormant Commerce Clause between laws favoring private entities and those favoring public ones. Rather, the *Carbone* majority avoided the issue because the transfer station was private, and therefore the question whether *public* facilities may be favored was not properly before the Court. The majority viewed the ordinance as "just one more instance of local processing requirements that we long have held invalid," *id.*, at 391, citing six local processing cases involving discrimination in favor of *private* enterprise. If the Court were extending this line of cases to cover discrimination in favor of local government, it could be expected to have said so. Thus, *Carbone* cannot be regarded as having decided the public-private question. Pp. 339–341.

(c) The flow control ordinances in this case do not discriminate against interstate commerce. Compelling reasons justify treating these laws differently from laws favoring particular private businesses over their competitors. "[A]ny notion of discrimination assumes a comparison of substantially similar entities," *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 298, whereas government's important responsibilities to protect the health, safety, and welfare of its citizens set it apart from a typical pri-

vate business, cf. *id.*, at 313. Moreover, in contrast to laws favoring in-state business over out-of-state competition, which are often the product of economic protectionism, laws favoring local government may be directed toward any number of legitimate goals unrelated to protectionism. Here, the ordinances enable the Counties to pursue particular policies with respect to waste handling and treatment, while allocating the costs of those policies on citizens and businesses according to the volume of waste they generate. The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government. The Counties' citizens could have left the entire matter of waste management services for the private sector, in which case any regulation they undertook could not discriminate against interstate commerce. But it was also open to them to vest responsibility for the matter with their government, and to adopt flow control ordinances to support the government effort. It is not the office of the Commerce Clause to control the voters' decision in this regard. The Court is particularly hesitant to interfere here because waste disposal is typically and traditionally a function of local government exercising its police power. Nothing in the Commerce Clause vests the responsibility for such a policy judgment with the Federal Judiciary. Finally, while the Court's dormant Commerce Clause cases often find discrimination when the burden of state regulation falls on interests outside the State, the most palpable harm imposed by the ordinances at issue—more expensive trash removal—will likely fall upon the very people who voted for the laws, the Counties' citizens. There is no reason to step in and hand local businesses a victory they could not obtain through the political process. Pp. 342–345.

ROBERTS, C. J., delivered the opinion of the Court, except as to Part II–D. SOUTER, GINSBURG, and BREYER, JJ., joined that opinion in full. SCALIA, J., filed an opinion concurring as to Parts I and II–A through II–C, *post*, p. 348. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 349. ALITO, J., filed a dissenting opinion, in which STEVENS and KENNEDY, JJ., joined, *post*, p. 356.

Evan M. Tager argued the cause for petitioners. With him on the briefs was *Miriam R. Nemetz.*

Michael J. Cahill argued the cause for respondents. With him on the brief were *Judy Drabicki*, *Peter M. Rayhill*, *Bruce S. Rogow*, *Richard A. Frye*, and *Thomas E. Kelly.*

Counsel

Caitlin J. Halligan, Solicitor General of New York, argued the cause for the State of New York et al. as *amici curiae* urging affirmance. With her on the brief were *Eliot Spitzer*, former Attorney General, *Daniel Smirlock*, Deputy Solicitor General, *Benjamin N. Gutman*, Assistant Solicitor General, *John J. Sipos*, Assistant Attorney General, *Karen King Mitchell*, Deputy Attorney General of Missouri, and the Attorneys General and former Attorneys General for their respective States as follows: *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *Richard Blumenthal* of Connecticut, *Carl C. Danberg* of Delaware, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Gregory D. Stumbo* of Kentucky, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Michael A. Cox* of Michigan, *Mike Hatch* of Minnesota, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *George J. Chanos* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Stuart Rabner* of New Jersey, *Wayne Stenehjem* of North Dakota, *Hardy Myers* of Oregon, *Patrick Lynch* of Rhode Island, *Robert E. Cooper, Jr.*, of Tennessee, *William H. Sorrell* of Vermont, *Robert F. McDonnell* of Virginia, and *Darrell V. McGraw, Jr.*, of West Virginia.*

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*Briefs of *amici curiae* urging reversal were filed for Sussex County, Virginia, et al. by *Jonathan S. Franklin;* and for the National Solid Wastes Management Association et al. by *David Biderman*, *Robert Digges*, *Jan S. Amundson*, and *Quentin Riegel*.

Briefs of *amici curiae* urging affirmance were filed for Madison County, New York, by *Jeffrey B. Morris;* for the Arkansas Association of Regional Solid Waste Management Districts et al. by *Scott M. DuBoff*, *Michael F. X. Gillin*, *Nicholas Nadzo*, *Samuel G. Weiss, Jr.*, *Mathias H. Heck, Jr.*, *Stephen J. Acquario*, *Michael Rainwater*, *Moran M. Pope III*, *Charles H. Younger*, and *Larry S. Jenkins;* for the Economic Development Growth Enterprises Corp. et al. by *Gregory J. Amoroso;* for Environmental Defense by *Michael J. Bean;* for the Federation of New York Solid Waste Associations by *Michael D. Diederich, Jr.;* for the National Association of Counties et al. by *Richard Ruda* and *Richard H. Seamon;* for the Onondaga County Resource Recovery Agency et al. by *Bruce R. Braun*, *Gene C. Schaerr*, *Steffen N. Johnson*, and *Geoffrey P. Eaton;* for the Rockland Coalition for Democracy and Freedom et al. by *Mr. Diederich;* and for the

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part II–D.

"Flow control" ordinances require trash haulers to deliver solid waste to a particular waste processing facility. In *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383 (1994), this Court struck down under the Commerce Clause a flow control ordinance that forced haulers to deliver waste to a particular *private* processing facility. In this case, we face flow control ordinances quite similar to the one invalidated in *Carbone*. The only salient difference is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant. Disposing of trash has been a traditional government activity for years, and laws that favor the government in such areas—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause. Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer Counties.

I

Located in central New York, Oneida and Herkimer Counties span over 2,600 square miles and are home to about 306,000 residents. Traditionally, each city, town, or village within the Counties has been responsible for disposing of its own waste. Many had relied on local landfills, some in a more environmentally responsible fashion than others.

By the 1980's, the Counties confronted what they could credibly call a solid waste "'crisis.'" Brief for Respond-

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Rockland County Solid Waste Management Authority by *Robert Bergen*, *Teno West*, and *Bridget Gauntlett*.

ents 4. Many local landfills were operating without permits and in violation of state regulations. Sixteen were ordered to close and remediate the surrounding environment, costing the public tens of millions of dollars. These environmental problems culminated in a federal cleanup action against a landfill in Oneida County; the defendants in that case named over 600 local businesses and several municipalities and school districts as third-party defendants.

The "crisis" extended beyond health and safety concerns. The Counties had an uneasy relationship with local waste management companies, enduring price fixing, pervasive overcharging, and the influence of organized crime. Dramatic price hikes were not uncommon: In 1986, for example, a county contractor doubled its waste disposal rate on six weeks' notice.

Responding to these problems, the Counties requested and New York's Legislature and Governor created the Oneida-Herkimer Solid Waste Management Authority (Authority), a public benefit corporation. See N. Y. Pub. Auth. Law Ann. § 2049–aa *et seq.* (West 1995). The Authority is empowered to collect, process, and dispose of solid waste generated in the Counties. § 2049–ee(4). To further the Authority's governmental and public purposes, the Counties may impose "appropriate and reasonable limitations on competition" by, for instance, adopting "local laws requiring that all solid waste . . . be delivered to a specified solid waste management-resource recovery facility." § 2049–tt(3).

In 1989, the Authority and the Counties entered into a Solid Waste Management Agreement, under which the Authority agreed to manage all solid waste within the Counties. Private haulers would remain free to pick up citizens' trash from the curb, but the Authority would take over the job of processing the trash, sorting it, and sending it off for disposal. To fulfill its part of the bargain, the Authority agreed to purchase and develop facilities for the processing and

disposal of solid waste and recyclables generated in the Counties.

The Authority collected "tipping fees" to cover its operating and maintenance costs for these facilities.[1] The tipping fees significantly exceeded those charged for waste removal on the open market, but they allowed the Authority to do more than the average private waste disposer. In addition to landfill transportation and solid waste disposal, the fees enabled the Authority to provide recycling of 33 kinds of materials, as well as composting, household hazardous waste disposal, and a number of other services. If the Authority's operating costs and debt service were not recouped through tipping fees and other charges, the agreement provided that the Counties would make up the difference.

As described, the agreement had a flaw: Citizens might opt to have their waste hauled to facilities with lower tipping fees. To avoid being stuck with the bill for facilities that citizens voted for but then chose not to use, the Counties enacted "flow control" ordinances requiring that all solid waste generated within the Counties be delivered to the Authority's processing sites.[2] Private haulers must obtain a

[1] Tipping fees are disposal charges levied against collectors who drop off waste at a processing facility. They are called "tipping" fees because garbage trucks literally tip their back end to dump out the carried waste. As of 1995, haulers in the Counties had to pay tipping fees of at least $86 per ton, a price that ballooned to as much as $172 per ton if a particular load contained more than 25% recyclables.

[2] Oneida's flow control ordinance provides in part:

"From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County or by the Authority pursuant to contract with the County, or by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority." App. to Pet. for Cert. 122a.

The relevant portion of Herkimer's flow control ordinance is substantially similar:

"After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collec-

permit from the Authority to collect waste in the Counties. Penalties for noncompliance with the ordinances include permit revocation, fines, and imprisonment.

Petitioners are United Haulers Association, Inc., a trade association made up of solid waste management companies, and six haulers that operated in Oneida and Herkimer Counties when this action was filed. In 1995, they sued the Counties and the Authority under 42 U. S. C. § 1983, alleging that the flow control laws violate the Commerce Clause by discriminating against interstate commerce. They submitted evidence that without the flow control laws and the associated $86-per-ton tipping fees, they could dispose of solid waste at out-of-state facilities for between $37 and $55 per ton, including transportation.

The District Court read our decision in *Carbone*, 511 U. S. 383, as categorically rejecting nearly all flow control laws. The court ruled in the haulers' favor, enjoining enforcement of the Counties' laws. The Second Circuit reversed, reasoning that *Carbone* and our other dormant Commerce Clause precedents allow for a distinction between laws that benefit public as opposed to private facilities. 261 F. 3d 245, 263 (2001). Accordingly, it held that a statute does not discriminate against interstate commerce when it favors local government at the expense of all private industry. The court remanded to let the District Court decide whether the Counties' ordinances nevertheless placed an incidental burden on interstate commerce, and if so, whether the ordinances' benefits outweighed that burden.

On remand and after protracted discovery, a Magistrate Judge and the District Court found that the haulers did not show that the ordinances imposed *any* cognizable burden on interstate commerce. The Second Circuit affirmed, assuming that the laws exacted some toll on interstate commerce, but finding any possible burden "modest" compared to the

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tion in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County." *Id.*, at 135a.

"clear and substantial" benefits of the ordinances. 438 F. 3d 150, 160 (2006). Because the Sixth Circuit had recently issued a conflicting decision holding that a flow control ordinance favoring a public entity *does* facially discriminate against interstate commerce, see *National Solid Wastes Management Assn.* v. *Daviess Cty.*, 434 F. 3d 898 (2006), we granted certiorari, 548 U. S. 941 (2006).

II

A

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U. S. Const., Art. I, § 8, cl. 3. Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute. See *Case of the State Freight Tax*, 15 Wall. 232, 279 (1873); *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 318 (1852).

To determine whether a law violates this so-called "dormant" aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. *American Trucking Assns., Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U. S. 429, 433 (2005); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. 353, 359 (1992). In this context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99 (1994); *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 273 (1988). Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually *per se* rule of invalidity," *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978), which can only be overcome by a showing that the State has no

other means to advance a legitimate local purpose, *Maine* v. *Taylor*, 477 U. S. 131, 138 (1986).

B

Following the lead of the Sixth Circuit in *Daviess County*, the haulers argue vigorously that the Counties' ordinances discriminate against interstate commerce under *Carbone*. In *Carbone*, the town of Clarkstown, New York, hired a private contractor to build a waste transfer station. According to the terms of the deal, the contractor would operate the facility for five years, charging an above-market tipping fee of $81 per ton; after five years, the town would buy the facility for one dollar. The town guaranteed that the facility would receive a certain volume of trash per year. To make good on its promise, Clarkstown passed a flow control ordinance requiring that all nonhazardous solid waste within the town be deposited at the transfer facility. See 511 U. S., at 387.

This Court struck down the ordinance, holding that it discriminated against interstate commerce by "hoard[ing] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.*, at 392. The dissent pointed out that all of this Court's local processing cases involved laws that discriminated in favor of *private* entities, not public ones. *Id.*, at 411 (opinion of SOUTER, J.). According to the dissent, Clarkstown's ostensibly private transfer station was "essentially a municipal facility," *id.*, at 419, and this distinction should have saved Clarkstown's ordinance because favoring local government is by its nature different from favoring a particular private company. The majority did not comment on the dissent's public-private distinction.

The parties in this case draw opposite inferences from the majority's silence. The haulers say it proves that the majority agreed with the dissent's characterization of the facility, but thought there was no difference under the dormant Commerce Clause between laws favoring private entities and

those favoring public ones. The Counties disagree, arguing that the majority studiously avoided the issue because the facility in *Carbone* was private, and therefore the question whether *public* facilities may be favored was not properly before the Court.[3]

We believe the latter interpretation of *Carbone* is correct. As the Second Circuit explained, "in *Carbone* the Justices were divided over the *fact of whether* the favored facility was public or private, rather than on the import of that distinction." 261 F. 3d, at 259 (emphasis in original). The *Carbone* dissent offered a number of reasons why public entities should be treated differently from private ones under the dormant Commerce Clause. See 511 U. S., at 419–422 (opinion of SOUTER, J.). It is hard to suppose that the *Carbone* majority definitively rejected these arguments without explaining why.

The *Carbone* majority viewed Clarkstown's flow control ordinance as "just one more instance of local processing requirements that we long have held invalid." *Id.*, at 391. It then cited six local processing cases, every one of which involved discrimination in favor of *private* enterprise.[4] The

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[3] Each side makes much of the *Carbone* majority's various descriptions of the facility. The haulers point out that the Court twice referred to the construction and financing of the transfer station as the town's project. See 511 U. S., at 387 ("its new facility"), 394 ("its project"); Brief for Petitioners 20–22. The Counties note that the majority referred to the transfer station as a "town-sponsored facility," *Carbone*, 511 U. S., at 393, a "favored local operator," *id.*, at 389, "the preferred processing facility," a "single local proprietor," and a "local business," *id.*, at 392, but never as a *public* facility. Brief for Respondents 17, n. 7. The dissent has mined the *Carbone* decision, appendix, and briefs for further instances of allegedly supportive terminology, *post*, at 359–360 (opinion of ALITO, J.), but we continue to find this duel of labels at best inconclusive.

[4] See *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82 (1984) (invalidating Alaska regulation requiring all Alaskan timber to be processed in-state prior to export); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970) (invalidating application of an Arizona statute to require Arizona-grown cantaloupes to be packaged within the State before ex-

Court's own description of the cases acknowledges that the "offending local laws hoard a local resource—be it meat, shrimp, or milk—for the benefit of *local businesses* that treat it." *Id.*, at 392 (emphasis added). If the Court were extending this line of local processing cases to cover discrimination in favor of local government, one would expect it to have said so. Cf. *United States* v. *Burr*, 25 F. Cas. 55, 165 (No. 14,693) (CC Va. 1807) (Marshall, C. J.) ("[A]n opinion which is to . . . establish a principle never before recognized, should be expressed in plain and explicit terms").

The *Carbone* majority stated that "[t]he *only conceivable distinction*" between the laws in the local processing cases and Clarkstown's flow control ordinance was that Clarkstown's ordinance favored a single local business, rather than a group of them. 511 U. S., at 392 (emphasis added). If the Court thought Clarkstown's processing facility was public, that additional distinction was not merely "conceivable"—it was conceived, and discussed at length, by three Justices in dissent. *Carbone* cannot be regarded as having decided the public-private question.[5]

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port); *Toomer* v. *Witsell*, 334 U. S. 385 (1948) (invalidating South Carolina statute requiring shrimp fishermen to unload, pack, and stamp their catch before shipping it to another State); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928) (invalidating a Louisiana statute prohibiting the export of shrimp unless the heads and hulls had first been removed within the State); *Johnson* v. *Haydel*, 278 U. S. 16 (1928) (invalidating analogous Louisiana statute for oysters); *Minnesota* v. *Barber*, 136 U. S. 313 (1890) (invalidating Minnesota law requiring any meat sold within the State to be examined by an in-state inspector). *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951) (invalidating local ordinance requiring all milk sold in the city to be pasteurized within five miles of the city center)—discussed elsewhere in *Carbone* and in the dissent here, *post*, at 367–368—is readily distinguishable on the same ground.

[5] The dissent asserts that the Court "long ago recognized that the Commerce Clause can be violated by a law that discriminates in favor of a state-owned monopoly." *Post*, at 361. The authority it cites—*Scott* v. *Donald*, 165 U. S. 58 (1897), and *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 442 (1898)—certainly qualifies as from "long ago," but does not sup-

C

The flow control ordinances in this case benefit a clearly public facility, while treating all private companies exactly the same. Because the question is now squarely presented on the facts of the case before us, we decide that such flow control ordinances do not discriminate against interstate commerce for purposes of the dormant Commerce Clause.

Compelling reasons justify treating these laws differently from laws favoring particular private businesses over their competitors. "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 298 (1997) (footnote omitted). But States and municipalities are not private businesses—far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 756 (1985) ("The States traditionally have had great latitude under their police powers to legislate as to the protection of

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port the proposition. *Scott* struck down two laws that discriminated in favor of in-state businesses and against out-of-state businesses; neither law favored local government at the expense of all private industry. See 165 U. S., at 92–93, 101; *Granholm* v. *Heald*, 544 U. S. 460, 478–479 (2005) (describing *Scott* holding). *Scott* is simply another case like those cited in footnote 4.

Vance actually *upheld* "South Carolina's monopoly over liquor distribution[,] . . . reject[ing] the argument that this monopoly system was unconstitutionally discriminatory." *Granholm*, *supra*, at 507 (THOMAS, J., dissenting) (citing *Vance*, *supra*, at 450–452). It was the *dissent* in *Vance* that argued that "such a state monopoly system constituted unconstitutional discrimination." *Granholm*, *supra*, at 507 (THOMAS, J., dissenting) (citing 170 U. S., at 462–468 (opinion of Shiras, J.)). The *Vance* Court simply struck down a regulation on direct shipments to consumers for personal use, under the Court's excruciatingly arcane pre-Prohibition precedents. See *id.*, at 455. Most tellingly, *Vance* harkens back to a bygone era; until the dissent today, it had been cited by this Court in only two cases in the past 60 years.

the lives, limbs, health, comfort, and quiet of all persons" (internal quotation marks omitted)). These important responsibilities set state and local government apart from a typical private business. Cf. *Tracy*, *supra*, at 313 (SCALIA, J., concurring) ("Nothing in this Court's negative Commerce Clause jurisprudence" compels the conclusion "that private marketers engaged in the sale of natural gas are similarly situated to public utility companies").

Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism. As our local processing cases demonstrate, when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of "simple economic protectionism." *Wyoming* v. *Oklahoma*, 502 U. S. 437, 454 (1992); *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627. Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism. Here the flow control ordinances enable the Counties to pursue particular policies with respect to the handling and treatment of waste generated in the Counties, while allocating the costs of those policies on citizens and businesses according to the volume of waste they generate.

The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government. The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition. In this case, the citizens of Oneida and Herkimer Counties have chosen the government to provide waste management services, with a limited role for the private sector in arranging for transport of waste from the curb to the public facilities. The citizens could

have left the entire matter for the private sector, in which case any regulation they undertook could not discriminate against interstate commerce. But it was also open to them to vest responsibility for the matter with their government, and to adopt flow control ordinances to support the government effort. It is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services. "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values." *Maine* v. *Taylor*, 477 U. S., at 151. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 127 (1978) (Commerce Clause does not protect "the particular structure or methods of operation" of a market).

We should be particularly hesitant to interfere with the Counties' efforts under the guise of the Commerce Clause because "[w]aste disposal is both typically and traditionally a local government function." 261 F. 3d, at 264 (case below) (Calabresi, J., concurring); see *USA Recycling, Inc.* v. *Babylon*, 66 F. 3d 1272, 1275 (CA2 1995) ("For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States"); M. Melosi, Garbage in the Cities: Refuse, Reform, and the Environment, 1880–1980, pp. 153–155 (1981). Congress itself has recognized local government's vital role in waste management, making clear that "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." Resource Conservation and Recovery Act of 1976, 90 Stat. 2797, 42 U. S. C. § 6901(a)(4). The policy of the State of New York favors "displac[ing] competition with regulation or monopoly public control" in this area. N. Y. Pub. Auth. Law Ann. § 2049–tt(3). We may or may not agree with that approach, but

nothing in the Commerce Clause vests the responsibility for that policy judgment with the Federal Judiciary.[6]

Finally, it bears mentioning that the most palpable harm imposed by the ordinances—more expensive trash removal—is likely to fall upon the very people who voted for the laws. Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when "the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 767–768, n. 2 (1945). Here, the citizens and businesses of the Counties bear the costs of the ordinances. There is no reason to step in and hand local businesses a victory they could not obtain through the political process.

We hold that the Counties' flow control ordinances, which treat in-state private business interests exactly the same as out-of-state ones, do not "discriminate against interstate commerce" for purposes of the dormant Commerce Clause.[7]

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[6] JUSTICE THOMAS is thus wrong in stating that our approach might suggest "a policy-driven preference for government monopoly over privatization." *Post,* at 354 (opinion concurring in judgment). That is instead the preference of the affected locality here. Our opinion simply recognizes that a law favoring a public entity and treating all private entities the same does not discriminate against interstate commerce as does a law favoring local business over all others.

[7] The Counties and their *amicus* were asked at oral argument if affirmance would lead to the "Oneida-Herkimer Hamburger Stand," accompanied by a "flow control" law requiring citizens to purchase their burgers only from the state-owned producer. Tr. of Oral Arg. 33–34 (Counties), 45–46, 49–50 (*amicus* State of New York). We doubt it. "The existence of major in-state interests adversely affected by [a law] is a powerful safeguard against legislative abuse." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 473, n. 17 (1981). Recognizing that local government may facilitate a customary and traditional government function such as waste disposal, without running afoul of the Commerce Clause, is hardly

D

The Counties' flow control ordinances are properly analyzed under the test set forth in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), which is reserved for laws "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia* v. *New Jersey*, 437 U. S., at 624. Under the *Pike* test, we will uphold a nondiscriminatory statute like this one "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U. S., at 142; *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kan.*, 489 U. S. 493, 525–526 (1989).

After years of discovery, both the Magistrate Judge and the District Court could not detect *any* disparate impact on out-of-state as opposed to in-state businesses. The Second Circuit alluded to, but did not endorse, a "rather abstract harm" that may exist because "the Counties' flow control ordinances have removed the waste generated in Oneida and Herkimer Counties from the national marketplace for waste processing services." 438 F. 3d, at 160. We find it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances.

The ordinances give the Counties a convenient and effective way to finance their integrated package of waste disposal services. While "revenue generation is not a local interest that can justify *discrimination* against interstate commerce," *Carbone*, 511 U. S., at 393 (emphasis added), we think it is a cognizable benefit for purposes of the *Pike* test.

At the same time, the ordinances are more than financing tools. They increase recycling in at least two ways, confer-

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a prescription for state control of the economy. In any event, Congress retains authority under the Commerce Clause as written to regulate interstate commerce, whether engaged in by private or public entities. It can use this power, as it has in the past, to limit state use of exclusive franchises. See, *e. g.*, *Gibbons* v. *Ogden*, 9 Wheat. 1, 221 (1824).

ring significant health and environmental benefits upon the citizens of the Counties. First, they create enhanced incentives for recycling and proper disposal of other kinds of waste. Solid waste disposal is expensive in Oneida-Herkimer, but the Counties accept recyclables and many forms of hazardous waste for free, effectively encouraging their citizens to sort their own trash. Second, by requiring all waste to be deposited at Authority facilities, the Counties have markedly increased their ability to enforce recycling laws. If the haulers could take waste to any disposal site, achieving an equal level of enforcement would be much more costly, if not impossible. For these reasons, any arguable burden the ordinances impose on interstate commerce does not exceed their public benefits.

* * *

The Counties' ordinances are exercises of the police power in an effort to address waste disposal, a typical and traditional concern of local government. The haulers nevertheless ask us to hold that laws favoring public entities while treating all private businesses the same are subject to an almost *per se* rule of invalidity, because of asserted discrimination. In the alternative, they maintain that the Counties' laws cannot survive the more permissive *Pike* test, because of asserted burdens on commerce. There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner* v. *New York*, 198 U. S. 45 (1905). We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.

The judgments of the United States Court of Appeals for the Second Circuit are affirmed.

It is so ordered.

JUSTICE SCALIA, concurring in part.

I join Part I and Parts II–A through II–C of the Court's opinion. I write separately to reaffirm my view that "the so-called 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain." *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 312 (1997) (SCALIA, J., concurring). "The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce." *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 263 (1987) (SCALIA, J., concurring in part and dissenting in part).

I have been willing to enforce on *stare decisis* grounds a "negative" self-executing Commerce Clause in two situations: "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court." *West Lynn Creamery, Inc.* v. *Healy*, 512 U. S. 186, 210 (1994) (SCALIA, J., concurring in judgment). As today's opinion makes clear, the flow-control law at issue in this case meets neither condition. It benefits a *public entity* performing a traditional local-government function and treats *all private entities* precisely the same way. "Disparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 601 (1997) (SCALIA, J., dissenting). None of this Court's cases concludes that public entities and private entities are similarly situated for Commerce Clause purposes. To hold that they are "would broaden the negative Commerce Clause beyond its existing scope, and intrude on a regulatory sphere traditionally occupied by . . . the States." *Tracy, supra*, at 313 (SCALIA, J., concurring).

I am unable to join Part II–D of the principal opinion, in which the plurality performs so-called "*Pike* balancing."

Generally speaking, the balancing of various values is left to Congress—which is precisely what the Commerce Clause (the *real* Commerce Clause) envisions.

JUSTICE THOMAS, concurring in the judgment.

I concur in the judgment. Although I joined *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383 (1994), I no longer believe it was correctly decided. The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 610–620 (1997) (THOMAS, J., dissenting); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 259–265 (1987) (SCALIA, J., concurring in part and dissenting in part); *License Cases*, 5 How. 504, 578–586 (1847) (Taney, C. J.). As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence.

I

Under the Commerce Clause, "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3. The language of the Clause allows Congress not only to regulate interstate commerce but also to prevent state regulation of interstate commerce. *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U. S. 451, 456 (1962); *Gibbons* v. *Ogden*, 9 Wheat. 1, 210 (1824). Expanding on the interstate-commerce powers explicitly conferred on Congress, this Court has interpreted the Commerce Clause as a tool for courts to strike down state laws that it believes inhibit interstate commerce. But there is no basis in the Constitution for that interpretation.

The Court does not contest this point, and simply begins its analysis by appealing to *stare decisis:*

> "Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute. See *Case of the State Freight Tax*, 15 Wall. 232, 279 (1873); *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 318 (1852)." *Ante*, at 338.

The Court's reliance on *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299 (1852), and *Case of the State Freight Tax*, 15 Wall. 232 (1873), is curious because the Court has abandoned the reasoning of those cases in its more recent jurisprudence. *Cooley* and *State Freight Tax* are premised upon the notion that the Commerce Clause is an exclusive grant of power to Congress over certain subject areas.[1] *Cooley*, *supra*, at 319–320 (holding that "[w]hatever subjects of this [Commerce Clause] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress" but holding that "the nature of th[e] subject [of state pilotage laws] is not such as to require its exclusive legislation" and therefore upholding the state laws against the negative Commerce Clause challenge); *State Freight Tax*, *supra*, at 279–280 (applying the same rationale). The Court, however, no longer limits Congress' power by analyzing whether the subjects of state regulation "admit only of one uniform system," *Cooley*, *supra*, at 319. Rather,

[1] This justification for the negative Commerce Clause is itself unsupported by the Constitution. See *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 261–262 (1987) (SCALIA, J., concurring in part and dissenting in part).

the modern jurisprudence focuses upon the way in which States regulate those subjects to decide whether the regulation is permissible. *E. g.*, *ante*, at 338–339, 345. Because the reasoning of *Cooley* and *State Freight Tax* has been rejected entirely, they provide no foundation for today's decision.

Unfazed, the Court proceeds to analyze whether the ordinances "discriminat[e] on [their] face against interstate commerce." *Ante*, at 338. Again, none of the cases the Court cites explains how the absence or presence of discrimination is relevant to deciding whether the ordinances are constitutionally permissible, and at least one case affirmatively admits that the nondiscrimination rule has no basis in the Constitution. *Philadelphia* v. *New Jersey*, 437 U. S. 617, 623 (1978) ("The bounds of these restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose"). Thus cloaked in the "purpose" of the Commerce Clause, the rule against discrimination that the Court applies to decide this case exists untethered from the written Constitution. The rule instead depends upon the policy preferences of a majority of this Court.

The Court's policy preferences are an unsuitable basis for constitutional doctrine because they shift over time, as demonstrated by the different theories the Court has offered to support the nondiscrimination principle. In the early years of the nondiscrimination rule, the Court struck down a state health law because "the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States." *Minnesota* v. *Barber*, 136 U. S. 313, 321 (1890); see *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 13 (1928) (stating that a Commerce Clause violation would occur if the state statute would "directly . . . obstruct and burden interstate commerce"). More recently, the Court has struck

down state laws sometimes based on its preference for national unity, see, *e. g.*, *American Trucking Assns., Inc.* v. *Michigan Pub. Serv. Comm'n*, 545 U. S. 429, 433 (2005) (justifying the nondiscrimination rule by stating that "[o]ur Constitution was framed upon the theory that the peoples of the several states must sink or swim together" (internal quotation marks omitted)), and other times on the basis of antiprotectionist sentiment, see, *e. g.*, *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 98 (1994) (noting the interest in "avoid[ing] the tendencies toward economic Balkanization"); *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 273–274 (1988) (stating that the negative Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors"); see also *Carbone*, 511 U. S., at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent"); *Toomer* v. *Witsell*, 334 U. S. 385, 403–404 (1948) (striking down a law that "impose[d] an artificial rigidity on the economic pattern of the industry").

Many of the above-cited cases (and today's majority and dissent) rest on the erroneous assumption that the Court must choose between economic protectionism and the free market. But the Constitution vests that fundamentally legislative choice in Congress. To the extent that Congress does not exercise its authority to make that choice, the Constitution does not limit the States' power to regulate commerce. In the face of congressional silence, the States are free to set the balance between protectionism and the free market. Instead of accepting this constitutional reality, the Court's negative Commerce Clause jurisprudence gives nine Justices of this Court the power to decide the appropriate balance.

II

As the foregoing demonstrates, despite more than 100 years of negative Commerce Clause doctrine, there is no principled way to decide this case under current law. Notably, the Court cannot and does not consider this case "[i]n light of the language of the Constitution and the historical context." *Alden* v. *Maine*, 527 U. S. 706, 743 (1999). Likewise, it cannot follow "the cardinal rule to construe provisions in context." *United States* v. *Balsys*, 524 U. S. 666, 673 (1998). And with no text to construe, the Court cannot take into account the Founders' "deliberate choice of words" or "their natural meaning." *Wright* v. *United States*, 302 U. S. 583, 588 (1938). Furthermore, as the debate between the Court's opinion and the dissenting opinion reveals, no case law applies to the facts of this case.[2]

Explaining why the ordinances do not discriminate against interstate commerce, the Court states that "government is vested with the responsibility of protecting the health, safety, and welfare of its citizens." *Ante*, at 342. According to the Court, a law favoring in-state business requires rigorous scrutiny because the law "is often the product of 'simple economic protectionism.'" *Ante*, at 343. A law favoring local government, however, "may be directed toward any number of legitimate goals unrelated to protectionism." *Ibid.* This distinction is razor thin: In contrast to today's deferential approach (apparently based on the Court's trust of local government), the Court has applied the equivalent of strict scrutiny in other cases even where it is unchallenged that the state law discriminated in favor of in-state private entities for a legitimate, nonprotectionist reason. See *Barber*, *supra*, at 319 (striking down the State's inspection

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[2] No previous case addresses the question whether the negative Commerce Clause applies to favoritism of a government entity. I agree with the Court that *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383 (1994), did not resolve this issue. *Ante*, at 339–341.

law for livestock even though it did not challenge "[t]he presumption that this statute was enacted, in good faith, . . . to protect the health of the people of Minnesota").

In *Carbone*, which involved discrimination in favor of private entities, we did not doubt the good faith of the municipality in attempting to deal with waste through a flow-control ordinance. 511 U. S., at 386–389. But we struck down the ordinance because it did not allow interstate entities to participate in waste disposal. *Id.*, at 390–395. The majority distinguishes *Carbone* by deciding that favoritism of a government monopoly is less suspect than government regulation of private entities.[3] I see no basis for drawing such a conclusion, which, if anything, suggests a policy-driven preference for government monopoly over privatization. *Ante*, at 344 (stating that "waste disposal is both typically and traditionally a local government function" (brackets and internal quotation marks omitted)). Whatever the reason, the choice is not the Court's to make. Like all of the Court's previous negative Commerce Clause cases, today's decision leaves the future of state and local regulation of commerce to the whim of the Federal Judiciary.

III

Despite its acceptance of negative Commerce Clause jurisprudence, the Court expresses concern about "unprecedented and unbounded interference by the courts with state and local government." *Ante*, at 343. It explains:

> "The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and

[3] The dissent argues that such a preference is unwarranted. *Post*, at 365–366 (opinion of ALITO, J.) ("I cannot accept the proposition that laws discriminating in favor of state-owned enterprises are so unlikely to be the product of economic protectionism that they should be exempt from the usual dormant Commerce Clause standards").

> what activities must be the province of private market competition.
>
> . . . . .
>
> "There is no reason to step in and hand local businesses a victory they could not obtain through the political process." *Ante*, at 343, 345.

I agree that the Commerce Clause is not a "roving license" and that the Court should not deliver to businesses victories that they failed to obtain through the political process. I differ with the Court because I believe its powerful rhetoric is completely undermined by the doctrine it applies.

In this regard, the Court's analogy to *Lochner* v. *New York*, 198 U. S. 45 (1905), suggests that the Court should reject the negative Commerce Clause, rather than tweak it. *Ante*, at 347. In *Lochner* the Court located a "right of free contract" in a constitutional provision that says nothing of the sort. 198 U. S., at 57. The Court's negative Commerce Clause jurisprudence, created from whole cloth, is just as illegitimate as the "right" it vindicated in *Lochner*. Yet today's decision does not repudiate that doctrinal error. Rather, it further propagates the error by narrowing the negative Commerce Clause for policy reasons—reasons that later majorities of this Court may find to be entirely illegitimate.

In so doing, the majority revisits familiar territory: Just three years after *Lochner*, the Court narrowed the right of contract for policy reasons but did not overrule *Lochner*. *Muller* v. *Oregon*, 208 U. S. 412, 422–423 (1908) (upholding a maximum-hours requirement for women because the difference between the "two sexes" "justifies a difference in legislation"). Like the *Muller* Court, today's majority trifles with an unsound and illegitimate jurisprudence yet fails to abandon it.

Because I believe that the power to regulate interstate commerce is a power given to Congress and not the Court, I concur in the judgment of the Court.

JUSTICE ALITO, with whom JUSTICE STEVENS and JUSTICE KENNEDY join, dissenting.

In *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383 (1994), we held that "a so-called flow control ordinance, which require[d] all solid waste to be processed at a designated transfer station before leaving the municipality," discriminated against interstate commerce and was invalid under the Commerce Clause because it "depriv[ed] competitors, including out-of-state firms, of access to a local market." *Id.*, at 386. Because the provisions challenged in this case are essentially identical to the ordinance invalidated in *Carbone*, I respectfully dissent.

I

This Court has "interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State." *Id.*, at 390. As the Court acknowledges, a law "'"discriminat[es]"'" in this context if it mandates "'differential treatment of in-state and out-of-state economic interests'" in a way "'that benefits the former and burdens the latter.'" *Ante*, at 338 (quoting *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99 (1994)). A local law that discriminates against interstate commerce is sustainable only if it serves a legitimate local purpose that could not be served as well by nondiscriminatory means. *Maine* v. *Taylor*, 477 U. S. 131 (1986).

"Solid waste, even if it has no value, is an article of commerce." *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. 353, 359 (1992). Accordingly, laws that "discriminate against [trash] by reason of its origin or destination out of State," *Carbone*, 511 U. S., at 390, are sustainable only if they serve a legitimate local purpose that could not be served as well by nondiscriminatory means.

In *Carbone*, this Court invalidated a local ordinance requiring all nonhazardous solid waste in Clarkstown, New York, to be deposited at a specific local transfer facility. The Court concluded that the ordinance discriminated against interstate commerce because it "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.*, at 392.

The Court explained that the flow-control ordinance did serve a purpose that a nonprotectionist regulation would not: "It ensures that the town-sponsored facility will be profitable, so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years." *Id.*, at 393. "In other words . . . the flow control ordinance is a financing measure." *Ibid.* The Court concluded, however, that "revenue generation is not a local interest that can justify discrimination against interstate commerce." *Ibid.*

The Court also held that "Clarkstown has any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance"—including "uniform safety regulations" that could be enacted to "ensure that competitors . . . do not underprice the market by cutting corners on environmental safety." *Ibid.* Thus, the Court invalidated the ordinance because any legitimate local interests served by the ordinance could be accomplished through nondiscriminatory means. See *id.*, at 392–393.

This case cannot be meaningfully distinguished from *Carbone*. As the Court itself acknowledges, "[t]he only salient difference" between the cases is that the ordinance invalidated in *Carbone* discriminated in favor of a privately owned facility, whereas the laws at issue here discriminate in favor of "facilities owned and operated by a state-created public benefit corporation." *Ante*, at 334. The Court relies on the distinction between public and private ownership to uphold the flow-control laws, even though a straightforward application of *Carbone* would lead to the opposite result. See *ante*,

at 342–344. The public-private distinction drawn by the Court is both illusory and without precedent.

II

The fact that the flow-control laws at issue discriminate in favor of a government-owned enterprise does not meaningfully distinguish this case from *Carbone*. The preferred facility in *Carbone* was, to be sure, nominally owned by a private contractor who had built the facility on the town's behalf, but it would be misleading to describe the facility as private. In exchange for the contractor's promise to build the facility for the town free of charge and then to sell it to the town five years later for $1, the town guaranteed that, during the first five years of the facility's existence, the contractor would receive "a minimum waste flow of 120,000 tons per year" and that the contractor could charge an above-market tipping fee. 511 U. S., at 387. If the facility "received less than 120,000 tons in a year, the town [would] make up the tipping fee deficit." *Ibid.* To prevent residents, businesses, and trash haulers from taking their waste elsewhere in pursuit of lower tipping fees (leaving the town responsible for covering any shortfall in the contractor's guaranteed revenue stream), the town enacted an ordinance "requir[ing] all nonhazardous solid waste within the town to be deposited at" the preferred facility. *Ibid.*

This Court observed that "[t]he object of this arrangement was to amortize the cost of the transfer station: The town would finance *its new facility* with the income generated by the tipping fees." *Ibid.* (emphasis added). "In other words," the Court explained, "the flow control ordinance [wa]s a financing measure," *id.*, at 393, for what everyone—including the Court—regarded as *the town's* new transfer station.

The only real difference between the facility at issue in *Carbone* and its counterpart in this case is that title to the

former had not yet formally passed to the municipality. The Court exalts form over substance in adopting a test that turns on this technical distinction, particularly since, barring any obstacle presented by state law, the transaction in *Carbone* could have been restructured to provide for the passage of title at the beginning, rather than the end, of the 5-year period.

For this very reason, it is not surprising that in *Carbone* the Court did not dispute the dissent's observation that the preferred facility was for all practical purposes owned by the municipality. See *id.*, at 419 (opinion of SOUTER, J.) ("Clarkstown's transfer station is essentially a municipal facility"); *id.*, at 416 (describing the nominal "proprietor" of the transfer station as "essentially an agent of the municipal government"). To the contrary, the Court repeatedly referred to the transfer station in terms suggesting that the transfer station did in fact belong to the town. See *id.*, at 387 (explaining that "[t]he town would finance *its* new facility with the income generated by the tipping fees" (emphasis added)); *id.*, at 393 (observing that the challenged flow-control ordinance was designed to "ensur[e] that the town-sponsored facility will be profitable"); *id.*, at 394 (concluding that, "having elected to use the open market to earn revenues for *its* project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State" (emphasis added)).

Today the Court dismisses those statements as "at best inconclusive." *Ante*, at 340, n. 3. The Court, however, fails to offer any explanation as to what other meaning could possibly attach to *Carbone*'s repeated references to Clarkstown's transfer station as a municipal facility. It also ignores the fact that the ordinance itself, which was included in its entirety in an appendix to the Court's opinion, repeatedly referred to the station as "the Town of Clarkstown solid waste facility." 511 U. S., at 396, 398, 399. The Court likewise

fails to acknowledge that the parties in *Carbone* openly acknowledged the municipal character of the transfer station. See Pet. for Cert., O. T. 1993, No. 92–1402, p. 5 ("*The town's* designated trash disposal facility is operated by a private contractor, under an agreement with the town" (emphasis added)); Brief for Petitioners, O. T. 1993, No. 92–1402, p. 26 (arguing that "it is clear that the purported safety and health benefits of [the flow-control ordinance] derive simply from the continued economic viability of *the town's* waste facility" (emphasis added; internal quotation marks omitted)); Brief for Respondent, O. T. 1993, No. 92–1402, p. 8 ("The Town entered into a contract with Clarkstown Recycling, Inc., which provided for that firm to build and operate the new *Town facility*" (emphasis added)).

I see no ambiguities in those statements, much less any reason to dismiss them as "at best inconclusive"; they reflect a clear understanding that the station was, for all purposes relevant to the dormant Commerce Clause, a municipal facility.

III

In any event, we have never treated discriminatory legislation with greater deference simply because the entity favored by that legislation was a government-owned enterprise. In suggesting otherwise, the Court relies unduly on *Carbone*'s passing observation that "'offending local laws hoard a local resource—be it meat, shrimp, or milk—for the benefit of *local businesses.*'" *Ante,* at 341 (emphasis in original). *Carbone*'s use of the word "businesses," the Court insists, somehow reveals that *Carbone* was not "extending" our dormant Commerce Clause jurisprudence "to cover discrimination in favor of local government." *Ante,* at 341.

But no "exten[sion]" was required. The Court has long subjected discriminatory legislation to strict scrutiny, and has never, until today, recognized an exception for discrimination in favor of a state-owned entity.

A

This Court long ago recognized that the Commerce Clause can be violated by a law that discriminates in favor of a state-owned monopoly. In the 1890's, South Carolina enacted laws giving a state agency the exclusive right to operate facilities selling alcoholic beverages within that State, and these laws were challenged under the Commerce Clause in *Scott* v. *Donald*, 165 U. S. 58 (1897), and *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438 (1898). The Court held that the Commerce Clause barred the State from prohibiting its residents from purchasing alcohol from out-of-state vendors, see *id.*, at 442, but that the State could surmount this problem by allowing residents to receive out-of-state shipments for their personal use. See *id.*, at 452. The Court's holding was based on the same fundamental dormant Commerce Clause principle applied in *Carbone*.[1] As the Court put it in *Vance*, a State "'cannot discriminate against the bringing of [lawful] articles in and importing them from other States'" because such discrimination is "'a hindrance to interstate commerce and an unjust preference of the products of the enacting State as against similar products of other States.'" 170 U. S., at 443 (quoting *Scott*, *supra*, at 101). Cf. *Carbone*, *supra*, at 390 (the Commerce Clause bars state and local laws that "impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State").

Thus, were it not for the Twenty-first Amendment, laws creating state-owned liquor monopolies—which many States maintain today—would be deemed discriminatory under the

[1] See *Granholm* v. *Heald*, 544 U. S. 460, 517–518 (2005) (THOMAS, J., dissenting) ("These liquor regulation schemes discriminated against out-of-state economic interests . . . . State monopolies that did not permit direct shipments to consumers, for example, were thought to discriminate against out-of-state wholesalers and retailers . . . " (citing *Vance*, 170 U. S., at 451–452)).

dormant Commerce Clause. See *Granholm* v. *Heald*, 544 U. S. 460, 489 (2005) (explaining that the Twenty-first Amendment makes it possible for States to "assume direct control of liquor distribution through state-run outlets"); see *id.*, at 517–518 (THOMAS, J., dissenting) (noting that, although laws creating a "state monopoly" in the sale of liquor "discriminat[e]" against interstate commerce, they are "within the ambit of the Twenty-first Amendment" and are therefore immune from scrutiny under the dormant Commerce Clause). There is, of course, no comparable provision in the Constitution authorizing States to discriminate against out-of-state providers of waste processing and disposal services, either by means of a government-owned monopoly or otherwise.

B

Nor has this Court ever suggested that discriminatory legislation favoring a state-owned enterprise is entitled to favorable treatment. To be sure, state-owned entities are accorded special status under the market-participant doctrine. But that doctrine is not applicable here.

Under the market-participant doctrine, a State is permitted to exercise "'independent discretion as to parties with whom [it] will deal.'" *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 438–439 (1980). The doctrine thus allows States to engage in certain otherwise-discriminatory practices (*e. g.*, selling exclusively to, or buying exclusively from, the State's own residents), so long as the State is "acting as a market participant, *rather than as a market regulator*," *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 93 (1984) (emphasis added).

Respondents are doing exactly what the market-participant doctrine says they cannot: While acting as market participants by operating a fee-for-service business enterprise in an area in which there is an established interstate market, respondents are also regulating that market in a discriminatory manner and claiming that their special gov-

ernmental status somehow insulates them from a dormant Commerce Clause challenge. See *ibid.*

Respondents insist that the market-participant doctrine has no application here because they are not asserting a defense under the market-participant doctrine, Brief for Respondents 24–25, but that argument misses the point. Regardless of whether respondents can assert a defense under the market-participant doctrine, this Court's cases make clear that States cannot discriminate against interstate commerce unless they are acting solely as market participants. Today, however, the Court suggests, contrary to its prior holdings, that States can discriminate in favor of in-state interests while acting both as a market participant *and* as a market regulator.

IV

Despite precedent condemning discrimination in favor of government-owned enterprises, the Court attempts to develop a logical justification for the rule it creates today. That justification rests on three principal assertions. First, the Court insists that it simply "does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism," because the latter are "often the product of 'simple economic protectionism,'" *ante,* at 343 (quoting *Wyoming* v. *Oklahoma,* 502 U. S. 437, 454 (1992)), while the former "may be directed toward any number of legitimate goals unrelated to protectionism," *ante,* at 343. Second, the Court reasons that deference to legislation discriminating in favor of a municipal landfill is especially appropriate considering that "'[w]aste disposal is both typically and traditionally a local government function.'" *Ante,* at 344 (quoting 261 F. 3d 245, 264 (CA2 2001) (Calabresi, J., concurring)). Third, the Court suggests that respondents' flow-control laws are not discriminatory because they "treat in-state private business interests exactly the same as out-of-state ones." *Ante,* at 345. I find each of these arguments unpersuasive.

A

I see no basis for the Court's assumption that discrimination in favor of an in-state facility owned by the government is likely to serve "legitimate goals unrelated to protectionism." Discrimination in favor of an in-state government facility serves "'local economic interests,'" *Carbone*, 511 U. S., at 404 (O'Connor, J., concurring in judgment) (quoting *Raymond Motor Transp., Inc.* v. *Rice*, 434 U. S. 429, 444, n. 18 (1978)), inuring to the benefit of local residents who are employed at the facility, local businesses that supply the facility with goods and services, and local workers employed by such businesses. It is therefore surprising to read in the opinion of the Court that state discrimination in favor of a state-owned business is not likely to be motivated by economic protectionism.

Experience in other countries, where state ownership is more common than it is in this country, teaches that governments often discriminate in favor of state-owned businesses (by shielding them from international competition) precisely for the purpose of protecting those who derive economic benefits from those businesses, including their employees.[2] Such discrimination amounts to economic protectionism in any realistic sense of the term.[3]

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[2] See, *e. g.*, Owen, Sun, & Zheng, Antitrust in China: The Problem of Incentive Compatibility, 1 J. of Competition L. & Econ. 123, 131–133 (2005); Qin, WTO Regulation of Subsidies to State-Owned Enterprises (SOEs)—A Critical Appraisal of the China Accession Protocol, 7 J. of Int'l Econ. L. 863, 869–876 (Dec. 2004).

[3] It therefore seems strange that the Commerce Clause, which has historically been understood to protect free trade and prohibit States from "plac[ing] [themselves] in a position of economic isolation," *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935), is now being construed to condone blatantly protectionist laws on grounds that such legislation is necessary to support governmental efforts to commandeer the local market for a particular good or service. In adopting that construction, the Court sends a bold and enticing message to local governments throughout the United States: Protectionist legislation is now permissible, so long as

By the same token, discrimination in favor of an in-state, privately owned facility may serve legitimate ends, such as the promotion of public health and safety. For example, a State might enact legislation discriminating in favor of produce or livestock grown within the State, reasoning that the State's inspectors can more easily monitor the use of pesticides, fertilizers, and feed on farms within the State's borders. Such legislation would almost certainly be unconstitutional, notwithstanding its potential to promote public health and safety. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 627 (1978) (noting that the Court has repeatedly invalidated legislation where "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy").

The fallacy in the Court's approach can be illustrated by comparing a law that discriminates in favor of an in-state facility, owned by a corporation whose shares are publicly held, and a law discriminating in favor of an otherwise identical facility that is owned by the State or municipality. Those who are favored and disfavored by these two laws are essentially the same with one major exception: The law favoring the corporate facility presumably benefits the corporation's shareholders, most of whom are probably not local residents, whereas the law favoring the government-owned facility presumably benefits the people of the enacting State or municipality. I cannot understand why only the former law, and not the latter, should be regarded as a tool of economic protectionism. Nor do I think it is realistic or consistent with our precedents to condemn some discriminatory laws as protectionist while upholding other, equally discriminatory laws as lawful measures designed to serve legitimate local interests unrelated to protectionism.

For these reasons, I cannot accept the proposition that laws discriminating in favor of state-owned enterprises are

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the enacting government excludes all private-sector participants from the affected local market.

so unlikely to be the product of economic protectionism that they should be exempt from the usual dormant Commerce Clause standards.

Proper analysis under the dormant Commerce Clause involves more than an inquiry into whether the challenged Act is in some sense "directed toward . . . legitimate goals unrelated to protectionism"; equally important are the means by which those goals are realized. If the chosen means take the form of a statute that discriminates against interstate commerce—"'either on its face or in practical effect'"—then "the burden falls on [the enacting government] to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Taylor*, 477 U. S., at 138 (quoting *Hughes* v. *Oklahoma*, 441 U. S. 322, 336 (1979)).

Thus, if the legislative *means* are themselves discriminatory, then regardless of how legitimate and nonprotectionist the underlying legislative *goals* may be, the legislation is subject to strict scrutiny. Similarly, the fact that a discriminatory law "may [in some sense] be directed toward any number of legitimate goals unrelated to protectionism" does not make the law nondiscriminatory. The existence of such goals is relevant, not to whether the law is discriminatory, but to whether the law can be allowed to stand even though it discriminates against interstate commerce. And even then, the existence of legitimate goals is not enough; discriminatory legislation can be upheld only where such goals cannot adequately be achieved through nondiscriminatory means. See, *e. g.*, *Philadelphia*, *supra*, at 626–627 ("[T]he evil of protectionism can reside in legislative means as well as legislative ends," such that "whatever [the State's] purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently"); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 352–353 (1977) (explaining that "we

need not ascribe an economic protection motive to" discriminatory laws; such laws are subject to strict scrutiny even "if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace").

Dean Milk Co. v. *Madison*, 340 U. S. 349 (1951), is instructive on this point. That case involved a dormant Commerce Clause challenge to an ordinance requiring all milk sold in Madison, Wisconsin, to be processed within five miles of the city's central square. See *id.*, at 350. The ordinance "professe[d] to be a health measure," *id.*, at 354, and may have conferred some benefit on the city and its residents to the extent that it succeeded in guaranteeing the purity and quality of the milk sold in the city. The Court nevertheless invalidated the ordinance, concluding that any public health benefits it may have conferred could be achieved through "reasonable nondiscriminatory alternatives," including a system that would allow a nonlocal dairy to qualify to sell milk in the city upon proving that it was in compliance with applicable health and safety requirements. *Id.*, at 354–356.

The Court did not inquire whether the real purpose of the ordinance was to benefit public health and safety or to protect local economic interests; nor did the Court make any effort to determine whether or to what extent the ordinance may have succeeded in promoting health and safety. In fact, the Court apparently assumed that the ordinance could fairly be characterized as "a health measure." *Id.*, at 354. The Court nevertheless concluded that the ordinance could not stand because it "erect[ed] an economic barrier protecting a major local industry against competition from without the State," "plac[ed] a discriminatory burden on interstate commerce," and was "not essential for the protection of local health interests." *Id.*, at 354, 356.

The overarching concern expressed by the Court was that the ordinance, if left intact, "would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Id.*, at 356. "Under the circum-

stances here presented," the Court concluded, "the regulation must yield to the principle that 'one state in its dealings with another may not place itself in a position of economic isolation.'" *Ibid.* (quoting *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935)).

The same reasoning dooms the laws challenged here. Like the ordinance in *Dean Milk*, these laws discriminate against interstate commerce (generally favoring local interests over nonlocal interests), but are defended on the ground that they serve legitimate goals unrelated to protectionism (*e. g.*, health, safety, and protection of the environment). And while I do not question that the laws at issue in this case serve legitimate goals, the laws offend the dormant Commerce Clause because those goals could be attained effectively through nondiscriminatory means. Indeed, no less than in *Carbone*, those goals could be achieved through "uniform [health and] safety regulations enacted without the object to discriminate" that "would ensure that competitors [to the municipal program] do not underprice the market by cutting corners on environmental safety." 511 U. S., at 393. Respondents would also be free, of course, to "subsidize the[ir] [program] through general taxes or municipal bonds." *Id.*, at 394. "But having elected to use the open market to earn revenues for" their waste management program, respondents "may not employ discriminatory regulation to give that [program] an advantage over rival businesses from out of State." *Ibid.*

B

The Court next suggests that deference to legislation discriminating in favor of a municipal landfill is especially appropriate considering that "'[w]aste disposal is both typically and traditionally a local government function.'" *Ante*, at 344 (quoting 261 F. 3d, at 264 (Calabresi, J., concurring)). I disagree on two grounds.

First, this Court has previously recognized that any standard "that turns on a judicial appraisal of whether a particular

governmental function is 'integral' or 'traditional'" is "unsound in principle and unworkable in practice." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546–547 (1985). Indeed, the Court has *twice* experimented with such standards—first in the context of intergovernmental tax immunity, see *South Carolina* v. *United States*, 199 U. S. 437 (1905), and more recently in the context of state regulatory immunity under the Commerce Clause, see *National League of Cities* v. *Usery*, 426 U. S. 833 (1976)—only to abandon them later as analytically unsound. See *Garcia*, *supra*, at 547 (overruling *National League of Cities*); *New York* v. *United States*, 326 U. S. 572 (1946) (overruling *South Carolina* v. *United States*). Thus, to the extent today's holding rests on a distinction between "traditional" governmental functions and their nontraditional counterparts, see *ante*, at 344, it cannot be reconciled with prior precedent.

Second, although many municipalities in this country have long assumed responsibility for disposing of local garbage, see *Carbone*, *supra*, at 419–420, and n. 10 (SOUTER, J., dissenting), most of the garbage produced in this country is still managed by the private sector. See Brief for National Solid Wastes Management Association et al. as *Amici Curiae* 22 ("Today, nearly two-thirds of solid waste received at landfills is received at private sector landfills"); R. W. Beck, Inc., et al., Size of the United States Solid Waste Industry, p. ES–3 (Apr. 2001) (study sponsored by the Environmental Research and Education Foundation) (noting that in 1999, 69.2% of the solid waste produced in the United States was managed by privately owned businesses). In that respect, the Court is simply mistaken in concluding that waste disposal is "typically" a local government function.

Moreover, especially considering the Court's recognition that "'any notion of discrimination assumes a comparison of substantially similar entities,'" *ante*, at 342 (quoting *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 298 (1997)), a "traditional" municipal landfill is for present purposes entirely dif-

ferent from a monopolistic landfill supported by the kind of discriminatory legislation at issue in this case and in *Carbone*. While the former may be rooted in history and tradition, the latter has been deemed unconstitutional until today. See *Carbone*, *supra*, at 392–393. It is therefore far from clear that the laws at issue here can fairly be described as serving a function "typically and traditionally" performed by local governments.

C

Equally unpersuasive is the Court's suggestion that the flow-control laws do not discriminate against interstate commerce because they "treat in-state private business interests exactly the same as out-of-state ones." *Ante*, at 345. Again, the critical issue is whether the challenged legislation discriminates against interstate commerce. If it does, then regardless of whether those harmed by it reside entirely outside the State in question, the law is subject to strict scrutiny. Indeed, this Court has long recognized that "'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.'" *Brimmer* v. *Rebman*, 138 U. S. 78, 83 (1891) (quoting *Minnesota* v. *Barber*, 136 U. S. 313, 326 (1890)); accord, *Fort Gratiot Sanitary Landfill, Inc.*, 504 U. S., at 361–363; *Dean Milk*, 340 U. S., at 354, n. 4. It therefore makes no difference that the flow-control laws at issue here apply to in-state and out-of-state businesses alike.[4] See *Carbone*, *supra*, at 391 ("The [flow-control]

[4] A law granting monopoly rights to a single, local business clearly would not be immune from a dormant Commerce Clause challenge simply because it excluded both in-state and out-of-state competitors from the local market. See *C & A Carbone, Inc.* v. *Clarkstown*, 511 U. S. 383, 391 (1994). It is therefore strange for the Court to attach any significance to the fact that the flow-control laws at issue here apply to in-state and out-of-state competitors alike.

ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition").

* * *

The dormant Commerce Clause has long been understood to prohibit the kind of discriminatory legislation upheld by the Court in this case. I would therefore reverse the decision of the Court of Appeals.

Syllabus

SCOTT *v.* HARRIS

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

No. 05–1631. Argued February 26, 2007—Decided April 30, 2007

Deputy Timothy Scott, petitioner here, terminated a high-speed pursuit of respondent's car by applying his push bumper to the rear of the vehicle, causing it to leave the road and crash. Respondent was rendered a quadriplegic. He filed suit under 42 U. S. C. § 1983 alleging, *inter alia*, the use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. The District Court denied Scott's summary judgment motion, which was based on qualified immunity. The Eleventh Circuit affirmed on interlocutory appeal, concluding, *inter alia*, that Scott's actions could constitute "deadly force" under *Tennessee* v. *Garner*, 471 U. S. 1; that the use of such force in this context would violate respondent's constitutional right to be free from excessive force during a seizure; and that a reasonable jury could so find.

Held: Because the car chase respondent initiated posed a substantial and immediate risk of serious physical injury to others, Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. Pp. 377–386.

(a) Qualified immunity requires resolution of a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier* v. *Katz*, 533 U. S. 194, 201. Pp. 377–378.

(b) The record in this case includes a videotape capturing the events in question. Where, as here, the record blatantly contradicts the plaintiff's version of events so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a summary judgment motion. Pp. 378–381.

(c) Viewing the facts in the light depicted by the videotape, it is clear that Deputy Scott did not violate the Fourth Amendment. Pp. 381–386.

(1) *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." The Court there simply applied the Fourth Amendment's "reasonableness" test to the use of a particular type of force in a particular situation. That case has scant applicability to this one, which has vastly different facts. Whether or not Scott's actions constituted "deadly force," what matters is whether those actions were reasonable. Pp. 381–383.

Syllabus

(2) In determining a seizure's reasonableness, the Court balances the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests allegedly justifying the intrusion. *United States* v. *Place*, 462 U. S. 696, 703. In weighing the high likelihood of serious injury or death to respondent that Scott's actions posed against the actual and imminent threat that respondent posed to the lives of others, the Court takes account of the number of lives at risk and the relative culpability of the parties involved. Respondent intentionally placed himself and the public in danger by unlawfully engaging in reckless, high-speed flight; those who might have been harmed had Scott not forced respondent off the road were entirely innocent. The Court concludes that it was reasonable for Scott to take the action he did. It rejects respondent's argument that safety could have been ensured if the police simply ceased their pursuit. The Court rules that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. Pp. 383–386.

433 F. 3d 807, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. GINSBURG, J., *post*, p. 386, and BREYER, J., *post*, p. 387, filed concurring opinions. STEVENS, J., filed a dissenting opinion, *post*, p. 389.

Philip W. Savrin argued the cause for petitioner. With him on the briefs were *Sun S. Choy* and *Orin S. Kerr*.

Deputy Solicitor General Garre argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Jonathan L. Marcus*, and *Barbara L. Herwig*.

Craig T. Jones argued the cause for respondent. With him on the brief was *Andrew C. Clarke*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois et al. by *Lisa Madigan*, Attorney General of Illinois, *Gary Feinerman*, Solicitor General, and *Michael Scodro*, Deputy Solicitor General, by *Craig J. Tillery*, Acting Attorney General of Alaska, by *Roberto J. Sánchez-Ramos*, Secretary of Justice of Puerto Rico, and by the Attorneys

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

I

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what

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General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *John W. Suthers* of Colorado, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Kelly A. Ayotte* of New Hampshire, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Robert F. McDonnell* of Virginia, and *Patrick J. Crank* of Wyoming; and for the National Association of Counties et al. by *Richard Ruda*, *Charles A. Rothfeld*, *Andrew J. Pincus*, and *Dan Kahan*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Hamilton P. Fox III*, *Steven R. Shapiro*, and *Gerald R. Weber;* for the National Association of Criminal Defense Lawyers by *Jonathan D. Hacker*, *Nicole A. Saharsky*, and *Pamela Harris;* and for the National Police Accountability Project by *Karen Blum*, *Howard Friedman*, and *Myong J. Joun*.

A brief of *amicus curiae* was filed for the Georgia Association of Chiefs of Police, Inc., by *Michael A. Caldwell*.

is in most portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Brief for Petitioner 4. Having radioed his supervisor for permission, Scott was told to "'[g]o ahead and take him out.'" *Harris* v. *Coweta Cty.*, 433 F. 3d 807, 811 (CA11 2005). Instead, Scott applied his push bumper to the rear of respondent's vehicle.[1] As a result, respondent lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.

Respondent filed suit against Deputy Scott and others under Rev. Stat. §1979, 42 U. S. C. §1983, alleging, *inter alia*, a violation of his federal constitutional rights, viz. use

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[1] Scott says he decided not to employ the PIT maneuver because he was "concerned that the vehicles were moving too quickly to safely execute the maneuver." Brief for Petitioner 4. Respondent agrees that the PIT maneuver could not have been safely employed. See Brief for Respondent 9. It is irrelevant to our analysis whether Scott had permission to take the precise actions he took.

of excessive force resulting in an unreasonable seizure under the Fourth Amendment. In response, Scott filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion, finding that "there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." *Harris* v. *Coweta Cty.*, No. 3:01–CV–148–WBH (ND Ga., Sept. 23, 2003), App. to Pet. for Cert. 41a–42a. On interlocutory appeal,[2] the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial.[3] Taking respondent's view of the facts as given, the Court of Appeals concluded that Scott's actions could constitute "deadly force" under *Tennessee* v. *Garner*, 471 U. S. 1 (1985), and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated [respondent's] Fourth Amendment rights." 433 F. 3d, at 816. The Court of Appeals further concluded that "the law as it existed [at the time of the incident], was sufficiently clear to give reasonable law enforcement officers 'fair notice' that ramming a vehicle under these circumstances was unlawful." *Id.*, at 817. The Court of Appeals thus concluded that Scott was not entitled to qualified immunity. We granted certiorari, 549 U. S. 991 (2006), and now reverse.

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[2] Qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985). Thus, we have held that an order denying qualified immunity is immediately appealable even though it is interlocutory; otherwise, it would be "effectively unreviewable." *Id.*, at 527. Further, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U. S. 224, 227 (1991) *(per curiam)*.

[3] None of the other claims respondent brought against Scott or any other party are before this Court.

II

In resolving questions of qualified immunity, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Ibid.* Although this ordering contradicts "[o]ur policy of avoiding unnecessary adjudication of constitutional issues," *United States* v. *Treasury Employees*, 513 U. S. 454, 478 (1995) (citing *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring)), we have said that such a departure from practice is "necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established," *Saucier*, *supra*, at 201.[4] We therefore turn to the

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[4] Prior to this Court's announcement of *Saucier*'s "rigid 'order of battle,'" *Brosseau* v. *Haugen*, 543 U. S. 194, 201–202 (2004) (BREYER, J., concurring), we had described this order of inquiry as the "better approach," *County of Sacramento* v. *Lewis*, 523 U. S. 833, 841, n. 5 (1998), though not one that was required in all cases. See *id.*, at 858–859 (BREYER, J., concurring); *id.*, at 859 (STEVENS, J., concurring in judgment). There has been doubt expressed regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward. See, *e. g.*, *Brosseau*, *supra*, at 201 (BREYER, J., joined by SCALIA and GINSBURG, JJ., concurring); *Bunting* v. *Mellen*, 541 U. S. 1019 (2004) (STEVENS, J., joined by GINSBURG and BREYER, JJ., respecting denial of certiorari); *id.*, at 1025 (SCALIA, J., joined by Rehnquist, C. J., dissenting). See also *Lyons* v. *Xenia*, 417 F. 3d 565, 580–584 (CA6 2005) (Sutton, J., concurring). We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is, as discussed in Part III–B, *infra*, easily decided. Deciding that question first is thus the "better approach," *Lewis*, *supra*, at 841, n. 5, regardless of whether it is required.

threshold inquiry: whether Deputy Scott's actions violated the Fourth Amendment.

III

A

The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962) *(per curiam); Saucier*, *supra*, at 201. In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.[5] For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F. 3d, at 815. Indeed, reading the lower court's opinion, one gets the impression that respondent,

[5] JUSTICE STEVENS suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. See *post*, at 392 (dissenting opinion) ("In sum, the factual statements by the Court of Appeals quoted by the Court . . . were entirely accurate"). We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.html and in Clerk of Court's case file.

rather than fleeing from police, was attempting to pass his driving test:

> "[T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections." *Id.*, at 815–816 (citations omitted).

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit.[6] We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous

[6] JUSTICE STEVENS hypothesizes that these cars "had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights," so that "[a] jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance." *Post*, at 391. It is not our experience that ambulances and fire engines careen down two-lane roads at 85-plus miles per hour, with an unmarked scout car out in front of them. The risk they pose to the public is vastly less than what respondent created here. But even if that were not so, it would in no way lead to the conclusion that it was unreasonable to eliminate the threat to life that respondent posed. Society accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police.

maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.[7]

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 586–587 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 247–248 (1986). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied

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[7] This is not to say that each and every factual statement made by the Court of Appeals is inaccurate. For example, the videotape validates the court's statement that when Scott rammed respondent's vehicle it was not threatening any other vehicles or pedestrians. (Undoubtedly Scott *waited* for the road to be clear before executing his maneuver.)

on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

B

Judging the matter on that basis, we think it is quite clear that Deputy Scott did not violate the Fourth Amendment. Scott does not contest that his decision to terminate the car chase by ramming his bumper into respondent's vehicle constituted a "seizure." "[A] Fourth Amendment seizure [occurs] . . . when there is a governmental termination of freedom of movement through means intentionally applied." *Brower* v. *County of Inyo*, 489 U. S. 593, 596–597 (1989) (emphasis deleted). See also *id.*, at 597 ("If . . . the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure"). It is also conceded, by both sides, that a claim of "excessive force in the course of making [a] . . . 'seizure' of [the] person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham* v. *Connor*, 490 U. S. 386, 388 (1989). The question we need to answer is whether Scott's actions were objectively reasonable.[8]

1

Respondent urges us to analyze this case as we analyzed *Garner*, 471 U. S. 1. See Brief for Respondent 16–29. We must first decide, he says, whether the actions Scott took

[8] JUSTICE STEVENS incorrectly declares this to be "a question of fact best reserved for a jury," and complains we are "usurp[ing] the jury's factfinding function." *Post*, at 395. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, see Part III–A, *supra*, the reasonableness of Scott's actions—or, in JUSTICE STEVENS' parlance, "[w]hether [respondent's] actions have risen to a level warranting deadly force," *post*, at 395—is a pure question of law.

constituted "deadly force." (He defines "deadly force" as "any use of force which creates a substantial likelihood of causing death or serious bodily injury," *id.*, at 19.) If so, respondent claims that *Garner* prescribes certain preconditions that must be met before Scott's actions can survive Fourth Amendment scrutiny: (1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape;[9] and (3) where feasible, the officer must have given the suspect some warning. See Brief for Respondent 17–18 (citing *Garner*, *supra*, at 9–12). Since these *Garner* preconditions for using deadly force were not met in this case, Scott's actions were *per se* unreasonable.

Respondent's argument falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham*, *supra*, at 388, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, 471 U. S., at 21, by shooting him "in the back of the head" while he was running away on foot, *id.*, at 4, and when the officer "could not reason-

[9] Respondent, like the Court of Appeals, defines this second precondition as "'necessary to prevent escape,'" Brief for Respondent 17; 433 F. 3d 807, 813 (CA11 2005) (quoting *Garner*, 471 U. S., at 11). But that quote from *Garner* is taken out of context. The necessity described in *Garner* was, in fact, the need to prevent "serious physical harm, either to the officer or to others." *Ibid.* By way of example only, *Garner* hypothesized that deadly force may be used "if necessary to prevent escape" when the suspect is known to have "committed a crime involving the infliction or threatened infliction of serious physical harm," *ibid.*, so that his mere being at large poses an inherent danger to society. Respondent did not pose that type of inherent threat to society, since (prior to the car chase) he had committed only a minor traffic offense and, as far as the police were aware, had no prior criminal record. But in this case, unlike in *Garner*, it was respondent's flight itself (by means of a speeding automobile) that posed the threat of "serious physical harm . . . to others." *Ibid.*

ably have believed that [the suspect] . . . posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape," *id.*, at 21. Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. "*Garner* had nothing to do with one car striking another or even with car chases in general . . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Adams* v. *St. Lucie County Sheriff's Dept.*, 962 F. 2d 1563, 1577 (CA11 1992) (Edmondson, J., dissenting), adopted by 998 F. 2d 923 (CA11 1993) (en banc) *(per curiam)*. Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by respondent in this case. Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

2

In determining the reasonableness of the manner in which a seizure is effected, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States* v. *Place*, 462 U. S. 696, 703 (1983). Scott defends his actions by pointing to the paramount governmental interest in ensuring public safety, and respondent nowhere suggests this was not the purpose motivating Scott's behavior. Thus, in judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate. Although there is no obvious way to quantify

the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. See Part III–A, *supra.* It is equally clear that Scott's actions posed a high likelihood of serious injury or death to respondent—though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head, see *Garner*, *supra*, at 4, or pulling alongside a fleeing motorist's car and shooting the motorist, cf. *Vaughan* v. *Cox*, 343 F. 3d 1323, 1326–1327 (CA11 2003). So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.[10]

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[10] The Court of Appeals cites *Brower* v. *County of Inyo*, 489 U. S. 593, 595 (1989), for its refusal to "countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any possible liability for all ensuing actions during the chase," 433 F. 3d, at 816. The only question in *Brower* was whether a police roadblock constituted a *seizure* under the Fourth Amendment. In deciding that question, the relative culpability of the parties is, of course, irrelevant; a seizure occurs whenever the police are "'responsib[le] for the termination of [a person's] movement,'" 433 F. 3d, at 816 (quoting *Brower*, *supra*, at 595), regardless of the reason for the termination. Culpability *is* relevant, however, to the *reasonableness* of the seizure—to whether preventing possible harm to

But wait, says respondent: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best. Whereas Scott's action—ramming respondent off the road—was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Cf. *Brower*, 489 U. S., at 594. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.[11]

Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this

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the innocent justifies exposing to possible harm the person threatening them.

[11] Contrary to JUSTICE STEVENS' assertions, we do not "assum[e] that dangers caused by flight from a police pursuit will continue after the pursuit ends," *post*, at 394, nor do we make any "factual assumptions," *post*, at 393, with respect to what would have happened if the police had gone home. We simply point out the *uncertainties* regarding what would have happened, in response to *respondent's* factual assumption that the high-speed flight would have ended.

invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

* * *

The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals' judgment to the contrary is reversed.

It is so ordered.

JUSTICE GINSBURG, concurring.

I join the Court's opinion and would underscore two points. First, I do not read today's decision as articulating a mechanical, *per se* rule. Cf. *post*, at 389 (BREYER, J., concurring). The inquiry described by the Court, *ante*, at 383–385 and this page, is situation specific. Among relevant considerations: Were the lives and well-being of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle? "[A]dmirable" as "[an] attempt to craft an easy-to-apply legal test in the Fourth Amendment context [may be]," the Court explains, "in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Ante*, at 383.

Second, were this case suitable for resolution on qualified immunity grounds, without reaching the constitutional question, JUSTICE BREYER's discussion would be engaging. See *post*, at 387–389 (urging the Court to overrule *Saucier* v. *Katz*, 533 U. S. 194 (2001)). In joining the Court's opinion,

however, JUSTICE BREYER apparently shares the view that, in the appeal before us, the constitutional question warrants an answer. The video footage of the car chase, he agrees, demonstrates that the officer's conduct did not transgress Fourth Amendment limitations. See *post* this page. Confronting *Saucier*, therefore, is properly reserved for another day and case. See *ante*, at 377, n. 4.

JUSTICE BREYER, concurring.

I join the Court's opinion with one suggestion and two qualifications. Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court's opinion, *ante*, at 378, n. 5, and watch it. Having done so, I do not believe a reasonable jury could, in this instance, find that Officer Timothy Scott (who joined the chase late in the day and did not know the specific reason why the respondent was being pursued) acted in violation of the Constitution.

Second, the video makes clear the highly fact-dependent nature of this constitutional determination. And that fact dependency supports the argument that we should overrule the requirement, announced in *Saucier* v. *Katz*, 533 U. S. 194 (2001), that lower courts must first decide the "constitutional question" before they turn to the "qualified immunity question." See *id.*, at 200 ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged"). Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case. Although I do not object to our deciding the constitutional question in this particular case, I believe that in order to lift the burden from lower courts we can and should reconsider *Saucier*'s requirement as well.

Sometimes (*e. g.*, where a defendant is clearly entitled to qualified immunity) *Saucier*'s fixed order-of-battle rule wastes judicial resources in that it may require courts to

answer a difficult constitutional question unnecessarily. Sometimes (*e. g.*, where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes, as here, the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944); see *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"). In a sharp departure from this counsel, *Saucier* requires courts to embrace unnecessary constitutional questions not to avoid them.

It is not surprising that commentators, judges, and, in this case, 28 States in an *amicus* brief have invited us to reconsider *Saucier*'s requirement. See Leval, Judging Under the Constitution: Dicta About Dicta, 81 N. Y. U. L. Rev. 1249, 1275 (2006) (calling the requirement "a puzzling misadventure in constitutional dictum"); *Dirrane* v. *Brookline Police Dept.*, 315 F. 3d 65, 69–70 (CA1 2002) (referring to the requirement as "an uncomfortable exercise" when "the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed"); *Lyons* v. *Xenia*, 417 F. 3d 565, 580–584 (CA6 2005) (Sutton, J., concurring); Brief for State of Illinois et al. as *Amici Curiae*. I would accept that invitation.

While this Court should generally be reluctant to overturn precedents, *stare decisis* concerns are at their weakest here. See, *e. g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules"). The

order-of-battle rule is relatively novel, it primarily affects judges, and there has been little reliance upon it.

Third, I disagree with the Court insofar as it articulates a *per se* rule. The majority states: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Ante*, at 386. This statement is too absolute. As JUSTICE GINSBURG points out, *ibid.*, whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects. With these qualifications, I join the Court's opinion.

JUSTICE STEVENS, dissenting.

Today, the Court asks whether an officer may "take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders." *Ante*, at 374. Depending on the circumstances, the answer may be an obvious "yes," an obvious "no," or sufficiently doubtful that the question of the reasonableness of the officer's actions should be decided by a jury, after a review of the degree of danger and the alternatives available to the officer. A high-speed chase in a desert in Nevada is, after all, quite different from one that travels through the heart of Las Vegas.

Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of

review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him." *Ante*, at 380.

Rather than supporting the conclusion that what we see on the video "resembles a Hollywood-style car chase of the most frightening sort," *ibid.*,[1] the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue. More importantly, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.

Omitted from the Court's description of the initial speeding violation is the fact that respondent was on a four-lane portion of Highway 34 when the officer clocked his speed at 73 miles per hour and initiated the chase.[2] More significantly—and contrary to the Court's assumption that respondent's vehicle "force[d] cars traveling in both directions

[1] I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.

[2] According to the District Court record, when respondent was clocked at 73 miles per hour, the deputy who recorded his speed was sitting in his patrol car on Highway 34 between Lora Smith Road and Sullivan Road in Coweta County, Georgia. At that point, as well as at the point at which Highway 34 intersects with Highway 154—where the deputy caught up with respondent and the videotape begins—Highway 34 is a four-lane road, consisting of two lanes in each direction with a wide grass divider separating the flow of traffic.

to their respective shoulders to avoid being hit," *ante*, at 379—a fact unmentioned in the text of the opinion explains why those cars pulled over prior to being passed by respondent. The sirens and flashing lights on the police cars following respondent gave the same warning that a speeding ambulance or fire engine would have provided.[3] The 13 cars that respondent passed on his side of the road before entering the shopping center, and both of the cars that he passed on the right after leaving the center, no doubt had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights before respondent or the police cruisers approached.[4] A jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance, and that their reactions were fully consistent with the evidence that respondent, though speeding, retained full control of his vehicle.

The police sirens also minimized any risk that may have arisen from running "multiple red lights," *ibid.* In fact, respondent and his pursuers went through only two intersections with stop lights and in both cases all other vehicles in sight were stationary, presumably because they had been warned of the approaching speeders. Incidentally, the videos do show that the lights were red when the police cars passed through them but, because the cameras were farther away when respondent did so and it is difficult to discern the color of the signal at that point, it is not entirely clear that

[3] While still on the four-lane portion of Highway 34, the deputy who had clocked respondent's speed turned on his blue light and siren in an attempt to get respondent to pull over. It was when the deputy turned on his blue light that the dash-mounted video camera was activated and began to record the pursuit.

[4] Although perhaps understandable, because their volume on the sound recording is low (possibly due to sound proofing in the officer's vehicle), the Court appears to minimize the significance of the sirens audible throughout the tape recording of the pursuit.

he ran either or both of the red lights. In any event, the risk of harm to the stationary vehicles was minimized by the sirens, and there is no reason to believe that respondent would have disobeyed the signals if he were not being pursued.

My colleagues on the jury saw respondent "swerve around more than a dozen other cars," and "force cars traveling in both directions to their respective shoulders," *ibid.*, but they apparently discounted the possibility that those cars were already out of the pursuit's path as a result of hearing the sirens. Even if that were not so, passing a slower vehicle on a two-lane road always involves some degree of swerving and is not especially dangerous if there are no cars coming from the opposite direction. At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him; he did the latter no more than five times and, on most of those occasions, used his turn signal. On none of these occasions was there a car traveling in the opposite direction. In fact, at one point, when respondent found himself behind a car in his own lane and there were cars traveling in the other direction, he slowed and waited for the cars traveling in the other direction to pass before overtaking the car in front of him while using his turn signal to do so. This is hardly the stuff of Hollywood. To the contrary, the video does not reveal any incidents that could even be remotely characterized as "close calls."

In sum, the factual statements by the Court of Appeals quoted by the Court, *ante*, at 378–379, were entirely accurate. That court did not describe respondent as a "cautious" driver as my colleagues imply, *ante*, at 380, but it did correctly conclude that there is no evidence that he ever lost control of his vehicle. That court also correctly pointed out that the incident in the shopping center parking lot did not create any risk to pedestrians or other vehicles because the chase occurred just before 11 p.m. on a weekday night and the center was closed. It is apparent from the record (in-

cluding the videotape) that local police had blocked off intersections to keep respondent from entering residential neighborhoods and possibly endangering other motorists. I would add that the videos also show that no pedestrians, parked cars, sidewalks, or residences were visible at any time during the chase. The only "innocent bystanders" who were placed "at great risk of serious injury," *ibid.*, were the drivers who either pulled off the road in response to the sirens or passed respondent in the opposite direction when he was driving on his side of the road.

I recognize, of course, that even though respondent's original speeding violation on a four-lane highway was rather ordinary, his refusal to stop and subsequent flight was a serious offense that merited severe punishment. It was not, however, a capital offense, or even an offense that justified the use of deadly force rather than an abandonment of the chase. The Court's concern about the "imminent threat to the lives of any pedestrians who might have been present," *ante*, at 384, while surely valid in an appropriate case, should be discounted in a case involving a nighttime chase in an area where no pedestrians were present.

What would have happened if the police had decided to abandon the chase? We now know that they could have apprehended respondent later because they had his license plate number. Even if that were not true, and even if he would have escaped any punishment at all, the use of deadly force in this case was no more appropriate than the use of a deadly weapon against a fleeing felon in *Tennessee* v. *Garner*, 471 U. S. 1 (1985). In any event, any uncertainty about the result of abandoning the pursuit has not prevented the Court from basing its conclusions on its own factual assumptions.[5]

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[5] In noting that Scott's action "was *certain* to eliminate the risk that respondent posed to the public" while "ceasing pursuit was not," the Court prioritizes total elimination of the risk of harm to the public over the risk that respondent may be seriously injured or even killed. *Ante*, at 385 (emphasis in original). The Court is only able to make such a statement

The Court attempts to avoid the conclusion that deadly force was unnecessary by speculating that if the officers had let him go, respondent might have been "just as likely" to continue to drive recklessly as to slow down and wipe his brow. *Ante*, at 385. That speculation is unconvincing as a matter of common sense and improper as a matter of law. Our duty to view the evidence in the light most favorable to the nonmoving party would foreclose such speculation if the Court had not used its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment. There is no evidentiary basis for an assumption that dangers caused by flight from a police pursuit will continue after the pursuit ends. Indeed, rules adopted by countless police departments throughout the country are based on a judgment that differs from the Court's. See, *e. g.*, App. to Brief for Georgia Association of Chiefs of Police, Inc., as *Amicus Curiae* A–52 ("During a pursuit, the need to apprehend the suspect should always outweigh the level of danger created by the pursuit. When the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large, then the pursuit should be discontinued or terminated. . . . [P]ursuits should usually be discontinued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public").

Although *Garner* may not, as the Court suggests, "establish a magical on/off switch that triggers rigid preconditions"

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by assuming, based on its interpretation of events on the videotape, that the risk of harm posed in this case, and the type of harm involved, rose to a level warranting deadly force. These are the same types of questions that, when disputed, are typically resolved by a jury; this is why both the District Court and the Court of Appeals saw fit to have them be so decided. Although the Court claims only to have drawn factual inferences in respondent's favor "*to the extent supportable by the record*," *ante*, at 381, n. 8 (emphasis in original), its own view of the record has clearly precluded it from doing so to the same extent as the two courts through which this case has already traveled, see *ante*, at 376, 378–379.

for the use of deadly force, *ante,* at 382, it did set a threshold under which the use of deadly force would be considered constitutionally unreasonable:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." 471 U. S., at 11–12.

Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury.[6] Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. It chastises the Court of Appeals for failing to "vie[w] the facts in the light depicted by the videotape" and implies that no reasonable person could view the videotape and come to the conclusion that deadly force was unjustified. *Ante,* at 380–381. However, the three judges on the Court of Appeals panel apparently did view the videotapes entered into evidence[7] and described a very different version of events:

> "At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-

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[6] In its opinion, the Court of Appeals correctly noted: "We reject the defendants' argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury." *Harris* v. *Coweta Cty.*, 433 F. 3d 807, 815 (CA11 2005).

[7] In total, there are four police tapes which captured portions of the pursuit, all recorded from different officers' vehicles.

> aggressive fashion (i. e., without trying to ram or run into the officers). Moreover, . . . Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (e. g., over the loudspeaker or otherwise) prior to using deadly force." 433 F. 3d 807, 819, n. 14 (CA11 2005).

If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events. Moreover, under the standard set forth in *Garner*, it is certainly possible that "a jury could conclude that Scott unreasonably used deadly force to seize Harris by ramming him off the road under the instant circumstances." 433 F. 3d, at 821.

The Court today sets forth a *per se* rule that presumes its own version of the facts: "A police officer's attempt to terminate a dangerous high-speed car chase *that threatens the lives of innocent bystanders* does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Ante*, at 386 (emphasis added). Not only does that rule fly in the face of the flexible and case-by-case "reasonableness" approach applied in *Garner* and *Graham* v. *Connor*, 490 U. S. 386 (1989), but it is also arguably inapplicable to the case at hand, given that it is not clear that this chase threatened the life of any "innocent bystande[r]."[8] In my view, the risks inherent in justifying unwarranted police conduct on the basis of unfounded as-

[8] It is unclear whether, in referring to "innocent bystanders," the Court is referring to the motorists driving unfazed in the opposite direction or to the drivers who pulled over to the side of the road, safely out of respondent's and petitioner's path.

sumptions are unacceptable, particularly when less drastic measures—in this case, the use of stop sticks[9] or a simple warning issued from a loudspeaker—could have avoided such a tragic result. In my judgment, jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent's speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.

I respectfully dissent.

[9] "Stop sticks" are a device which can be placed across the roadway and used to flatten a vehicle's tires slowly to safely terminate a pursuit.

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KSR INTERNATIONAL CO. *v.* TELEFLEX INC. ET AL.

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

No. 04–1350. Argued November 28, 2006—Decided April 30, 2007

To control a conventional automobile's speed, the driver depresses or releases the gas pedal, which interacts with the throttle via a cable or other mechanical link. Because the pedal's position in the footwell normally cannot be adjusted, a driver wishing to be closer or farther from it must either reposition himself in the seat or move the seat, both of which can be imperfect solutions for smaller drivers in cars with deep footwells. This prompted inventors to design and patent pedals that could be adjusted to change their locations. The Asano patent reveals a support structure whereby, when the pedal location is adjusted, one of the pedal's pivot points stays fixed. Asano is also designed so that the force necessary to depress the pedal is the same regardless of location adjustments. The Redding patent reveals a different, sliding mechanism where both the pedal and the pivot point are adjusted.

In newer cars, computer-controlled throttles do not operate through force transferred from the pedal by a mechanical link, but open and close valves in response to electronic signals. For the computer to know what is happening with the pedal, an electronic sensor must translate the mechanical operation into digital data. Inventors had obtained a number of patents for such sensors. The so-called '936 patent taught that it was preferable to detect the pedal's position in the pedal mechanism, not in the engine, so the patent disclosed a pedal with an electronic sensor on a pivot point in the pedal assembly. The Smith patent taught that to prevent the wires connecting the sensor to the computer from chafing and wearing out, the sensor should be put on a fixed part of the pedal assembly rather than in or on the pedal's footpad. Inventors had also patented self-contained modular sensors, which can be taken off the shelf and attached to any mechanical pedal to allow it to function with a computer-controlled throttle. The '068 patent disclosed one such sensor. Chevrolet also manufactured trucks using modular sensors attached to the pedal support bracket, adjacent to the pedal and engaged with the pivot shaft about which the pedal rotates. Other patents disclose electronic sensors attached to adjustable pedal assemblies. For example, the Rixon patent locates the sensor in the pedal footpad, but is known for wire chafing.

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After petitioner KSR developed an adjustable pedal system for cars with cable-actuated throttles and obtained its '986 patent for the design, General Motors Corporation (GMC) chose KSR to supply adjustable pedal systems for trucks using computer-controlled throttles. To make the '986 pedal compatible with the trucks, KSR added a modular sensor to its design. Respondents (Teleflex) hold the exclusive license for the Engelgau patent, claim 4 of which discloses a position-adjustable pedal assembly with an electronic pedal position sensor attached to a fixed pivot point. Despite having denied a similar, broader claim, the U. S. Patent and Trademark Office (PTO) had allowed claim 4 because it included the limitation of a fixed pivot position, which distinguished the design from Redding's. Asano was neither included among the Engelgau patent's prior art references nor mentioned in the patent's prosecution, and the PTO did not have before it an adjustable pedal with a fixed pivot point. After learning of KSR's design for GMC, Teleflex sued for infringement, asserting that KSR's pedal system infringed the Engelgau patent's claim 4. KSR countered that claim 4 was invalid under § 103 of the Patent Act, which forbids issuance of a patent when "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art."

Graham v. *John Deere Co. of Kansas City*, 383 U. S. 1, 17–18, set out an objective analysis for applying § 103: "[T]he scope and content of the prior art are . . . determined; differences between the prior art and the claims at issue are . . . ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented." While the sequence of these questions might be reordered in any particular case, the factors define the controlling inquiry. However, seeking to resolve the obviousness question with more uniformity and consistency, the Federal Circuit has employed a "teaching, suggestion, or motivation" (TSM) test, under which a patent claim is only proved obvious if the prior art, the problem's nature, or the knowledge of a person having ordinary skill in the art reveals some motivation or suggestion to combine the prior art teachings.

The District Court granted KSR summary judgment. After reviewing pedal design history, the Engelgau patent's scope, and the relevant prior art, the court considered claim 4's validity, applying *Graham*'s framework to determine whether under summary-judgment standards

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KSR had demonstrated that claim 4 was obvious. The court found "little difference" between the prior art's teachings and claim 4: Asano taught everything contained in the claim except using a sensor to detect the pedal's position and transmit it to a computer controlling the throttle. That additional aspect was revealed in, *e. g.*, the '068 patent and Chevrolet's sensors. The court then held that KSR satisfied the TSM test, reasoning (1) the state of the industry would lead inevitably to combinations of electronic sensors and adjustable pedals, (2) Rixon provided the basis for these developments, and (3) Smith taught a solution to Rixon's chafing problems by positioning the sensor on the pedal's fixed structure, which could lead to the combination of a pedal like Asano with a pedal position sensor.

Reversing, the Federal Circuit ruled the District Court had not applied the TSM test strictly enough, having failed to make findings as to the specific understanding or principle within a skilled artisan's knowledge that would have motivated one with no knowledge of the invention to attach an electronic control to the Asano assembly's support bracket. The Court of Appeals held that the District Court's recourse to the nature of the problem to be solved was insufficient because, unless the prior art references addressed the precise problem that the patentee was trying to solve, the problem would not motivate an inventor to look at those references. The appeals court found that the Asano pedal was designed to ensure that the force required to depress the pedal is the same no matter how the pedal is adjusted, whereas Engelgau sought to provide a simpler, smaller, cheaper adjustable electronic pedal. The Rixon pedal, said the court, suffered from chafing but was not designed to solve that problem and taught nothing helpful to Engelgau's purpose. Smith, in turn, did not relate to adjustable pedals and did not necessarily go to the issue of motivation to attach the electronic control on the pedal assembly's support bracket. So interpreted, the court held, the patents would not have led a person of ordinary skill to put a sensor on an Asano-like pedal. That it might have been obvious to try that combination was likewise irrelevant. Finally, the court held that genuine issues of material fact precluded summary judgment.

Held: The Federal Circuit addressed the obviousness question in a narrow, rigid manner that is inconsistent with § 103 and this Court's precedents. KSR provided convincing evidence that mounting an available sensor on a fixed pivot point of the Asano pedal was a design step well within the grasp of a person of ordinary skill in the relevant art and that the benefit of doing so would be obvious. Its arguments, and the record, demonstrate that the Engelgau patent's claim 4 is obvious. Pp. 415–428.

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1. *Graham* provided an expansive and flexible approach to the obviousness question that is inconsistent with the way the Federal Circuit applied its TSM test here. Neither § 103's enactment nor *Graham*'s analysis disturbed the Court's earlier instructions concerning the need for caution in granting a patent based on the combination of elements found in the prior art. See *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 152. Such a combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results. See, *e. g.*, *United States* v. *Adams*, 383 U. S. 39, 50–52. When a work is available in one field, design incentives and other market forces can prompt variations of it, either in the same field or in another. If a person of ordinary skill in the art can implement a predictable variation, and would see the benefit of doing so, § 103 likely bars its patentability. Moreover, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond that person's skill. A court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions. Following these principles may be difficult if the claimed subject matter involves more than the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for the improvement. To determine whether there was an apparent reason to combine the known elements in the way a patent claims, it will often be necessary to look to interrelated teachings of multiple patents; to the effects of demands known to the design community or present in the marketplace; and to the background knowledge possessed by a person having ordinary skill in the art. To facilitate review, this analysis should be made explicit. But it need not seek out precise teachings directed to the challenged claim's specific subject matter, for a court can consider the inferences and creative steps a person of ordinary skill in the art would employ. Pp. 415–422.

(a) The TSM test captures a helpful insight: A patent composed of several elements is not proved obvious merely by demonstrating that each element was, independently, known in the prior art. Although common sense directs caution as to a patent application claiming as innovation the combination of two known devices according to their established functions, it can be important to identify a reason that would have prompted a person of ordinary skill in the art to combine the elements as the new invention does. Inventions usually rely upon building blocks long since uncovered, and claimed discoveries almost necessarily will be combinations of what, in some sense, is already known. Helpful in-

sights, however, need not become rigid and mandatory formulas. If it is so applied, the TSM test is incompatible with this Court's precedents. The diversity of inventive pursuits and of modern technology counsels against confining the obviousness analysis by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasizing the importance of published articles and the explicit content of issued patents. In many fields there may be little discussion of obvious techniques or combinations, and market demand, rather than scientific literature, may often drive design trends. Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, for patents combining previously known elements, deprive prior inventions of their value or utility. Since the TSM test was devised, the Federal Circuit doubtless has applied it in accord with these principles in many cases. There is no necessary inconsistency between the test and the *Graham* analysis. But a court errs where, as here, it transforms general principle into a rigid rule limiting the obviousness inquiry. Pp. 418–419.

(b) The flaws in the Federal Circuit's analysis relate mostly to its narrow conception of the obviousness inquiry consequent in its application of the TSM test. The Circuit first erred in holding that courts and patent examiners should look only to the problem the patentee was trying to solve. Under the correct analysis, any need or problem known in the field and addressed by the patent can provide a reason for combining the elements in the manner claimed. Second, the appeals court erred in assuming that a person of ordinary skill in the art attempting to solve a problem will be led only to those prior art elements designed to solve the same problem. The court wrongly concluded that because Asano's primary purpose was solving the constant ratio problem, an inventor considering how to put a sensor on an adjustable pedal would have no reason to consider putting it on the Asano pedal. It is common sense that familiar items may have obvious uses beyond their primary purposes, and a person of ordinary skill often will be able to fit the teachings of multiple patents together like pieces of a puzzle. Regardless of Asano's primary purpose, it provided an obvious example of an adjustable pedal with a fixed pivot point, and the prior art was replete with patents indicating that such a point was an ideal mount for a sensor. Third, the court erred in concluding that a patent claim cannot be proved obvious merely by showing that the combination of elements was obvious to try. When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill in the art has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of

ordinary skill and common sense. Finally, the court drew the wrong conclusion from the risk of courts and patent examiners falling prey to hindsight bias. Rigid preventative rules that deny recourse to common sense are neither necessary under, nor consistent with, this Court's case law. Pp. 419–422.

2. Application of the foregoing standards demonstrates that claim 4 is obvious. Pp. 422–426.

(a) The Court rejects Teleflex's argument that the Asano pivot mechanism's design prevents its combination with a sensor in the manner claim 4 describes. This argument was not raised before the District Court, and it is unclear whether it was raised before the Federal Circuit. Given the significance of the District Court's finding that combining Asano with a pivot-mounted pedal position sensor fell within claim 4's scope, it is apparent that Teleflex would have made clearer challenges if it intended to preserve this claim. Its failure to clearly raise the argument, and the appeals court's silence on the issue, lead this Court to accept the District Court's conclusion. Pp. 422–424.

(b) The District Court correctly concluded that when Engelgau designed the claim 4 subject matter, it was obvious to a person of ordinary skill in the art to combine Asano with a pivot-mounted pedal position sensor. There then was a marketplace creating a strong incentive to convert mechanical pedals to electronic pedals, and the prior art taught a number of methods for doing so. The Federal Circuit considered the issue too narrowly by, in effect, asking whether a pedal designer writing on a blank slate would have chosen both Asano and a modular sensor similar to the ones used in the Chevrolet trucks and disclosed in the '068 patent. The proper question was whether a pedal designer of ordinary skill in the art, facing the wide range of needs created by developments in the field, would have seen an obvious benefit to upgrading Asano with a sensor. For such a designer starting with Asano, the question was where to attach the sensor. The '936 patent taught the utility of putting the sensor on the pedal device. Smith, in turn, explained not to put the sensor on the pedal footpad, but instead on the structure. And from Rixon's known wire-chafing problems, and Smith's teaching that the pedal assemblies must not precipitate any motion in the connecting wires, the designer would know to place the sensor on a nonmoving part of the pedal structure. The most obvious such point is a pivot point. The designer, accordingly, would follow Smith in mounting the sensor there. Just as it was possible to begin with the objective to upgrade Asano to work with a computer-controlled throttle, so too was it possible to take an adjustable electronic pedal like Rixon and seek an improvement that would avoid the wire-chafing problem. Teleflex has not shown anything in the prior art that taught away from the

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use of Asano, nor any secondary factors to dislodge the determination that claim 4 is obvious. Pp. 424–426.

3. The Court disagrees with the Federal Circuit's holding that genuine issues of material fact precluded summary judgment. The ultimate judgment of obviousness is a legal determination. *Graham*, 383 U. S., at 17. Where, as here, the prior art's content, the patent claim's scope, and the level of ordinary skill in the art are not in material dispute and the claim's obviousness is apparent, summary judgment is appropriate. Pp. 426–427.

119 Fed. Appx. 282, reversed and remanded.

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

James W. Dabney argued the cause for petitioner. With him on the briefs were *Stephen S. Rabinowitz*, *Henry C. Lebowitz*, *Mitchell E. Epner*, *Darcy M. Goddard*, and *John F. Duffy*.

Deputy Solicitor General Hungar argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Jeffrey P. Minear*, *Anthony J. Steinmeyer*, *Anthony A. Yang*, *John M. Whealan*, and *William G. Jenks*.

Thomas C. Goldstein argued the cause for respondents. With him on the briefs were *Garreth A. Sarosi*, *Kenneth C. Bass III*, *Robert G. Sterne*, *Rodger D. Young*, *Samuel J. Haidle*, and *David M. LaPrairie*.*

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Barbara A. Jones*, *Sarah L. Lock*, *Stacy Canan*, and *Michael Schuster;* for the Business Software Alliance by *Andrew J. Pincus*, *Miriam R. Nemetz*, and *Evan P. Schultz;* for Cisco Systems Inc. et al. by *Peter A. Sullivan* and *William R. Stein;* for the Computer & Communications Industry Association by *Jonathan Band;* for Economists and Legal Historians by *Joshua D. Sarnoff;* for Intel Corp. et al. by *Theodore B. Olson*, *Matthew D. McGill*, *Amir C. Tayrani*, and *Tina M. Chappell;* for the Progress & Freedom Foundation by *James V. Delong;* and for Joseph V. Colaianni, Sr., et al. by *Mr. Colaianni*, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for Altitude Capital Partners et al. by *Lawrence S. Robbins* and *Roy T. Englert, Jr.;* for the American Bar Association by *Karen J. Mathis*, *Mark T. Banner*, and *Paul*

JUSTICE KENNEDY delivered the opinion of the Court.

Teleflex Incorporated and its subsidiary Technology Holding Company—both referred to here as Teleflex—sued KSR International Company for patent infringement. The patent at issue, United States Patent No. 6,237,565 B1, is enti-

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M. Rivard; for the American Intellectual Property Law Association by *Jeffrey I. D. Lewis*, *Melissa Mandrgoc*, and *Melvin C. Garner;* for the Biotechnology Industry Organization by *Beth S. Brinkmann* and *Seth M. Galanter;* for Chemistry and Bioengineering Professors by *Henry L. Brinks*, *Meredith Martin Addy*, and *K. Shannon Mrksich;* for Fallbrook Technologies, Inc., et al. by *Don W. Martens*, *Justin A. Nelson*, and *Brooke A. M. Taylor;* for the Franklin Pierce Law Center Intellectual Property Amicus Clinic by *Thomas G. Field, Jr.*, and *J. Scott Anderson;* for the Intellectual Property Law Association of Chicago by *Patrick G. Burns*, *Edward D. Manzo*, and *Dean A. Monco;* for Michelin North America, Inc., et al. by *Richard W. Hoffmann* and *Cary W. Brooks;* for Technology Properties Limited by *Roger L. Cook;* for Tessera, Inc., et al. by *Adam H. Charnes;* for the United Inventors Association by *Robert F. Redmond, Jr.;* for the 3M Co. et al. by *Gary L. Griswold, Q. Todd Dickinson, Steven W. Miller*, and *Philip S. Johnson;* for Harold W. Milton, Jr., by *Mr. Milton, pro se;* and for Lee Thomason by *Mr. Thomason, pro se.*

Briefs of *amici curiae* were filed for the Bar Association of the District of Columbia—Patent, Trademark & Copyright Section by *Blair E. Taylor* and *Lynn E. Eccleston;* for Business and Law Professors by *Christopher A. Cotropia*, *F. Scott Kieff*, and *Mark A. Lemley*, all *pro se;* for the Electronic Frontier Foundation by *Jason Schultz* and *Corynne McSherry;* for the Federal Circuit Bar Association by *Frank A. Angileri;* for Ford Motor Co. et al. by *Catherine E. Stetson*, *William J. Coughlin*, and *Franklin A. Mackenzie;* for Intellectual Property Law Professors by *Katherine J. Strandburg*, *Joseph Scott Miller*, *Thomas F. Cotter*, *Eileen Kane*, *Malla Pollack*, and *Pamela Samuelson*, all *pro se;* for the Intellectual Property Owners Association by *Paul H. Berghoff* and *Richard F. Phillips;* for the International Business Machines Corp. by *Traci L. Lovitt*, *Glen D. Nager*, *Gregory A. Castanias*, and *Kenneth R. Adamo;* for the New York Intellectual Property Law Association by *Rochelle K. Seide*, *John K. Hsu*, and *Marylee Jenkins;* for the Pharmaceutical Research and Manufacturers of America by *Allen M. Sokal;* for Practicing Patent Attorneys by *William W. Cochran*, *Samuel M. Freund*, and *Christopher R. Benson*, all *pro se;* for Time Warner Inc. et al. by *Kathleen M. Sullivan* and *Daniel H. Bromberg;* for the Wisconsin Alumni Research Foundation et al. by *Richard B. Nettler;* and for Lee A. Hollaar by *David M. Bennion.*

tled "Adjustable Pedal Assembly With Electronic Throttle Control." Supp. App. 1. The patentee is Steven J. Engelgau, and the patent is referred to as "the Engelgau patent." Teleflex holds the exclusive license to the patent.

Claim 4 of the Engelgau patent describes a mechanism for combining an electronic sensor with an adjustable automobile pedal so the pedal's position can be transmitted to a computer that controls the throttle in the vehicle's engine. When Teleflex accused KSR of infringing the Engelgau patent by adding an electronic sensor to one of KSR's previously designed pedals, KSR countered that claim 4 was invalid under the Patent Act, 35 U. S. C. § 103 (2000 ed. and Supp. IV), because its subject matter was obvious.

Section 103(a) forbids issuance of a patent when "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

In *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1 (1966), the Court set out a framework for applying the statutory language of § 103, language itself based on the logic of the earlier decision in *Hotchkiss* v. *Greenwood*, 11 How. 248 (1851), and its progeny. See 383 U. S., at 15–17. The analysis is objective:

> "Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented." *Id.*, at 17–18.

While the sequence of these questions might be reordered in any particular case, the factors continue to define the inquiry that controls. If a court, or patent examiner, conducts this analysis and concludes the claimed subject matter was obvious, the claim is invalid under § 103.

Seeking to resolve the question of obviousness with more uniformity and consistency, the Court of Appeals for the Federal Circuit has employed an approach referred to by the parties as the "teaching, suggestion, or motivation" test (TSM test), under which a patent claim is only proved obvious if "some motivation or suggestion to combine the prior art teachings" can be found in the prior art, the nature of the problem, or the knowledge of a person having ordinary skill in the art. See, *e. g.*, *Al-Site Corp.* v. *VSI Int'l, Inc.*, 174 F. 3d 1308, 1323–1324 (CA Fed. 1999). KSR challenges that test, or at least its application in this case. See 119 Fed. Appx. 282, 286–290 (CA Fed. 2005). Because the Court of Appeals addressed the question of obviousness in a manner contrary to § 103 and our precedents, we granted certiorari, 548 U. S. 902 (2006). We now reverse.

I

A

In car engines without computer-controlled throttles, the accelerator pedal interacts with the throttle via cable or other mechanical link. The pedal arm acts as a lever rotating around a pivot point. In a cable-actuated throttle control the rotation caused by pushing down the pedal pulls a cable, which in turn pulls open valves in the carburetor or fuel injection unit. The wider the valves open, the more fuel and air are released, causing combustion to increase and the car to accelerate. When the driver takes his foot off the pedal, the opposite occurs as the cable is released and the valves slide closed.

In the 1990's it became more common to install computers in cars to control engine operation. Computer-controlled

throttles open and close valves in response to electronic signals, not through force transferred from the pedal by a mechanical link. Constant, delicate adjustments of air and fuel mixture are possible. The computer's rapid processing of factors beyond the pedal's position improves fuel efficiency and engine performance.

For a computer-controlled throttle to respond to a driver's operation of the car, the computer must know what is happening with the pedal. A cable or mechanical link does not suffice for this purpose; at some point, an electronic sensor is necessary to translate the mechanical operation into digital data the computer can understand.

Before discussing sensors further we turn to the mechanical design of the pedal itself. In the traditional design a pedal can be pushed down or released but cannot have its position in the footwell adjusted by sliding the pedal forward or back. As a result, a driver who wishes to be closer or farther from the pedal must either reposition himself in the driver's seat or move the seat in some way. In cars with deep footwells these are imperfect solutions for drivers of smaller stature. To solve the problem, inventors, beginning in the 1970's, designed pedals that could be adjusted to change their location in the footwell. Important for this case are two adjustable pedals disclosed in U. S. Patent Nos. 5,010,782 (filed July 28, 1989) (Asano) and 5,460,061 (filed Sept. 17, 1993) (Redding). The Asano patent reveals a support structure that houses the pedal so that even when the pedal location is adjusted relative to the driver, one of the pedal's pivot points stays fixed. The pedal is also designed so that the force necessary to push the pedal down is the same regardless of adjustments to its location. The Redding patent reveals a different, sliding mechanism where both the pedal and the pivot point are adjusted.

We return to sensors. Well before Engelgau applied for his challenged patent, some inventors had obtained patents involving electronic pedal sensors for computer-controlled

throttles. These inventions, such as the device disclosed in U. S. Patent No. 5,241,936 (filed Sept. 9, 1991) ('936), taught that it was preferable to detect the pedal's position in the pedal assembly, not in the engine. The '936 patent disclosed a pedal with an electronic sensor on a pivot point in the pedal assembly. U. S. Patent No. 5,063,811 (filed July 9, 1990) (Smith) taught that to prevent the wires connecting the sensor to the computer from chafing and wearing out, and to avoid grime and damage from the driver's foot, the sensor should be put on a fixed part of the pedal assembly rather than in or on the pedal's footpad.

In addition to patents for pedals with integrated sensors inventors obtained patents for self-contained modular sensors. A modular sensor is designed independently of a given pedal so that it can be taken off the shelf and attached to mechanical pedals of various sorts, enabling the pedals to be used in automobiles with computer-controlled throttles. One such sensor was disclosed in U. S. Patent No. 5,385,068 (filed Dec. 18, 1992) ('068). In 1994, Chevrolet manufactured a line of trucks using modular sensors "attached to the pedal assembly support bracket, adjacent to the pedal and engaged with the pivot shaft about which the pedal rotates in operation." 298 F. Supp. 2d 581, 589 (ED Mich. 2003).

The prior art contained patents involving the placement of sensors on adjustable pedals as well. For example, U. S. Patent No. 5,819,593 (filed Aug. 17, 1995) (Rixon) discloses an adjustable pedal assembly with an electronic sensor for detecting the pedal's position. In the Rixon pedal the sensor is located in the pedal footpad. The Rixon pedal was known to suffer from wire chafing when the pedal was depressed and released.

This short account of pedal and sensor technology leads to the instant case.

B

KSR, a Canadian company, manufactures and supplies auto parts, including pedal systems. Ford Motor Company hired

KSR in 1998 to supply an adjustable pedal system for various lines of automobiles with cable-actuated throttle controls. KSR developed an adjustable mechanical pedal for Ford and obtained U. S. Patent No. 6,151,986 (filed July 16, 1999) ('986) for the design. In 2000, KSR was chosen by General Motors Corporation (GMC or GM) to supply adjustable pedal systems for Chevrolet and GMC light trucks that used engines with computer-controlled throttles. To make the '986 pedal compatible with the trucks, KSR merely took that design and added a modular sensor.

Teleflex is a rival to KSR in the design and manufacture of adjustable pedals. As noted, it is the exclusive licensee of the Engelgau patent. Engelgau filed the patent application on August 22, 2000, as a continuation of a previous application for U. S. Patent No. 6,109,241, which was filed on January 26, 1999. He has sworn he invented the patent's subject matter on February 14, 1998. The Engelgau patent discloses an adjustable electronic pedal described in the specification as a "simplified vehicle control pedal assembly that is less expensive, and which uses fewer parts and is easier to package within the vehicle." Engelgau, col. 2, ll. 2–5, Supp. App. 6. Claim 4 of the patent, at issue here, describes:

> "A vehicle control pedal apparatus comprising:
>
> "a support adapted to be mounted to a vehicle structure;
>
> "an adjustable pedal assembly having a pedal arm moveable in for[e] and aft directions with respect to said support;
>
> "a pivot for pivotally supporting said adjustable pedal assembly with respect to said support and defining a pivot axis; and
>
> "an electronic control attached to said support for controlling a vehicle system;
>
> "said apparatus characterized by said electronic control being responsive to said pivot for providing a signal that corresponds to pedal arm position as said pedal arm piv-

> ots about said pivot axis between rest and applied positions wherein the position of said pivot remains constant while said pedal arm moves in fore and aft directions with respect to said pivot." *Id.*, col. 6, ll. 17–36, Supp. App. 8 (diagram numbers omitted).

We agree with the District Court that the claim discloses "a position-adjustable pedal assembly with an electronic pedal position sensor attached to the support member of the pedal assembly. Attaching the sensor to the support member allows the sensor to remain in a fixed position while the driver adjusts the pedal." 298 F. Supp. 2d, at 586–587.

Before issuing the Engelgau patent the U. S. Patent and Trademark Office (PTO) rejected one of the patent claims that was similar to, but broader than, the present claim 4. The claim did not include the requirement that the sensor be placed on a fixed pivot point. The PTO concluded the claim was an obvious combination of the prior art disclosed in Redding and Smith, explaining:

> "'Since the prior ar[t] references are from the field of endeavor, the purpose disclosed . . . would have been recognized in the pertinent art of Redding. Therefore it would have been obvious . . . to provide the device of Redding with the . . . means attached to a support member as taught by Smith.'" *Id.*, at 595.

In other words Redding provided an example of an adjustable pedal, and Smith explained how to mount a sensor on a pedal's support structure, and the rejected patent claim merely put these two teachings together.

Although the broader claim was rejected, claim 4 was later allowed because it included the limitation of a fixed pivot point, which distinguished the design from Redding's. *Ibid.* Engelgau had not included Asano among the prior art references, and Asano was not mentioned in the patent's prosecution. Thus, the PTO did not have before it an adjustable

pedal with a fixed pivot point. The patent issued on May 29, 2001, and was assigned to Teleflex.

Upon learning of KSR's design for GM, Teleflex sent a warning letter informing KSR that its proposal would violate the Engelgau patent. "'Teleflex believes that any supplier of a product that combines an adjustable pedal with an electronic throttle control necessarily employs technology covered by one or more'" of Teleflex's patents. *Id.*, at 585. KSR refused to enter a royalty arrangement with Teleflex; so Teleflex sued for infringement, asserting KSR's pedal infringed the Engelgau patent and two other patents. *Ibid.* Teleflex later abandoned its claims regarding the other patents and dedicated the patents to the public. The remaining contention was that KSR's pedal system for GM infringed claim 4 of the Engelgau patent. Teleflex has not argued that the other three claims of the patent are infringed by KSR's pedal, nor has Teleflex argued that the mechanical adjustable pedal designed by KSR for Ford infringed any of its patents.

C

The District Court granted summary judgment in KSR's favor. After reviewing the pertinent history of pedal design, the scope of the Engelgau patent, and the relevant prior art, the court considered the validity of the contested claim. By direction of 35 U. S. C. § 282, an issued patent is presumed valid. The District Court applied *Graham*'s framework to determine whether under summary-judgment standards KSR had overcome the presumption and demonstrated that claim 4 was obvious in light of the prior art in existence when the claimed subject matter was invented. See § 103(a).

The District Court determined, in light of the expert testimony and the parties' stipulations, that the level of ordinary skill in pedal design was "'an undergraduate degree in mechanical engineering (or an equivalent amount of industry experience) [and] familiarity with pedal control systems for

vehicles.'" 298 F. Supp. 2d, at 590. The court then set forth the relevant prior art, including the patents and pedal designs described above.

Following *Graham*'s direction, the court compared the teachings of the prior art to the claims of Engelgau. It found "little difference." 298 F. Supp. 2d, at 590. Asano taught everything contained in claim 4 except the use of a sensor to detect the pedal's position and transmit it to the computer controlling the throttle. That additional aspect was revealed in sources such as the '068 patent and the sensors used by Chevrolet.

Under the controlling cases from the Court of Appeals for the Federal Circuit, however, the District Court was not permitted to stop there. The court was required also to apply the TSM test. The District Court held KSR had satisfied the test. It reasoned (1) the state of the industry would lead inevitably to combinations of electronic sensors and adjustable pedals, (2) Rixon provided the basis for these developments, and (3) Smith taught a solution to the wire-chafing problems in Rixon, namely, locating the sensor on the fixed structure of the pedal. This could lead to the combination of Asano, or a pedal like it, with a pedal position sensor.

The conclusion that the Engelgau design was obvious was supported, in the District Court's view, by the PTO's rejection of the broader version of claim 4. Had Engelgau included Asano in his patent application, it reasoned, the PTO would have found claim 4 to be an obvious combination of Asano and Smith, as it had found the broader version an obvious combination of Redding and Smith. As a final matter, the District Court held that the secondary factor of Teleflex's commercial success with pedals based on Engelgau's design did not alter its conclusion. The District Court granted summary judgment for KSR.

With principal reliance on the TSM test, the Court of Appeals reversed. It ruled the District Court had not been strict enough in applying the test, having failed to make

"'finding[s] as to the specific understanding or principle within the knowledge of a skilled artisan that would have motivated one with no knowledge of [the] invention' . . . to attach an electronic control to the support bracket of the Asano assembly." 119 Fed. Appx., at 288 (quoting *In re Kotzab*, 217 F. 3d 1365, 1371 (CA Fed. 2000); brackets in original). The Court of Appeals held that the District Court was incorrect that the nature of the problem to be solved satisfied this requirement because unless the "prior art references address[ed] the precise problem that the patentee was trying to solve," the problem would not motivate an inventor to look at those references. 119 Fed. Appx., at 288.

Here, the Court of Appeals found, the Asano pedal was designed to solve the "'constant ratio problem'"—that is, to ensure that the force required to depress the pedal is the same no matter how the pedal is adjusted—whereas Engelgau sought to provide a simpler, smaller, cheaper adjustable electronic pedal. *Ibid.* As for Rixon, the court explained, that pedal suffered from the problem of wire chafing but was not designed to solve it. In the court's view Rixon did not teach anything helpful to Engelgau's purpose. Smith, in turn, did not relate to adjustable pedals and did not "necessarily go to the issue of motivation to attach the electronic control on the support bracket of the pedal assembly." *Ibid.* When the patents were interpreted in this way, the Court of Appeals held, they would not have led a person of ordinary skill to put a sensor on the sort of pedal described in Asano.

That it might have been obvious to try the combination of Asano and a sensor was likewise irrelevant, in the court's view, because "'"[o]bvious to try" has long been held not to constitute obviousness.'" *Id.*, at 289 (quoting *In re Deuel*, 51 F. 3d 1552, 1559 (CA Fed. 1995)).

The Court of Appeals also faulted the District Court's consideration of the PTO's rejection of the broader version of claim 4. The District Court's role, the Court of Appeals explained, was not to speculate regarding what the PTO might

have done had the Engelgau patent mentioned Asano. Rather, the court held, the District Court was obliged first to presume that the issued patent was valid and then to render its own independent judgment of obviousness based on a review of the prior art. The fact that the PTO had rejected the broader version of claim 4, the Court of Appeals said, had no place in that analysis.

The Court of Appeals further held that genuine issues of material fact precluded summary judgment. Teleflex had proffered statements from one expert that claim 4 "'was a simple, elegant, and novel combination of features,'" 119 Fed. Appx., at 290, compared to Rixon, and from another expert that claim 4 was nonobvious because, unlike in Rixon, the sensor was mounted on the support bracket rather than the pedal itself. This evidence, the court concluded, sufficed to require a trial.

II

A

We begin by rejecting the rigid approach of the Court of Appeals. Throughout this Court's engagement with the question of obviousness, our cases have set forth an expansive and flexible approach inconsistent with the way the Court of Appeals applied its TSM test here. To be sure, *Graham* recognized the need for "uniformity and definiteness." 383 U. S., at 18. Yet the principles laid down in *Graham* reaffirmed the "functional approach" of *Hotchkiss*, 11 How. 248. See 383 U. S., at 12. To this end, *Graham* set forth a broad inquiry and invited courts, where appropriate, to look at any secondary considerations that would prove instructive. *Id.*, at 17.

Neither the enactment of § 103 nor the analysis in *Graham* disturbed this Court's earlier instructions concerning the need for caution in granting a patent based on the combination of elements found in the prior art. For over a half century, the Court has held that a "patent for a combination

which only unites old elements with no change in their respective functions . . . obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men." *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 152–153 (1950). This is a principal reason for declining to allow patents for what is obvious. The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results. Three cases decided after *Graham* illustrate the application of this doctrine.

In *United States* v. *Adams*, 383 U. S. 39, 40 (1966), a companion case to *Graham*, the Court considered the obviousness of a "wet battery" that varied from prior designs in two ways: It contained water, rather than the acids conventionally employed in storage batteries; and its electrodes were magnesium and cuprous chloride, rather than zinc and silver chloride. The Court recognized that when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result. 383 U. S., at 50–51. It nevertheless rejected the Government's claim that Adams' battery was obvious. The Court relied upon the corollary principle that when the prior art teaches away from combining certain known elements, discovery of a successful means of combining them is more likely to be nonobvious. *Id.*, at 51–52. When Adams designed his battery, the prior art warned that risks were involved in using the types of electrodes he employed. The fact that the elements worked together in an unexpected and fruitful manner supported the conclusion that Adams' design was not obvious to those skilled in the art.

In *Anderson's-Black Rock, Inc.* v. *Pavement Salvage Co.*, 396 U. S. 57 (1969), the Court elaborated on this approach. The subject matter of the patent before the Court was a device combining two pre-existing elements: a radiant-heat

burner and a paving machine. The device, the Court concluded, did not create some new synergy: The radiant-heat burner functioned just as a burner was expected to function; and the paving machine did the same. The two in combination did no more than they would in separate, sequential operation. *Id.*, at 60–62. In those circumstances, "while the combination of old elements performed a useful function, it added nothing to the nature and quality of the radiant-heat burner already patented," and the patent failed under § 103. *Id.*, at 62 (footnote omitted).

Finally, in *Sakraida* v. *AG Pro, Inc.*, 425 U. S. 273 (1976), the Court derived from the precedents the conclusion that when a patent "simply arranges old elements with each performing the same function it had been known to perform" and yields no more than one would expect from such an arrangement, the combination is obvious. *Id.*, at 282.

The principles underlying these cases are instructive when the question is whether a patent claiming the combination of elements of prior art is obvious. When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. *Sakraida* and *Anderson's-Black Rock* are illustrative—a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.

Following these principles may be more difficult in other cases than it is here because the claimed subject matter may involve more than the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for the improvement.

Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit. See *In re Kahn*, 441 F. 3d 977, 988 (CA Fed. 2006) ("[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness"). As our precedents make clear, however, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.

B

When it first established the requirement of demonstrating a teaching, suggestion, or motivation to combine known elements in order to show that the combination is obvious, the Court of Customs and Patent Appeals captured a helpful insight. See *Application of Bergel*, 292 F. 2d 955, 956–957 (1961). As is clear from cases such as *Adams*, a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. Although common sense directs one to look with care at a patent application that claims as innovation the combination of two known devices according to their established functions, it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does. This is so because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity

will be combinations of what, in some sense, is already known.

Helpful insights, however, need not become rigid and mandatory formulas; and when it is so applied, the TSM test is incompatible with our precedents. The obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents. The diversity of inventive pursuits and of modern technology counsels against limiting the analysis in this way. In many fields it may be that there is little discussion of obvious techniques or combinations, and it often may be the case that market demand, rather than scientific literature, will drive design trends. Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility.

In the years since the Court of Customs and Patent Appeals set forth the essence of the TSM test, the Court of Appeals no doubt has applied the test in accord with these principles in many cases. There is no necessary inconsistency between the idea underlying the TSM test and the *Graham* analysis. But when a court transforms the general principle into a rigid rule that limits the obviousness inquiry, as the Court of Appeals did here, it errs.

C

The flaws in the analysis of the Court of Appeals relate for the most part to the court's narrow conception of the obviousness inquiry reflected in its application of the TSM test. In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls. What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under § 103. One of the ways

in which a patent's subject matter can be proved obvious is by noting that there existed at the time of invention a known problem for which there was an obvious solution encompassed by the patent's claims.

The first error of the Court of Appeals in this case was to foreclose this reasoning by holding that courts and patent examiners should look only to the problem the patentee was trying to solve. 119 Fed. Appx., at 288. The Court of Appeals failed to recognize that the problem motivating the patentee may be only one of many addressed by the patent's subject matter. The question is not whether the combination was obvious to the patentee but whether the combination was obvious to a person with ordinary skill in the art. Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.

The second error of the Court of Appeals lay in its assumption that a person of ordinary skill attempting to solve a problem will be led only to those elements of prior art designed to solve the same problem. *Ibid.* The primary purpose of Asano was solving the constant ratio problem; so, the court concluded, an inventor considering how to put a sensor on an adjustable pedal would have no reason to consider putting it on the Asano pedal. *Ibid.* Common sense teaches, however, that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle. Regardless of Asano's primary purpose, the design provided an obvious example of an adjustable pedal with a fixed pivot point; and the prior art was replete with patents indicating that a fixed pivot point was an ideal mount for a sensor. The idea that a designer hoping to make an adjustable electronic pedal would ignore Asano because Asano was designed to solve the constant

ratio problem makes little sense. A person of ordinary skill is also a person of ordinary creativity, not an automaton.

The same constricted analysis led the Court of Appeals to conclude, in error, that a patent claim cannot be proved obvious merely by showing that the combination of elements was "[o]bvious to try." *Id.*, at 289 (internal quotation marks omitted). When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103.

The Court of Appeals, finally, drew the wrong conclusion from the risk of courts and patent examiners falling prey to hindsight bias. A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning. See *Graham*, 383 U. S., at 36 (warning against a "temptation to read into the prior art the teachings of the invention in issue" and instructing courts to "'guard against slipping into use of hindsight'" (quoting *Monroe Auto Equip. Co.* v. *Heckethorn Mfg. & Supply Co.*, 332 F. 2d 406, 412 (CA6 1964))). Rigid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it.

We note the Court of Appeals has since elaborated a broader conception of the TSM test than was applied in the instant matter. See, *e. g.*, *DyStar Textilfarben GmbH & Co. Deutschland KG* v. *C. H. Patrick Co.*, 464 F. 3d 1356, 1367 (CA Fed. 2006) ("Our suggestion test is in actuality quite flexible and not only permits, but *requires*, consideration of common knowledge and common sense"); *Alza Corp.* v. *Mylan Labs., Inc.*, 464 F. 3d 1286, 1291 (2006) ("There is flexibility in our obviousness jurisprudence because a moti-

vation may be found *implicitly* in the prior art. We do not have a rigid test that requires an actual teaching to combine . . . "). Those decisions, of course, are not now before us and do not correct the errors of law made by the Court of Appeals in this case. The extent to which they may describe an analysis more consistent with our earlier precedents and our decision here is a matter for the Court of Appeals to consider in its future cases. What we hold is that the fundamental misunderstandings identified above led the Court of Appeals in this case to apply a test inconsistent with our patent law decisions.

III

When we apply the standards we have explained to the instant facts, claim 4 must be found obvious. We agree with and adopt the District Court's recitation of the relevant prior art and its determination of the level of ordinary skill in the field. As did the District Court, we see little difference between the teachings of Asano and Smith and the adjustable electronic pedal disclosed in claim 4 of the Engelgau patent. A person having ordinary skill in the art could have combined Asano with a pedal position sensor in a fashion encompassed by claim 4, and would have seen the benefits of doing so.

A

Teleflex argues in passing that the Asano pedal cannot be combined with a sensor in the manner described by claim 4 because of the design of Asano's pivot mechanisms. See Brief for Respondents 48–49, and n. 17. Therefore, Teleflex reasons, even if adding a sensor to Asano was obvious, that does not establish that claim 4 encompasses obvious subject matter. This argument was not, however, raised before the District Court. There Teleflex was content to assert only that the problem motivating the invention claimed by the Engelgau patent would not lead to the solution of combining Asano with a sensor. See Teleflex's Response to KSR's Mo-

tion for Summary Judgment of Invalidity in No. 02–74586 (ED Mich.), pp. 18–20, App. 144a–146a. It is also unclear whether the current argument was raised before the Court of Appeals, where Teleflex advanced the nonspecific, conclusory contention that combining Asano with a sensor would not satisfy the limitations of claim 4. See Brief for Plaintiffs-Appellants in No. 04–1152 (CA Fed.), pp. 42–44. Teleflex's own expert declarations, moreover, do not support the point Teleflex now raises. See Declaration of Clark J. Radcliffe, Ph.D., Supp. App. 204–207; Declaration of Timothy L. Andresen, *id.*, at 208–210. The only statement in either declaration that might bear on the argument is found in the Radcliffe declaration:

> "Asano . . . and the Rixon . . . are complex mechanical linkage-based devices that are expensive to produce and assemble and difficult to package. It is exactly these difficulties with prior art designs that [Engelgau] resolves. The use of an adjustable pedal with a single pivot reflecting pedal position combined with an electronic control mounted between the support and the adjustment assembly at that pivot was a simple, elegant, and novel combination of features in the Engelgau '565 patent." *Id.*, at 206, ¶ 16.

Read in the context of the declaration as a whole this is best interpreted to mean that Asano could not be used to solve "[t]he problem addressed by Engelgau '565[:] to provide a less expensive, more quickly assembled, and smaller package adjustable pedal assembly with electronic control." *Id.*, at 205, ¶ 10.

The District Court found that combining Asano with a pivot-mounted pedal position sensor fell within the scope of claim 4. 298 F. Supp. 2d, at 592–593. Given the significance of that finding to the District Court's judgment, it is apparent that Teleflex would have made clearer challenges to it if it intended to preserve this claim. In light of Teleflex's fail-

ure to raise the argument in a clear fashion, and the silence of the Court of Appeals on the issue, we take the District Court's conclusion on the point to be correct.

B

The District Court was correct to conclude that, as of the time Engelgau designed the subject matter in claim 4, it was obvious to a person of ordinary skill to combine Asano with a pivot-mounted pedal position sensor. There then existed a marketplace that created a strong incentive to convert mechanical pedals to electronic pedals, and the prior art taught a number of methods for achieving this advance. The Court of Appeals considered the issue too narrowly by, in effect, asking whether a pedal designer writing on a blank slate would have chosen both Asano and a modular sensor similar to the ones used in the Chevrolet truckline and disclosed in the '068 patent. The District Court employed this narrow inquiry as well, though it reached the correct result nevertheless. The proper question to have asked was whether a pedal designer of ordinary skill, facing the wide range of needs created by developments in the field of endeavor, would have seen a benefit to upgrading Asano with a sensor.

In automotive design, as in many other fields, the interaction of multiple components means that changing one component often requires the others to be modified as well. Technological developments made it clear that engines using computer-controlled throttles would become standard. As a result, designers might have decided to design new pedals from scratch; but they also would have had reason to make pre-existing pedals work with the new engines. Indeed, upgrading its own pre-existing model led KSR to design the pedal now accused of infringing the Engelgau patent.

For a designer starting with Asano, the question was where to attach the sensor. The consequent legal question, then, is whether a pedal designer of ordinary skill starting with Asano would have found it obvious to put the sensor on

a fixed pivot point. The prior art discussed above leads us to the conclusion that attaching the sensor where both KSR and Engelgau put it would have been obvious to a person of ordinary skill.

The '936 patent taught the utility of putting the sensor on the pedal device, not in the engine. Smith, in turn, explained to put the sensor not on the pedal's footpad but instead on its support structure. And from the known wire-chafing problems of Rixon, and Smith's teaching that "the pedal assemblies must not precipitate any motion in the connecting wires," Smith, col. 1, ll. 35–37, Supp. App. 274, the designer would know to place the sensor on a nonmoving part of the pedal structure. The most obvious nonmoving point on the structure from which a sensor can easily detect the pedal's position is a pivot point. The designer, accordingly, would follow Smith in mounting the sensor on a pivot, thereby designing an adjustable electronic pedal covered by claim 4.

Just as it was possible to begin with the objective to upgrade Asano to work with a computer-controlled throttle, so too was it possible to take an adjustable electronic pedal like Rixon and seek an improvement that would avoid the wire-chafing problem. Following similar steps to those just explained, a designer would learn from Smith to avoid sensor movement and would come, thereby, to Asano because Asano disclosed an adjustable pedal with a fixed pivot.

Teleflex indirectly argues that the prior art taught away from attaching a sensor to Asano because Asano in its view is bulky, complex, and expensive. The only evidence Teleflex marshals in support of this argument, however, is the Radcliffe declaration, which merely indicates that Asano would not have solved Engelgau's goal of making a small, simple, and inexpensive pedal. What the declaration does not indicate is that Asano was somehow so flawed that there was no reason to upgrade it, or pedals like it, to be compatible with modern engines. Indeed, Teleflex's own declara-

tions refute this conclusion. Dr. Radcliffe states that Rixon suffered from the same bulk and complexity as did Asano. See *id.*, at 206. Teleflex's other expert, however, explained that Rixon was itself designed by adding a sensor to a preexisting mechanical pedal. See *id.*, at 209. If Rixon's base pedal was not too flawed to upgrade, then Dr. Radcliffe's declaration does not show Asano was either. Teleflex may have made a plausible argument that Asano is inefficient as compared to Engelgau's preferred embodiment, but to judge Asano against Engelgau would be to engage in the very hindsight bias Teleflex rightly urges must be avoided. Accordingly, Teleflex has not shown anything in the prior art that taught away from the use of Asano.

Like the District Court, finally, we conclude Teleflex has shown no secondary factors to dislodge the determination that claim 4 is obvious. Proper application of *Graham* and our other precedents to these facts therefore leads to the conclusion that claim 4 encompassed obvious subject matter. As a result, the claim fails to meet the requirement of § 103.

We need not reach the question whether the failure to disclose Asano during the prosecution of Engelgau voids the presumption of validity given to issued patents, for claim 4 is obvious despite the presumption. We nevertheless think it appropriate to note that the rationale underlying the presumption—that the PTO, in its expertise, has approved the claim—seems much diminished here.

IV

A separate ground the Court of Appeals gave for reversing the order for summary judgment was the existence of a dispute over an issue of material fact. We disagree with the Court of Appeals on this point as well. To the extent the court understood the *Graham* approach to exclude the possibility of summary judgment when an expert provides a conclusory affidavit addressing the question of obviousness, it misunderstood the role expert testimony plays in the analy-

sis. In considering summary judgment on that question the district court can and should take into account expert testimony, which may resolve or keep open certain questions of fact. That is not the end of the issue, however. The ultimate judgment of obviousness is a legal determination. *Graham*, 383 U. S., at 17. Where, as here, the content of the prior art, the scope of the patent claim, and the level of ordinary skill in the art are not in material dispute, and the obviousness of the claim is apparent in light of these factors, summary judgment is appropriate. Nothing in the declarations proffered by Teleflex prevented the District Court from reaching the careful conclusions underlying its order for summary judgment in this case.

* * *

We build and create by bringing to the tangible and palpable reality around us new works based on instinct, simple logic, ordinary inferences, extraordinary ideas, and sometimes even genius. These advances, once part of our shared knowledge, define a new threshold from which innovation starts once more. And as progress beginning from higher levels of achievement is expected in the normal course, the results of ordinary innovation are not the subject of exclusive rights under the patent laws. Were it otherwise patents might stifle, rather than promote, the progress of useful arts. See U. S. Const., Art. I, § 8, cl. 8. These premises led to the bar on patents claiming obvious subject matter established in *Hotchkiss* and codified in § 103. Application of the bar must not be confined within a test or formulation too constrained to serve its purpose.

KSR provided convincing evidence that mounting a modular sensor on a fixed pivot point of the Asano pedal was a design step well within the grasp of a person of ordinary skill in the relevant art. Its arguments, and the record, demonstrate that claim 4 of the Engelgau patent is obvious. In rejecting the District Court's rulings, the Court of Ap-

peals analyzed the issue in a narrow, rigid manner inconsistent with § 103 and our precedents. 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

EC TERM OF YEARS TRUST *v.* UNITED STATES

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

No. 05–1541. Argued February 26, 2007—Decided April 30, 2007

Under 26 U. S. C. § 7426(a)(1), if the Internal Revenue Service (IRS) levies upon a third party's property to collect taxes owed by another, the third party may bring a wrongful levy action against the United States, so long as such action is brought before "the expiration of 9 months from the date of the levy," § 6532(c)(1). In contrast, the limitations period for a tax-refund action under 28 U. S. C. § 1346(a)(1) begins with an administrative claim that may be filed within at least two years, and may be brought to court within another two years after an administrative denial. The IRS levied on a bank account in which petitioner (Trust) had deposited funds because the IRS assumed that the Trust's creators had transferred assets to the Trust to evade taxes. The bank responded with a check to the Treasury. Almost a year later, the Trust and others brought a § 7426(a)(1) action claiming wrongful levies, but the District Court dismissed the complaint because it was filed after the 9-month limitations period had expired. After unsuccessfully pursuing a tax refund at the administrative level, the Trust filed a refund action under § 1346(a)(1). The District Court held that a wrongful levy claim under § 7426(a)(1) was the sole remedy possible and dismissed, and the Fifth Circuit affirmed.

Held: The Trust missed § 7426(a)(1)'s deadline for challenging a levy, and may not bring the challenge as a tax-refund claim under § 1346(a)(1). Section 7426(a)(1) provides the exclusive remedy for third-party wrongful levy claims. "[A] precisely drawn, detailed statute pre-empts more general remedies," *Brown* v. *GSA*, 425 U. S. 820, 834, and it braces the preemption claim when resort to a general remedy would effectively extend the limitations period for the specific one, see *id.*, at 833. If third parties could avail themselves of § 1346(a)(1)'s general tax-refund jurisdiction, they could effortlessly evade § 7426(a)(1)'s much shorter limitations period. The Trust argues that, because *United States* v. *Williams*, 514 U. S. 527, construed § 1346(a)(1)'s general jurisdictional grant expansively enough to cover third parties' wrongful levy claims, treating § 7426(a)(1) as the exclusive avenue for these claims would amount to a disfavored holding that § 7426(a)(1) implicitly repealed § 1346(a)(1)'s pre-existing jurisdictional grant. But this reads *Williams* too broadly. *Williams* involved a lien and was decided on the specific

understanding that no other remedy was open to the plaintiff. Here, the Trust challenges a levy and could have made a timely claim under § 7426(a)(1). Even if the presumption against implied repeals applied here, § 7426(a)(1)'s 9-month limitations period cannot be reconciled with the notion that the same challenge would be open under § 1346(a)(1) for up to four years. Nor can the two statutory schemes be harmonized by construing § 7426(a)(1)'s filing deadline to cover only those actions seeking predeprivation remedies unavailable under § 1346(a)(1). On its face, § 7426(a)(1) applies to predeprivation and postdeprivation claims alike. Pp. 433–436.

434 F. 3d 807, affirmed.

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

Francis S. Ainsa, Jr., argued the cause and filed briefs for petitioner.

Deanne E. Maynard argued the cause for the United States. With her on the brief were *Solicitor General Clement*, *Assistant Attorney General O'Connor*, *Deputy Solicitor General Hungar*, *Bruce R. Ellisen*, and *Teresa T. Milton.*

JUSTICE SOUTER delivered the opinion of the Court.

This is a challenge to the Internal Revenue Service's levy upon the property of a trust, to collect taxes owed by another, an action specifically authorized by 26 U. S. C. § 7426(a)(1), but subject to a statutory filing deadline the trust missed. The question is whether the trust may still challenge the levy through an action for tax refund under 28 U. S. C. § 1346(a)(1). We hold that it may not.

I

The Internal Revenue Code provides that "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U. S. C. § 6321. "A federal tax lien, however, is not self-executing," and the IRS must take "[a]ffirmative action . . .

to enforce collection of the unpaid taxes." *United States* v. *National Bank of Commerce*, 472 U. S. 713, 720 (1985). One of its "principal tools," *ibid.*, is a levy, which is a "legally sanctioned seizure and sale of property," Black's Law Dictionary 926 (8th ed. 2004); see also § 6331(b) ("The term 'levy' as used in this title includes the power of distraint and seizure by any means").

To protect against a "'[w]rongful'" imposition upon "property which is not the taxpayer's," S. Rep. No. 1708, 89th Cong., 2d Sess., 30 (1966), the Federal Tax Lien Act of 1966 added § 7426(a)(1), providing that "[i]f a levy has been made on property . . . any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in . . . such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court." 80 Stat. 1143. The action must, however, be brought before "the expiration of 9 months from the date of the levy."[1] § 6532(c)(1). This short limitations period contrasts with its counterpart in a tax-refund action under 28 U. S. C. § 1346(a)(1), which begins with an administrative claim that may be filed within at least two years, and may be brought to court within another two after an administrative denial.[2] The demand for greater

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[1] This period can be extended for up to 12 months if the third party makes an administrative request for the return of the property wrongfully levied upon. See 26 U. S. C. § 6532(c)(2).

[2] Title 28 U. S. C. § 1346(a)(1) gives district courts "jurisdiction, concurrent with the United States Court of Federal Claims," over "[a]ny civil action against the United States for the recovery of," among other things, "any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." A taxpayer may bring such an action within two years after the IRS disallows the taxpayer's administrative refund claim. See 26 U. S. C. §§ 6532(a)(1)–(2); see also § 7422(a) (requiring a taxpayer to file the administrative claim before seeking a refund in court). An administrative refund claim must, in turn, be filed within two years from the date the tax was paid or three years from the time the tax return was filed, whichever is later. See § 6511(a).

haste when a third party contests a levy is no accident; as the Government explained in the hearings before passage of the Act, "[s]ince after seizure of property for nonpayment of taxes [an IRS] district director is likely to suspend further collection activities against the taxpayer, it is essential that he be advised promptly if he has seized property which does not belong to the taxpayer." Hearings on H. R. 11256 and H. R. 11290 before the House Committee on Ways and Means, 89th Cong., 2d Sess., 57–58 (1966) (written statement of Stanley S. Surrey, Assistant Secretary of the Treasury); see also *id.*, at 72 (statement of Laurens Williams, Chairman, Special Committee on Federal Liens, American Bar Association) ("A short (9 month) statute of limitations is provided, because it is important to get such controversies decided quickly so the Government may pursue the taxpayer's own property if it made a mistake the first time").

II

After Elmer W. Cullers, Jr., and Dorothy Cullers established the EC Term of Years Trust in 1991, the IRS assessed federal tax liabilities against them for what the Government claimed (and the Trust does not dispute, see Tr. of Oral Arg. 7) were unwarranted income tax deductions in the 1980s. The Government assumed that the Cullerses had transferred assets to the Trust to evade taxes, and so filed a tax lien against the Trust in August 1999. The Trust denied any obligation, but for the sake of preventing disruptive collection efforts by the IRS, it deposited funds in a bank account, against which the IRS issued a notice of levy to the bank in September 1999. In October, the bank responded with a check for over $3 million to the United States Treasury.

Almost a year after that, the Trust (joined by several other trusts created by the Cullerses) brought a civil action under 26 U. S. C. § 7426(a)(1) claiming wrongful levies, but the District Court dismissed it because the complaint was filed after the 9-month limitations period had expired, see

§ 6532(c)(1). The court also noted that tax-refund claims under 28 U. S. C. § 1346(a)(1) were not open to the plaintiff trusts because § 7426 "'affords the exclusive remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability.'" *BSC Term of Years Trust* v. *United States*, 2001–1 USTC ¶ 50,174, p. 87,237, n. 1, 87 AFTR 2d ¶ 2001–390, p. 2001–547, n. 1 (WD Tex. 2000) (quoting *Texas Comm. Bank Fort Worth, N. A.* v. *United States*, 896 F. 2d 152, 156 (CA5 1990); emphasis deleted). At first the Trust sought review by the Court of Appeals for the Fifth Circuit, but then voluntarily dismissed its appeal. *BSC Term of Years Trust* v. *United States*, 87 AFTR 2d ¶ 2001–1039, p. 2001–2532 (2001).

After unsuccessfully pursuing a tax refund at the administrative level, the Trust filed a second action, this one for a refund under § 1346(a)(1). The District Court remained of the view that a claim for a wrongful levy under § 7426(a)(1) had been the sole remedy possible and dismissed.[3] The Court of Appeals for the Fifth Circuit affirmed.

Because the Ninth Circuit, on the contrary, has held that § 7426(a)(1) is not the exclusive remedy for third parties challenging a levy, see *WWSM Investors* v. *United States*, 64 F. 3d 456 (1995), we granted certiorari to resolve the conflict, 549 U. S. 990 (2006). We affirm.

III

"In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Brown* v. *GSA*, 425 U. S. 820, 834 (1976); see *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 284–286 (1983) (adverse claimants to real property of the United States may not rely on "officer's suits" or on other general remedies because the Quiet Title Act of 1972

[3] The District Court declined to dismiss the Trust's claim on res judicata grounds, and the Government does not argue claim or issue preclusion in this Court, see Brief for United States 5, n. 2.

is their exclusive recourse); see also *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561 (1942) (venue in patent infringement cases is governed by a statute dealing specifically with patents, not a general venue provision). It braces the preemption claim when resort to a general remedy would effectively extend the limitations period for the specific one. See *Brown* v. *GSA*, *supra*, at 833 (rejecting an interpretation that would "driv[e] out of currency" a narrowly aimed provision "with its rigorous . . . time limitations" by permitting "access to the courts under other, less demanding statutes"); see also *Rancho Palos Verdes* v. *Abrams*, 544 U. S. 113, 122–123 (2005) (concluding that 47 U. S. C. § 332(c) precludes resort to the general cause of action under 42 U. S. C. § 1983, in part because § 332 "limits relief in ways that § 1983 does not" by requiring judicial review to be sought within 30 days); 544 U. S., at 130, n. (STEVENS, J., concurring in judgment) (same).

Resisting the force of the better fitted statute requires a good countervailing reason, and none appears here. Congress specifically tailored § 7426(a)(1) to third-party claims of wrongful levy, and if third parties could avail themselves of the general tax-refund jurisdiction of § 1346(a)(1), they could effortlessly evade the levy statute's 9-month limitations period thought essential to the Government's tax collection.

The Trust argues that in *United States* v. *Williams*, 514 U. S. 527 (1995), we construed the general jurisdictional grant of § 1346(a)(1) expansively enough to cover third parties' wrongful levy claims. So, according to the Trust, treating § 7426(a)(1) as the exclusive avenue for these claims would amount to a disfavored holding that § 7426(a)(1) implicitly repealed the pre-existing jurisdictional grant of § 1346(a)(1). See *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148 (1976); *Morton* v. *Mancari*, 417 U. S. 535 (1974).

But the Trust reads *Williams* too broadly. Although we decided that § 1346(a)(1) authorizes a tax-refund claim by a third party whose property was subjected to an allegedly

wrongful tax lien, we so held on the specific understanding that no other remedy, not even a timely claim under § 7426(a)(1), was open to the plaintiff in that case. See *Williams*, *supra*, at 536–538. Here, on the contrary, the Trust challenges a levy, not a lien, and could have made a timely claim under § 7426(a)(1) for the relief it now seeks under § 1346(a)(1).[4]

And even if the canon against implied repeals applied here, the Trust still could not prevail. We simply cannot reconcile the 9-month limitations period for a wrongful levy claim under § 7426(a)(1) with the notion that the same challenge would be open under § 1346(a)(1) for up to four years. See *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936) ("[W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one"). On this point, the Trust proposes that the two statutory schemes can be "har-

[4] It has been commonly understood that *Williams* did not extend § 1346(a)(1) to parties in the Trust's position. See 434 F. 3d 807, 810 (CA5 2006) (case below) ("To construe *Williams* to allow an alternative remedy under § 1346, with its longer statute of limitations period, would undermine the surety provided by the clear avenue to recovery under § 7426" (citation omitted)); *Dahn* v. *United States*, 127 F. 3d 1249, 1253 (CA10 1997) ("[T]here were no tax levies involved in *[Williams]*. Thus, the Court was concerned solely with the reach of § 1346 per se; the exclusivity of a concurrent § 7426 claim was never in issue. Indeed, the Court specifically emphasized the inapplicability of § 7426 (or any other meaningful remedy) to reinforce its broad reading of § 1346"); *WWSM Investors* v. *United States*, 64 F. 3d 456, 459 (CA9 1995) (Brunetti, J., dissenting) ("The Supreme Court recognized *Williams* as a refund, not a wrongful levy, case, and [did not] even hint that § 7426 was not the exclusive remedy for a claimed *wrongful levy*"); Rev. Rul. 2005–49, 2005–2 Cum. Bull. 126 ("The rationale in *Williams* is inapplicable to wrongful levy suits because Congress created an exclusive remedy under section 7426 for third persons claiming an interest in property levied upon by the [IRS]"); but see *WWSM Investors*, *supra*, at 459 (majority opinion) ("[S]eizing money from WWSM's bank account is functionally equivalent to what the IRS did in *Williams*—placing a lien on property in escrow under circumstances which compelled Mrs. Williams to pay the IRS and discharge the lien").

monized" by construing the deadline for filing § 7426(a)(1) claims to cover only those actions seeking "pre-deprivation" remedies unavailable under § 1346(a)(1). See Reply Brief for Petitioner 6. But this reading would violate the clear text of § 7426(a)(1), which on its face applies to pre-deprivation and postdeprivation claims alike. See 26 U. S. C. § 7426(a)(1) ("Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary").

* * *

The Trust missed the deadline for challenging a levy under § 7426(a)(1), and may not bring the challenge as a tax-refund claim under § 1346(a)(1). The judgment of the Court of Appeals is accordingly affirmed.

It is so ordered.

Syllabus

MICROSOFT CORP. *v.* AT&T CORP.

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

No. 05–1056. Argued February 21, 2007—Decided April 30, 2007

It is the general rule under United States patent law that no infringement occurs when a patented product is made and sold in another country. There is an exception. Section 271(f) of the Patent Act, adopted in 1984, provides that infringement does occur when one "suppl[ies] . . . from the United States," for "combination" abroad, a patented invention's "components." 35 U. S. C. § 271(f)(1). This case concerns the applicability of § 271(f) to computer software first sent from the United States to a foreign manufacturer on a master disk, or by electronic transmission, then copied by the foreign recipient for installation on computers made and sold abroad.

AT&T holds a patent on a computer used to digitally encode and compress recorded speech. Microsoft's Windows operating system has the potential to infringe that patent because Windows incorporates software code that, when installed, enables a computer to process speech in the manner claimed by the patent. Microsoft sells Windows to foreign manufacturers who install the software onto the computers they sell. Microsoft sends each manufacturer a master version of Windows, either on a disk or via encrypted electronic transmission, which the manufacturer uses to generate copies. Those copies, not the master version sent by Microsoft, are installed on the foreign manufacturer's computers. The foreign-made computers are then sold to users abroad.

AT&T filed an infringement suit charging Microsoft with liability for the foreign installations of Windows. By sending Windows to foreign manufacturers, AT&T contended, Microsoft "supplie[d] . . . from the United States," for "combination" abroad, "components" of AT&T's patented speech-processing computer, and, accordingly, was liable under § 271(f). Microsoft responded that unincorporated software, because it is intangible information, cannot be typed a "component" of an invention under § 271(f). Microsoft also urged that the foreign-generated copies of Windows actually installed abroad were not "supplie[d] . . . from the United States." Rejecting these responses, the District Court held Microsoft liable under § 271(f), and a divided Federal Circuit panel affirmed.

Held: Because Microsoft does not export from the United States the copies of Windows installed on the foreign-made computers in question,

Microsoft does not "suppl[y] . . . from the United States" "components" of those computers, and therefore is not liable under § 271(f) as currently written. Pp. 447–459.

(a) A copy of Windows, not Windows in the abstract, qualifies as a "component" under § 271(f). Section 271(f) attaches liability to the supply abroad of the "components of a patented invention, where *such components* are uncombined in whole or in part, in such manner as to actively induce the combination of *such components*." § 271(f)(1) (emphasis added). The provision thus applies only to "such components" as are combined to form the "patented invention" at issue—here, AT&T's speech-processing computer. Until expressed as a computer-readable "copy," *e. g.,* on a CD–ROM, Windows—indeed any software detached from an activating medium—remains uncombinable. It cannot be inserted into a CD–ROM drive or downloaded from the Internet; it cannot be installed or executed on a computer. Abstract software code is an idea without physical embodiment, and as such, it does not match § 271(f)'s categorization: "components" amenable to "combination." Windows abstracted from a tangible copy no doubt is information—a detailed set of instructions—and thus might be compared to a blueprint (or anything else containing design information). A blueprint may contain precise instructions for the construction and combination of the components of a patented device, but it is not itself a combinable component.

The fact that it is easy to encode software's instructions onto a computer-readable medium does not counsel a different answer. The copy-producing step is what renders software a usable, combinable part of a computer; easy or not, the extra step is essential. Moreover, many tools may be used easily and inexpensively to generate the parts of a device. Those tools are not, however, "components" of the devices in which the parts are incorporated, at least not under any ordinary understanding of the term "component." Congress might have included within § 271(f)'s compass, for example, not only a patented invention's combinable "components," but also "information, instructions, or tools from which those components readily may be generated." It did not. Pp. 449–452.

(b) Microsoft did not "suppl[y] . . . from the United States" the foreign-made copies of Windows installed on the computers here involved. Under a conventional reading of § 271(f)'s text, those copies were "supplie[d]" from outside the United States. The Federal Circuit majority concluded, however, that for software components, the act of copying is subsumed in the act of supplying. A master sent abroad, the majority observed, differs not at all from exact copies, generated easily, inexpensively, and swiftly from the master. Hence, sending a

single copy of software abroad with the intent that it be replicated invokes § 271(f) liability for the foreign-made copies. Judge Rader, dissenting, noted that "supplying" is ordinarily understood to mean an activity separate and distinct from any subsequent "copying," "replicating," or "reproducing"—in effect, manufacturing. He further observed that the only true difference between software components and physical components of other patented inventions is that copies of software are easier to make and transport. But nothing in § 271(f)'s text, Judge Rader maintained, renders ease of copying a relevant, no less decisive, factor in triggering liability for infringement. The Court agrees. Under § 271(f)'s text, the very components supplied from the United States, and not foreign-made copies thereof, trigger liability when combined abroad to form the patented invention at issue. While copying software abroad is indeed easy and inexpensive, the same can be said of other items, such as keys copied from a master. Section 271(f) contains no instruction to gauge when duplication is easy and cheap enough to deem a copy in fact made abroad nevertheless "supplie[d] . . . from the United States." The absence of anything addressing copying in the statutory text weighs against a judicial determination that replication abroad of a master dispatched from the United States "supplies" the foreign-made copies from this country. Pp. 452–454.

(c) Any doubt that Microsoft's conduct falls outside § 271(f)'s compass would be resolved by the presumption against extraterritoriality. Foreign conduct is generally the domain of foreign law, and in the patent area, that law may embody different policy judgments about the relative rights of inventors, competitors, and the public. Applied here, the presumption tugs strongly against construing § 271(f) to encompass as a "component" not only a physical copy of software, but also software's intangible code, and to render "supplie[d] . . . from the United States" not only exported copies of software, but also duplicates made abroad. Foreign law alone, not United States law, currently governs the manufacture and sale of components of patented inventions in foreign countries. If AT&T desires to prevent copying abroad, its remedy lies in obtaining and enforcing foreign patents. Pp. 454–456.

(d) While reading § 271(f) to exclude from coverage foreign-made copies of software may create a "loophole" in favor of software makers, the Court is not persuaded that dynamic judicial interpretation of § 271(f) is in order; the "loophole" is properly left for Congress to consider, and to close if it finds such action warranted. Section 271(f) was a direct response to a gap in U. S. patent law revealed by *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, where the items exported were kits containing all the physical, readily assemblable parts of a machine (not an intangible set of instructions), and those parts themselves (not

Syllabus

foreign-made copies of them) would be combined abroad by foreign buyers. Having attended to that gap, Congress did not address other arguable gaps, such as the loophole AT&T describes. Given the expanded extraterritorial thrust AT&T's reading of § 271(f) entails, the patent-protective determination AT&T seeks must be left to Congress. Cf. *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 431. Congress is doubtless aware of the ease with which electronic media such as software can be copied, and has not left the matter untouched. See the Digital Millennium Copyright Act, 17 U. S. C. § 1201 *et seq.* If patent law is to be adjusted better to account for the realities of software distribution, the alteration should be made after focused legislative consideration, not by the Judiciary forecasting Congress' likely disposition. Pp. 456–459.

414 F. 3d 1366, reversed.

GINSBURG, J., delivered the opinion of the Court, except as to footnote 14. SCALIA, KENNEDY, and SOUTER, JJ., joined that opinion in full. ALITO, J., filed an opinion concurring as to all but footnote 14, in which THOMAS and BREYER, JJ., joined, *post*, p. 459. STEVENS, J., filed a dissenting opinion, *post*, p. 462. ROBERTS, C. J., took no part in the consideration or decision of the case.

Theodore B. Olson argued the cause for petitioner. With him on the briefs were *Miguel A. Estrada*, *Mark A. Perry*, *Matthew D. McGill*, *Amir C. Tayrani*, *T. Andrew Culbert*, and *Dale M. Heist.*

Daryl Joseffer argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Hungar*, *John J. Sullivan*, *Joan Bernott Maginnis*, *John M. Whealan*, *Thomas W. Krause*, and *Heather F. Auyang.*

Seth P. Waxman argued the cause for respondent. With him on the brief were *William G. McElwain*, *Jonathan E. Nuechterlein*, and *Mark C. Fleming.**

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*Briefs of *amici curiae* urging reversal were filed for Amazon.com, Inc., et al. by *Jeffrey S. Love* and *John D. Vandenberg;* for Autodesk, Inc., by *John Dragseth* and *Frank E. Scherkenbach;* for the Business Software Alliance by *Viet D. Dinh;* for Eli Lilly and Co. by *Robert A. Armitage* and *James J. Kelley;* for Intel Corp. by *Joel W. Nomkin*, *Jonathan M. James*,

JUSTICE GINSBURG delivered the opinion of the Court, except as to footnote 14.

It is the general rule under United States patent law that no infringement occurs when a patented product is made and sold in another country. There is an exception. Section 271(f) of the Patent Act, adopted in 1984, provides that infringement does occur when one "supplies . . . from the United States," for "combination" abroad, a patented invention's "components." 35 U. S. C. § 271(f)(1). This case concerns the applicability of § 271(f) to computer software first sent from the United States to a foreign manufacturer on a master disk, or by electronic transmission, then copied by the foreign recipient for installation on computers made and sold abroad.

AT&T holds a patent on an apparatus for digitally encoding and compressing recorded speech. Microsoft's Windows operating system, it is conceded, has the potential to infringe AT&T's patent, because Windows incorporates software code

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that, when installed, enables a computer to process speech in the manner claimed by that patent. It bears emphasis, however, that uninstalled Windows software does not infringe AT&T's patent any more than a computer standing alone does; instead, the patent is infringed only when a computer is loaded with Windows and is thereby rendered capable of performing as the patented speech processor. The question before us: Does Microsoft's liability extend to computers made in another country when loaded with Windows software copied abroad from a master disk or electronic transmission dispatched by Microsoft from the United States? Our answer is "No."

The master disk or electronic transmission Microsoft sends from the United States is never installed on any of the foreign-made computers in question. Instead, copies made abroad are used for installation. Because Microsoft does not export from the United States the copies actually installed, it does not "suppl[y] . . . from the United States" "components" of the relevant computers, and therefore is not liable under § 271(f) as currently written.

Plausible arguments can be made for and against extending § 271(f) to the conduct charged in this case as infringing AT&T's patent. Recognizing that § 271(f) is an exception to the general rule that our patent law does not apply extraterritorially, we resist giving the language in which Congress cast § 271(f) an expansive interpretation. Our decision leaves to Congress' informed judgment any adjustment of § 271(f) it deems necessary or proper.

I

Our decision some 35 years ago in *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518 (1972), a case about a shrimp deveining machine, led Congress to enact § 271(f). In that case, Laitram, holder of a patent on the time-and-expense-saving machine, sued Deepsouth, manufacturer of an infringing deveiner. Deepsouth conceded that the Patent Act

barred it from making and selling its deveining machine in the United States, but sought to salvage a portion of its business: Nothing in United States patent law, Deepsouth urged, stopped it from making in the United States the *parts* of its deveiner, as opposed to the machine itself, and selling those *parts* to foreign buyers for assembly and use abroad. *Id.*, at 522–524.[1] We agreed.

Interpreting our patent law as then written, we reiterated in *Deepsouth* that it was "not an infringement to make or use a patented product outside of the United States." *Id.*, at 527; see 35 U. S. C. § 271(a) (1970 ed.) ("[W]hoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent."). Deepsouth's foreign buyers did not infringe Laitram's patent, we held, because they assembled and used the deveining machines outside the United States. Deepsouth, we therefore concluded, could not be charged with inducing or contributing to an infringement. 406 U. S., at 526–527.[2] Nor could Deepsouth be held liable as a direct infringer, for it did not make, sell, or use the patented invention—the fully assembled deveining machine—within the United States. The parts of the machine were not themselves patented, we noted, hence export of those parts, unassembled, did not rank as an infringement of Laitram's patent. *Id.*, at 527–529.

Laitram had argued in *Deepsouth* that resistance to extension of the patent privilege to cover exported parts "derived

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[1] Deepsouth shipped its deveining equipment "to foreign customers in three separate boxes, each containing only parts of the 1¾-ton machines, yet the whole [was] assemblable in less than one hour." *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518, 524 (1972).

[2] See 35 U. S. C. § 271(b) (1970 ed.) ("Whoever actively induces infringement of a patent shall be liable as an infringer."); § 271(c) (rendering liable as a contributory infringer anyone who sells or imports a "component" of a patented invention, "knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use").

from too narrow and technical an interpretation of the [Patent Act]." *Id.*, at 529. Rejecting that argument, we referred to prior decisions holding that "a combination patent protects only against the operable assembly of the whole and not the manufacture of its parts." *Id.*, at 528. Congress' codification of patent law, we said, signaled no intention to broaden the scope of the privilege. *Id.*, at 530 ("When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress."). And we again emphasized that

> "[o]ur patent system makes no claim to extraterritorial effect; these acts of Congress do not, and were not intended to, operate beyond the limits of the United States; and we correspondingly reject the claims of others to such control over our markets." *Id.*, at 531 (quoting *Brown* v. *Duchesne*, 19 How. 183, 195 (1857)).

Absent "a clear congressional indication of intent," we stated, courts had no warrant to stop the manufacture and sale of the parts of patented inventions for assembly and use abroad. 406 U. S., at 532.

Focusing its attention on *Deepsouth*, Congress enacted § 271(f). See Patent Law Amendments Act of 1984, § 101, 98 Stat. 3383; Fisch & Allen, The Application of Domestic Patent Law to Exported Software: 35 U. S. C. § 271(f), 25 U. Pa. J. Int'l Econ. L. 557, 565 (2004) (hereinafter Fisch & Allen) ("Congress specifically intended § 271(f) as a response to the Supreme Court's decision in Deepsouth").[3] The provision expands the definition of infringement to include

[3] See also, *e. g.*, Patent Law Amendments of 1984, S. Rep. No. 98–663, pp. 2–3 (1984) (describing § 271(f) as "a response to the Supreme Court's 1972 *Deepsouth* decision which interpreted the patent law not to make it infringement where the final assembly and sale is abroad"); Section-by-Section Analysis of H. R. 6286, 130 Cong. Rec. 28069 (1984) ("This proposal responds to the United States Supreme Court decision in *Deepsouth* . . . concerning the need for a legislative solution to close a loophole in [the] patent law.").

supplying from the United States a patented invention's components:

> "(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.
>
> "(2) Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer." 35 U. S. C. §271(f).

II

Windows is designed, authored, and tested at Microsoft's Redmond, Washington, headquarters. Microsoft sells Windows to end users and computer manufacturers, both foreign and domestic. Purchasing manufacturers install the software onto the computers they sell. Microsoft sends to each of the foreign manufacturers a master version of Windows, either on a disk or via encrypted electronic transmission. The manufacturer uses the master version to generate copies. Those copies, not the master sent by Microsoft, are installed on the foreign manufacturer's computers. Once as-

sembly is complete, the foreign-made computers are sold to users abroad. App. to Pet. for Cert. 45a–46a.[4]

AT&T's patent ('580 patent) is for an apparatus (as relevant here, a computer) capable of digitally encoding and compressing recorded speech. Windows, the parties agree, contains software that enables a computer to process speech in the manner claimed by the '580 patent. In 2001, AT&T filed an infringement suit in the United States District Court for the Southern District of New York, charging Microsoft with liability for domestic and foreign installations of Windows.

Neither Windows software (*e. g.*, in a box on the shelf) nor a computer standing alone (*i. e.*, without Windows installed) infringes AT&T's patent. Infringement occurs only when Windows is installed on a computer, thereby rendering it capable of performing as the patented speech processor. Microsoft stipulated that by installing Windows on its own computers during the software development process, it directly infringed the '580 patent.[5] Microsoft further acknowledged that by licensing copies of Windows to manufacturers of computers sold in the United States, it induced infringement of AT&T's patent.[6] *Id.*, at 42a; Brief for Petitioner 3–4; Brief for Respondent 9, 19.

Microsoft denied, however, any liability based on the master disks and electronic transmissions it dispatched to foreign manufacturers, thus joining issue with AT&T. By sending Windows to foreign manufacturers, AT&T contended, Microsoft "supplie[d] . . . from the United States,"

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[4] Microsoft also distributes Windows to foreign manufacturers indirectly, by sending a master version to an authorized foreign "replicator"; the replicator then makes copies and ships them to the manufacturers. App. to Pet. for Cert. 45a–46a.

[5] See 35 U. S. C. § 271(a) ("[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.").

[6] See § 271(b) ("Whoever actively induces infringement of a patent shall be liable as an infringer.").

for "combination" abroad, "components" of AT&T's patented speech processor; accordingly, AT&T urged, Microsoft was liable under § 271(f). See *supra*, at 445 (reproducing text of § 271(f)). Microsoft responded that unincorporated software, because it is intangible information, cannot be typed a "component" of an invention under § 271(f). In any event, Microsoft urged, the foreign-generated copies of Windows actually installed abroad were not "supplie[d] . . . from the United States." Rejecting these responses, the District Court held Microsoft liable under § 271(f). 71 USPQ 2d 1118 (SDNY 2004). On appeal, a divided panel of the Court of Appeals for the Federal Circuit affirmed. 414 F. 3d 1366 (2005). We granted certiorari, 549 U. S. 991 (2006), and now reverse.

III

A

This case poses two questions: First, when, or in what form, does software qualify as a "component" under § 271(f)? Second, were "components" of the foreign-made computers involved in this case "supplie[d]" by Microsoft "from the United States"? [7]

As to the first question, no one in this litigation argues that software can *never* rank as a "component" under § 271(f). The parties disagree, however, over the stage at which software becomes a component. Software, the "set of instructions, known as code, that directs a computer to perform specified functions or operations," *Fantasy Sports Properties, Inc.* v. *SportsLine.com, Inc.*, 287 F. 3d 1108, 1118 (CA Fed. 2002), can be conceptualized in (at least) two ways. One can speak of software in the abstract: the instructions

[7] The record leaves unclear which paragraph of § 271(f) AT&T's claim invokes. While there are differences between § 271(f)(1) and (f)(2), see, *e. g.*, *infra*, at 458, n. 18, the parties do not suggest that those differences are outcome determinative. Cf. *infra*, at 454, n. 16 (explaining why both paragraphs yield the same result). For clarity's sake, we focus our analysis on the text of § 271(f)(1).

themselves detached from any medium. (An analogy: The notes of Beethoven's Ninth Symphony.) One can alternatively envision a tangible "copy" of software, the instructions encoded on a medium such as a CD–ROM. (Sheet music for Beethoven's Ninth.) AT&T argues that software in the abstract, not simply a particular copy of software, qualifies as a "component" under § 271(f). Microsoft and the United States argue that only a copy of software, not software in the abstract, can be a component.[8]

The significance of these diverse views becomes apparent when we turn to the second question: Were components of the foreign-made computers involved in this case "supplie[d]" by Microsoft "from the United States"? If the relevant components are the copies of Windows actually installed on the foreign computers, AT&T could not persuasively argue that those components, though generated abroad, were "supplie[d] . . . from the United States" as § 271(f) requires for liability to attach.[9] If, on the other hand, Windows in the abstract qualifies as a component within § 271(f)'s compass, it would not matter that the master copies of Windows software dispatched from the United

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[8] Microsoft and the United States stress that to count as a component, the copy of software must be expressed as "object code." "Software in the form in which it is written and understood by humans is called 'source code.' To be functional, however, software must be converted (or 'compiled') into its machine-usable version," a sequence of binary number instructions typed "object code." Brief for United States as *Amicus Curiae* 4, n. 1; 71 USPQ 2d 1118, 1119, n. 5 (SDNY 2004) (recounting Microsoft's description of the software development process). It is stipulated that object code was on the master disks and electronic transmissions Microsoft dispatched from the United States.

[9] On this view of "component," the copies of Windows on the master disks and electronic transmissions that Microsoft sent from the United States could not themselves serve as a basis for liability, because those copies were not installed on the foreign manufacturers' computers. See § 271(f)(1) (encompassing only those components "combin[ed] . . . outside of the United States in a manner that would infringe the patent if such combination occurred within the United States").

States were not themselves installed abroad as working parts of the foreign computers.[10]

With this explanation of the relationship between the two questions in view, we further consider the twin inquiries.

B

First, when, or in what form, does software become a "component" under § 271(f)? We construe § 271(f)'s terms "in accordance with [their] ordinary or natural meaning." *FDIC* v. *Meyer*, 510 U. S. 471, 476 (1994). Section 271(f) applies to the supply abroad of the "components of a patented invention, where *such components* are uncombined in whole or in part, in such manner as to actively induce the combination of *such components*." § 271(f)(1) (emphasis added). The provision thus applies only to "such components"[11] as are combined to form the "patented invention" at issue. The patented invention here is AT&T's speech-processing computer.

Until it is expressed as a computer-readable "copy," *e. g.*, on a CD–ROM, Windows software—indeed any software detached from an activating medium—remains uncombinable. It cannot be inserted into a CD–ROM drive or downloaded from the Internet; it cannot be installed or executed on a computer. Abstract software code is an idea without physical embodiment, and as such, it does not match § 271(f)'s categorization: "components" amenable to "combination." Windows abstracted from a tangible copy no doubt is information—a detailed set of instructions—and thus might

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[10] The Federal Circuit panel in this case, relying on that court's prior decision in *Eolas Technologies Inc.* v. *Microsoft Corp.*, 399 F. 3d 1325 (2005), held that software qualifies as a component under § 271(f). We are unable to determine, however, whether the Federal Circuit panels regarded as a component software in the abstract, or a copy of software.

[11] "Component" is commonly defined as "a constituent part," "element," or "ingredient." Webster's Third New International Dictionary of the English Language 466 (1981).

be compared to a blueprint (or anything containing design information, *e. g.*, a schematic, template, or prototype). A blueprint may contain precise instructions for the construction and combination of the components of a patented device, but it is not itself a combinable component of that device. AT&T and its *amici* do not suggest otherwise. Cf. *Pellegrini* v. *Analog Devices, Inc.*, 375 F. 3d 1113, 1117–1119 (CA Fed. 2004) (transmission abroad of instructions for production of patented computer chips not covered by § 271(f)).

AT&T urges that software, at least when expressed as machine-readable object code, is distinguishable from design information presented in a blueprint. Software, unlike a blueprint, is "modular"; it is a stand-alone product developed and marketed "for use on many different types of computer hardware and in conjunction with many other types of software." Brief for Respondent 5; Tr. of Oral Arg. 46. Software's modularity persists even after installation; it can be updated or removed (deleted) without affecting the hardware on which it is installed. *Ibid.* Software, unlike a blueprint, is also "dynamic." *Ibid.* After a device has been built according to a blueprint's instructions, the blueprint's work is done (as AT&T puts it, the blueprint's instructions have been "exhausted," *ibid.*). Software's instructions, in contrast, are contained in and continuously performed by a computer. Brief for Respondent 27–28; Tr. of Oral Arg. 46. See also *Eolas Technologies Inc.* v. *Microsoft Corp.*, 399 F. 3d 1325, 1339 (CA Fed. 2005) ("[S]oftware code . . . drives the functional nucleus of the finished computer product." (quoting *Imagexpo, L. L. C.* v. *Microsoft Corp.*, 299 F. Supp. 2d 550, 553 (ED Va. 2003))).

The distinctions advanced by AT&T do not persuade us to characterize software, uncoupled from a medium, as a combinable component. Blueprints too, or any design information for that matter, can be independently developed, bought,

and sold. If the point of AT&T's argument is that we do not see blueprints lining stores' shelves, the same observation may be made about software in the abstract: What retailers sell, and consumers buy, are *copies* of software. Likewise, before software can be contained in and continuously performed by a computer, before it can be updated or deleted, an actual, physical copy of the software must be delivered by CD–ROM or some other means capable of interfacing with the computer.[12]

Because it is so easy to encode software's instructions onto a medium that can be read by a computer, AT&T intimates, that extra step should not play a decisive role under § 271(f). But the extra step is what renders the software a usable, combinable part of a computer; easy or not, the copy-producing step is essential. Moreover, many tools may be used easily and inexpensively to generate the parts of a device. A machine for making sprockets might be used by a manufacturer to produce tens of thousands of sprockets an hour. That does not make the machine a "component" of the tens of thousands of devices in which the sprockets are incorporated, at least not under any ordinary understanding of the term "component." Congress, of course, might have included within § 271(f)'s compass, for example, not only combinable "components" of a patented invention, but also "information, instructions, or tools from which those components readily may be generated." It did not. In sum, a

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[12] The dissent, embracing AT&T's argument, contends that, "unlike a blueprint that merely instructs a user how to do something, software actually causes infringing conduct to occur." *Post*, at 464 (opinion of STEVENS, J.). We have emphasized, however, that Windows can "caus[e] infringing conduct to occur"—*i. e.*, function as part of AT&T's speech-processing computer—only when expressed as a computer-readable copy. Abstracted from a usable copy, Windows code is intangible, uncombinable information, more like notes of music in the head of a composer than "a roller that causes a player piano to produce sound." *Ibid.*

copy of Windows, not Windows in the abstract, qualifies as a "component" under § 271(f).[13]

C

The next question, has Microsoft "supplie[d] . . . from the United States" components of the computers here involved? Under a conventional reading of § 271(f)'s text, the answer would be "No," for the foreign-made copies of Windows actually installed on the computers were "supplie[d]" from places outside the United States. The Federal Circuit majority concluded, however, that "for software 'components,' the act of copying is subsumed in the act of 'supplying.'" 414 F. 3d, at 1370. A master sent abroad, the majority observed, differs not at all from the exact copies, easily, inexpensively, and swiftly generated from the master; hence "sending a single copy abroad with the intent that it be replicated invokes § 271(f) liability for th[e] foreign-made copies." *Ibid.;* cf. *post,* at 464 (STEVENS, J., dissenting) ("[A] master disk is the functional equivalent of a warehouse of components . . . that Microsoft fully expects to be incorporated into foreign-manufactured computers.").

Judge Rader, dissenting, noted that "supplying" is ordinarily understood to mean an activity separate and distinct from any subsequent "copying, replicating, or reproducing—in effect manufacturing." 414 F. 3d, at 1372–1373 (internal quotation marks omitted); see *id.*, at 1373 ("[C]opying and supplying are separate acts with different consequences—particularly when the 'supplying' occurs in the United States and the copying occurs in Düsseldorf or Tokyo. As a matter of logic, one cannot supply one hundred components of a pat-

[13] We need not address whether software in the abstract, or any other intangible, can *ever* be a component under § 271(f). If an intangible method or process, for instance, qualifies as a "patented invention" under § 271(f) (a question as to which we express no opinion), the combinable components of that invention might be intangible as well. The invention before us, however, AT&T's speech-processing computer, is a tangible thing.

ented invention without first making one hundred copies of the component . . . ."). He further observed: "The only true difference between making and supplying software components and physical components [of other patented inventions] is that copies of software components are easier to make and transport." *Id.*, at 1374. But nothing in § 271(f)'s text, Judge Rader maintained, renders ease of copying a relevant, no less decisive, factor in triggering liability for infringement. See *ibid.* We agree.

Section 271(f) prohibits the supply of components "from the United States . . . in such manner as to actively induce the combination of *such components.*" § 271(f)(1) (emphasis added). Under this formulation, the very components supplied from the United States, and not copies thereof, trigger § 271(f) liability when combined abroad to form the patented invention at issue. Here, as we have repeatedly noted, see *supra,* at 441, 442, 445–446, the copies of Windows actually installed on the foreign computers were not themselves supplied from the United States.[14] Indeed, those copies did not exist until they were generated by third parties outside the United States.[15] Copying software abroad, all might agree,

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[14] In a footnote, Microsoft suggests that even a disk shipped from the United States, and used to install Windows directly on a foreign computer, would not give rise to liability under § 271(f) if the disk were removed after installation. See Brief for Petitioner 37, n. 11; cf. *post,* at 460, 461–462 (ALITO, J., concurring in part). We need not and do not reach that issue here.

[15] The dissent analogizes Microsoft's supply of master versions of Windows abroad to "the export of an inventory of . . . knives to be warehoused until used to complete the assembly of an infringing machine." *Post,* at 463. But as we have underscored, foreign-made copies of Windows, not the masters Microsoft dispatched from the United States, were installed on the computers here involved. A more apt analogy, therefore, would be the export of knives for *copying* abroad, with the foreign-made *copies* "warehoused until used to complete the assembly of an infringing machine." *Ibid.* Without stretching § 271(f) beyond the text Congress composed, a copy made entirely abroad does not fit the description "supplie[d] . . . from the United States."

is indeed easy and inexpensive. But the same could be said of other items: "Keys or machine parts might be copied from a master; chemical or biological substances might be created by reproduction; and paper products might be made by electronic copying and printing." Brief for United States as *Amicus Curiae* 24. See also *supra*, at 451–452 (rejecting argument similarly based on ease of copying in construing "component"). Section 271(f) contains no instruction to gauge when duplication is easy and cheap enough to deem a copy in fact made abroad nevertheless "supplie[d] . . . from the United States." The absence of anything addressing copying in the statutory text weighs against a judicial determination that replication abroad of a master dispatched from the United States "supplies" the foreign-made copies from the United States within the intendment of § 271(f).[16]

D

Any doubt that Microsoft's conduct falls outside § 271(f)'s compass would be resolved by the presumption against extraterritoriality, on which we have already touched. See *supra*, at 442, 444. The presumption that United States law governs domestically but does not rule the world applies

[16] Our analysis, while focusing on § 271(f)(1), is equally applicable to § 271(f)(2). But cf. *post*, at 463 (STEVENS, J., dissenting) (asserting "paragraph (2) . . . best supports AT&T's position here"). While the two paragraphs differ, among other things, on the quantity of components that must be "supplie[d] . . . from the United States" for liability to attach, see *infra*, at 458, n. 18, that distinction does not affect our analysis. Paragraph (2), like (1), covers only a "component" amenable to "combination." § 271(f)(2); see *supra*, at 449–452 (explaining why Windows in the abstract is not a combinable component). Paragraph (2), like (1), encompasses only the "suppl[y] . . . from the United States" of "such [a] component" as will itself "be combined outside of the United States." § 271(f)(2); see *supra*, at 452–453 and this page (observing that foreign-made copies of Windows installed on computers abroad were not "supplie[d] . . . from the United States"). It is thus unsurprising that AT&T does not join the dissent in suggesting that the outcome might turn on whether we view the case under paragraph (1) or (2).

with particular force in patent law. The traditional understanding that our patent law "operate[s] only domestically and d[oes] not extend to foreign activities," Fisch & Allen 559, is embedded in the Patent Act itself, which provides that a patent confers exclusive rights in an invention within the United States. 35 U. S. C. § 154(a)(1) (patentee's rights over invention apply to manufacture, use, or sale "throughout the United States" and to importation "into the United States"). See *Deepsouth*, 406 U. S., at 531 ("Our patent system makes no claim to extraterritorial effect"; our legislation "d[oes] not, and [was] not intended to, operate beyond the limits of the United States, and we correspondingly reject the claims of others to such control over our markets." (quoting *Brown*, 19 How., at 195)).

As a principle of general application, moreover, we have stated that courts should "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 164 (2004); see *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991). Thus, the United States accurately conveyed in this case: "Foreign conduct is [generally] the domain of foreign law," and in the area here involved, in particular, foreign law "may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions." Brief for United States as *Amicus Curiae* 28. Applied to this case, the presumption tugs strongly against construction of § 271(f) to encompass as a "component" not only a physical copy of software, but also software's intangible code, and to render "supplie[d] . . . from the United States" not only exported copies of software, but also duplicates made abroad.

AT&T argues that the presumption is inapplicable because Congress enacted § 271(f) specifically to extend the reach of United States patent law to cover certain activity abroad. But as this Court has explained, "the presumption is not de-

feated . . . just because [a statute] specifically addresses [an] issue of extraterritorial application," *Smith* v. *United States*, 507 U. S. 197, 204 (1993); it remains instructive in determining the *extent* of the statutory exception, see *Empagran*, 542 U. S., at 161–162, 164–165; *Smith*, 507 U. S., at 204.

AT&T alternately contends that the presumption holds no sway here given that § 271(f), by its terms, applies only to domestic conduct, *i. e.*, to the supply of a patented invention's components "from the United States." § 271(f)(1). AT&T's reading, however, "converts a single act of supply from the United States into a springboard for liability each time a copy of the software is subsequently made [abroad] and combined with computer hardware [abroad] for sale [abroad.]" Brief for United States as *Amicus Curiae* 29; see 414 F. 3d, at 1373, 1375 (Rader, J., dissenting). In short, foreign law alone, not United States law, currently governs the manufacture and sale of components of patented inventions in foreign countries. If AT&T desires to prevent copying in foreign countries, its remedy today lies in obtaining and enforcing foreign patents. See *Deepsouth*, 406 U. S., at 531.[17]

IV

AT&T urges that reading § 271(f) to cover only those copies of software actually dispatched from the United States creates a "loophole" for software makers. Liability for infringing a United States patent could be avoided, as Microsoft's practice shows, by an easily arranged circumvention: Instead of making installation copies of software in the United States, the copies can be made abroad, swiftly and at small cost, by generating them from a master supplied

[17] AT&T has secured patents for its speech processor in Canada, France, Germany, Great Britain, Japan, and Sweden. App. in No. 04–1285 (CA Fed.), p. 1477. AT&T and its *amici* do not relate what protections and remedies are, or are not, available under these foreign regimes. Cf. Brief for Respondent 46 (observing that "foreign patent protections are *sometimes* weaker than their U. S. counterparts" (emphasis added)).

from the United States. The Federal Circuit majority found AT&T's plea compelling:

> "Were we to hold that Microsoft's supply by exportation of the master versions of the Windows® software—specifically for the purpose of foreign replication—avoids infringement, we would be subverting the remedial nature of § 271(f), permitting a technical avoidance of the statute by ignoring the advances in a field of technology—and its associated industry practices—that developed after the enactment of § 271(f). . . . Section 271(f), if it is to remain effective, must therefore be interpreted in a manner that is appropriate to the nature of the technology at issue." 414 F. 3d, at 1371.

While the majority's concern is understandable, we are not persuaded that dynamic judicial interpretation of § 271(f) is in order. The "loophole," in our judgment, is properly left for Congress to consider, and to close if it finds such action warranted.

There is no dispute, we note again, that § 271(f) is inapplicable to the export of design tools—blueprints, schematics, templates, and prototypes—all of which may provide the information required to construct and combine overseas the components of inventions patented under United States law. See *supra*, at 449–452. We have no license to attribute to Congress an unstated intention to place the information Microsoft dispatched from the United States in a separate category.

Section 271(f) was a direct response to a gap in our patent law revealed by this Court's *Deepsouth* decision. See *supra*, at 444, and n. 3. The facts of that case were undeniably at the fore when § 271(f) was in the congressional hopper. In *Deepsouth*, the items exported were kits containing all the physical, readily assemblable parts of a shrimp deveining machine (not an intangible set of instructions), and those parts themselves (not foreign-made copies of them)

would be combined abroad by foreign buyers. Having attended to the gap made evident in *Deepsouth*, Congress did not address other arguable gaps: Section 271(f) does not identify as an infringing act conduct in the United States that facilitates making a component of a patented invention outside the United States; nor does the provision check "suppl[ying] . . . from the United States" information, instructions, or other materials needed to make copies abroad.[18] Given that Congress did not home in on the loophole AT&T describes, and in view of the expanded extraterritorial thrust AT&T's reading of § 271(f) entails, our precedent leads us to leave in Congress' court the patent-protective determination AT&T seeks. Cf. *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 431 (1984) ("In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.").

Congress is doubtless aware of the ease with which software (and other electronic media) can be copied, and has not left the matter untouched. In 1998, Congress addressed "the ease with which pirates could copy and distribute a copyrightable work in digital form." *Universal City Studios, Inc.* v. *Corley*, 273 F. 3d 429, 435 (CA2 2001). The resulting measure, the Digital Millennium Copyright Act, 17 U. S. C. § 1201 *et seq.*, "backed with legal sanctions the efforts of copyright owners to protect their works from piracy behind digital walls such as encryption codes or password protections." *Universal City Studios*, 273 F. 3d, at 435. If

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[18] Section 271(f)'s text does, in one respect, reach past the facts of *Deepsouth*. While Deepsouth exported kits containing *all* the parts of its deveining machines, § 271(f)(1) applies to the supply abroad of "all or a substantial portion of" a patented invention's components. And § 271(f)(2) applies to the export of even a single component if it is "especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use."

the patent law is to be adjusted better "to account for the realities of software distribution," 414 F. 3d, at 1370, the alteration should be made after focused legislative consideration, and not by the Judiciary forecasting Congress' likely disposition.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Federal Circuit is

Reversed.

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

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE BREYER join, concurring as to all but footnote 14.

I agree with the Court that no "component[s]" of the foreign-made computers involved in this case were "supplie[d]" by Microsoft "from the United States." 35 U. S. C. §271(f)(1). I write separately because I reach this conclusion through somewhat different reasoning.

I

Computer programmers typically write programs in a "human readable" programming language. This "'source code'" is then generally converted by the computer into a "machine readable code" or "machine language" expressed in a binary format. Brief for Respondent 5, n. 1 (citing R. White, How Computers Work 87, 94 (8th ed. 2006)); E. Walters, Essential Guide to Computing 204–205 (2001). During the Windows writing process, the program exists in the form of machine readable code on the magnetic tape fields of Microsoft's computers' hard drives. White, *supra*, at 144–145; Walters, *supra*, at 54–55.

When Microsoft finishes writing its Windows program in the United States, it encodes Windows onto CD–ROMs known as "'golden master[s]'" in the form of machine read-

able code. App. 31, ¶ 4. This is done by engraving each disk in a specific way such that another computer can read the engravings, understand what they mean, and write the code onto the magnetic fields of its hard drive. *Ibid.;* Brief for Petitioner 4, n. 2.

Microsoft ships these disks (or sends the code via electronic transmission) abroad, where the code is copied onto other disks that are then placed into foreign-made computers for purposes of installing the Windows program. App. 31–32, ¶¶ 5–8. No physical aspect of a Windows CD–ROM—original disk or copy—is ever incorporated into the computer itself. See *Stenograph L. L. C.* v. *Bossard Assocs., Inc.*, 144 F. 3d 96, 100 (CADC 1998) (noting that, within the context of the Copyright Act, "installation of software onto a computer results in 'copying' "); White, *supra*, at 144–145, 172–173. The intact CD–ROM is then removed and may be discarded without affecting the computer's implementation of the code.* The parties agree for purposes of this litigation that a foreign-made computer containing the Windows code would violate AT&T's patent if present in the United States. App. to Pet. for Cert. 42a, ¶ 5.

II

A

I agree with the Court that a component of a machine, whether a shrimp deveiner or a personal computer, must be something physical. *Ante*, at 449–452. This is because the word "component," when concerning a physical device, is most naturally read to mean a physical part of the device. See Webster's Third New International Dictionary 466 (1976) (component is "constituent part: INGREDIENT"); Random House Dictionary of the English Language 301 (1967)

*In a sense, the whole process is akin to an author living prior to the existence of the printing press, who created a story in his mind, wrote a manuscript, and sent it to a scrivener, who in turn copied the story by hand into a blank book.

(component is "a component part; constituent"). Furthermore, § 271(f) requires that the component be "combined" with other components to form the infringing device, meaning that the component must remain a part of the device. Webster's, *supra*, at 452 (combine means "to join in physical or chemical union"; "to become one"; "to unite into a chemical compound"); Random House, *supra*, at 293 (combine means "to bring or join into a close union or whole"). For these reasons, I agree with the Court that a set of instructions on how to build an infringing device, or even a template of the device, does not qualify as a component. *Ante*, at 449–450.

B

As the parties agree, an inventor can patent a machine that carries out a certain process, and a computer may constitute such a machine when it executes commands—given to it by code—that allow it to carry out that process. Such a computer would not become an infringing device until enough of the code is installed on the computer to allow it to execute the process in question. The computer would not be an infringing device prior to the installation, or even during the installation. And the computer remains an infringing device after the installation process because, even though the original installation device (such as a CD–ROM) has been removed from the computer, the code remains on the hard drive.

III

Here, Windows software originating in the United States was sent abroad, whether on a master disk or by means of an electronic transmission, and eventually copied onto the hard drives of the foreign-made computers. Once the copying process was completed, the Windows program was recorded in a physical form, *i. e.*, in magnetic fields on the computers' hard drives. See Brief for Respondent 5. The physical form of the Windows program on the master disk, *i. e.*, the engravings on the CD–ROM, remained on the disk

in a form unchanged by the copying process. See Brief for Petitioner 4, n. 2 (citing White, How Computers Work, at 144–145, 172–173). There is nothing in the record to suggest that any physical part of the disk became a physical part of the foreign-made computer, and such an occurrence would be contrary to the general workings of computers.

Because no physical object originating in the United States was combined with these computers, there was no violation of § 271(f). Accordingly, it is irrelevant that the Windows software was not copied onto the foreign-made computers *directly* from the master disk or from an electronic transmission that originated in the United States. To be sure, if these computers could not run Windows without inserting and keeping a CD–ROM in the appropriate drive, then the CD–ROMs might be components of the computer. But that is not the case here.

* * *

Because the physical incarnation of code on the Windows CD–ROM supplied from the United States is not a "component" of an infringing device under § 271(f), it logically follows that a copy of such a CD–ROM also is not a component. For this reason, I join the Court's opinion, except for footnote 14.

JUSTICE STEVENS, dissenting.

As the Court acknowledges, "[p]lausible arguments can be made for and against extending § 271(f) to the conduct charged in this case as infringing AT&T's patent." *Ante*, at 442. Strong policy considerations, buttressed by the presumption against the application of domestic patent law in foreign markets, support Microsoft Corporation's position. I am, however, persuaded that an affirmance of the Court of Appeals' judgment is more faithful to the intent of the Congress that enacted § 271(f) than a reversal.

The provision was a response to our decision in *Deepsouth Packing Co.* v. *Laitram Corp.*, 406 U. S. 518 (1972), holding that a patent on a shrimp deveining machine had not been infringed by the export of components for assembly abroad. Paragraph (1) of § 271(f) would have been sufficient on its own to overrule *Deepsouth*,* but it is paragraph (2) that best supports AT&T's position here. It provides:

> "Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer." § 271(f)(2).

Under this provision, the export of a specially designed knife that has no use other than as a part of a patented deveining machine would constitute infringement. It follows that § 271(f)(2) would cover the export of an inventory of such knives to be warehoused until used to complete the assembly of an infringing machine.

The relevant component in this case is not a physical item like a knife. Both Microsoft and the Court think that means it cannot be a "component." See *ante*, at 449. But if a disk

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*"Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer." 35 U. S. C. § 271(f)(1).

with software inscribed on it is a "component," I find it difficult to understand why the most important ingredient of that component is not also a component. Indeed, the master disk is the functional equivalent of a warehouse of components—components that Microsoft fully expects to be incorporated into foreign-manufactured computers. Put somewhat differently: On the Court's view, Microsoft could be liable under § 271(f) only if it sends individual copies of its software directly from the United States with the intent that each copy would be incorporated into a separate infringing computer. But it seems to me that an indirect transmission via a master disk warehouse is likewise covered by § 271(f).

I disagree with the Court's suggestion that because software is analogous to an abstract set of instructions, it cannot be regarded as a "component" within the meaning of § 271(f). See *ante,* at 449–450. Whether attached or detached from any medium, software plainly satisfies the dictionary definition of that word. See *ante*, at 449, n. 11 (observing that "'[c]omponent' is commonly defined as 'a constituent part,' 'element,' or 'ingredient'"). And unlike a blueprint that merely instructs a user how to do something, software actually causes infringing conduct to occur. It is more like a roller that causes a player piano to produce sound than sheet music that tells a pianist what to do. Moreover, it is surely not "a staple article or commodity of commerce suitable for substantial noninfringing use" as that term is used in § 271(f)(2). On the contrary, its sole intended use is an infringing use.

I would therefore affirm the judgment of the Court of Appeals.

Syllabus

SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* LANDRIGAN, AKA HILL

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

No. 05–1575. Argued January 9, 2007—Decided May 14, 2007

Respondent Landrigan refused to allow his counsel to present the testimony of his ex-wife and birth mother as mitigating evidence at his sentencing hearing for a felony-murder conviction. He also interrupted as counsel tried to proffer other evidence, and he told the Arizona trial judge he did not wish to present any mitigating evidence and to "bring on" the death penalty. The court sentenced him to death, and the sentence was affirmed. The state postconviction court rejected Landrigan's claim that his counsel was ineffective for failing to conduct further investigation into mitigating circumstances, finding that he had instructed counsel at sentencing not to present any mitigating evidence at all. Landrigan then filed a federal habeas petition under 28 U. S. C. § 2254. Exercising its discretion, the District Court refused to grant him an evidentiary hearing because he could not make out even a colorable ineffective-assistance-of-counsel claim. The en banc Ninth Circuit reversed, holding that Landrigan's counsel's performance fell below the standard required by *Strickland* v. *Washington*, 466 U. S. 668.

Held: The District Court did not abuse its discretion in refusing to grant Landrigan an evidentiary hearing. Pp. 473–481.

(a) The Antiterrorism and Effective Death Penalty Act of 1996 has not changed the basic rule that the decision to grant an evidentiary hearing is left to the district court's sound discretion, but it has changed the standards for granting federal habeas relief by prohibiting such relief unless a state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). Because § 2254's deferential standards control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate. In deciding whether to grant an evidentiary hearing, a federal court must consider whether the hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. It follows that if the record refutes the applicant's factual allegations or

otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing. Pp. 473–475.

(b) Contrary to the Ninth Circuit's reasoning, the District Court was well within its discretion to determine that, even with the benefit of an evidentiary hearing, Landrigan could not develop a factual record entitling him to federal habeas relief. Pp. 475–480.

(1) The Ninth Circuit concluded that the Arizona state courts' findings that Landrigan had instructed his counsel not to offer any mitigating evidence took Landrigan's sentencing colloquy out of context, amounting to an unreasonable determination of the facts. However, the colloquy's language plainly indicates that Landrigan told his counsel not to present any mitigating evidence, and the record conclusively dispels the Circuit's conclusion that Landrigan's statements referred to only his ex-wife's and birth mother's testimony. On that record, the state court's determination that Landrigan refused to allow the presentation of any mitigating evidence was a reasonable determination of the facts. Thus, it was not an abuse of discretion for the District Court to conclude that Landrigan could not overcome § 2254(d)(2)'s bar to granting federal habeas relief. That court was entitled to conclude that regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow him to present it. Thus, it could conclude that because of his established recalcitrance, Landrigan could not demonstrate prejudice under *Strickland* even if granted an evidentiary hearing. Pp. 475–477.

(2) The Ninth Circuit also erred in finding two alternative reasons for its holding. It concluded that the Arizona courts' determination that Landrigan's claims were frivolous and meritless was an unreasonable application of this Court's precedent, based on the belief, derived from *Wiggins* v. *Smith*, 539 U. S. 510, that his last minute decision to block testimony could not excuse his counsel's failure to do an adequate investigation before sentencing. However, this Court has never addressed a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court. Thus, it was not objectively unreasonable for the Arizona postconviction court to conclude that a defendant who refused to allow any mitigating evidence to be presented could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence. The Ninth Circuit also found that the record does not indicate that Landrigan's decision was informed and knowing, or that he understood its consequences. This Court has never held that an "informed and knowing" requirement exists with respect to the decision not to introduce mitigating evidence. But even assuming such a requirement exists in this case, Landrigan cannot benefit from it. First, because he never devel-

Syllabus

oped his claim properly before the Arizona courts, § 2254(e)(2) barred the District Court from granting an evidentiary hearing on that basis. Second, his counsel told the sentencing court in Landrigan's presence that he had carefully explained to Landrigan the importance of mitigating evidence in death penalty cases and his duty as counsel to disclose mitigating factors for consideration. In light of Landrigan's demonstrated propensity for interjecting himself into the proceedings, it is doubtful that he would have sat idly by while counsel lied about such discussions. Third, it is apparent from Landrigan's statement to the sentencing court to bring on the death penalty that he clearly understood the consequences of telling the judge that there were no relevant mitigating circumstances. Pp. 477–480.

(c) The Ninth Circuit also erred in rejecting the District Court's finding that the poor quality of Landrigan's alleged mitigating evidence prevented him from making a colorable prejudice claim. Because most of the evidence that Landrigan now wishes to offer would have been offered by his birth mother and ex-wife had he allowed them to testify, and because the sentencing court had much of the evidence before it by way of counsel's proffer, the District Court could reasonably conclude that any additional evidence would have made no difference in the sentencing. Pp. 480–481.

(d) Even assuming the truth of all the facts Landrigan sought to prove at an evidentiary hearing, he still could not be granted federal habeas relief because the state courts' factual determination that he would not have allowed counsel to present any mitigating evidence at sentencing is not an unreasonable determination of the facts under § 2254(d)(2), and the mitigating evidence he seeks to introduce would not have changed the result. P. 481.

441 F. 3d 638, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 482.

Kent E. Cattani, Assistant Attorney General of Arizona, argued the cause for petitioner. With him on the briefs were *Terry Goddard*, Attorney General, *Mary R. O'Grady*, Solicitor General, and *Patricia Nigro*, Assistant Attorney General.

Donald B. Verrilli, Jr., argued the cause for respondent. With him on the brief were *Jon M. Sands*, *Dale A. Baich*,

Sylvia J. Lett, *Ian Heath Gershengorn*, *Elaine J. Goldenberg*, and *Scott B. Wilkens.**

JUSTICE THOMAS delivered the opinion of the Court.

In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U. S. C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court. Here, the District Court determined that respondent could not make out a colorable claim of ineffective assistance of counsel and therefore was not entitled to an evidentiary hearing. It did so after reviewing the state-court record and expanding the record to

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel M. Medeiros*, State Solicitor General, *Mary Jo Graves*, Chief Assistant Attorney General, *Pamela C. Hamanaka*, Senior Assistant Attorney General, *Donald E. De Nicola*, Deputy State Solicitor General, *Keith H. Borjon*, Supervising Deputy Attorney General, and *Kristofer Jorstad* and *James William Bilderback II*, Deputy Attorneys General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Mike Beebe* of Arkansas, *John W. Suthers* of Colorado, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *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, *George J. Chanos* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Robert F. McDonnell* of Virginia, *Rob McKenna* of Washington, and *Patrick J. Crank* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Rhonda C. Canby*.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Karen J. Mathis*, *Lawrence J. Fox*, and *David J. Kessler;* and for the National Association of Criminal Defense Lawyers by *Andrew J. Pincus*, *Charles A. Rothfeld*, *Giovanna Shay*, *Christopher Lasch*, and *Pamela Harris*.

include additional evidence offered by respondent. The Court of Appeals held that the District Court abused its discretion in refusing to grant the hearing. We hold that it did not.

I

Respondent Jeffrey Landrigan was convicted in Oklahoma of second-degree murder in 1982. In 1986, while in custody for that murder, Landrigan repeatedly stabbed another inmate and was subsequently convicted of assault and battery with a deadly weapon. Three years later, Landrigan escaped from prison and murdered Chester Dean Dyer in Arizona.

An Arizona jury found Landrigan guilty of theft, second-degree burglary, and felony murder for having caused the victim's death in the course of a burglary. At sentencing, Landrigan's counsel attempted to present the testimony of Landrigan's ex-wife and birth mother as mitigating evidence. But at Landrigan's request, both women refused to testify. When the trial judge asked why the witnesses refused, Landrigan's counsel responded that "it's at my client's wishes." App. to Pet. for Cert. D–3. Counsel explained that he had "advised [Landrigan] very strongly that I think it's very much against his interests to take that particular position." *Ibid.* The court then questioned Landrigan:

> "THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> "THE DEFENDANT: Yeah.
>
> "THE COURT: Do you know what that means?
>
> "THE DEFENDANT: Yeah.
>
> "THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?
>
> "THE DEFENDANT: Not as far as I'm concerned." *Id.*, at D–3 to D–4.

Still not satisfied, the trial judge directly asked the witnesses to testify. Both refused. The judge then asked counsel to make a proffer of the witnesses' testimony. Counsel attempted to explain that the witnesses would testify that Landrigan's birth mother used drugs and alcohol (including while she was pregnant with Landrigan), that Landrigan abused drugs and alcohol, and that Landrigan had been a good father.

But Landrigan would have none of it. When counsel tried to explain that Landrigan had worked in a legitimate job to provide for his family, Landrigan interrupted and stated, "If I wanted this to be heard, I'd have my wife say it." *Id.*, at D–6. Landrigan then explained that he was not only working but also "doing robberies supporting my family." *Id.*, at D–7. When counsel characterized Landrigan's first murder as having elements of self-defense, Landrigan interrupted and clarified: "He didn't grab me. I stabbed him." *Id.*, at D–9. Responding to counsel's statement implying that the prison stabbing involved self-defense because the assaulted inmate knew Landrigan's first murder victim, Landrigan interrupted to clarify that the inmate was not acquainted with his first victim, but just "a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived." *Ibid.*

At the conclusion of the sentencing hearing, the judge asked Landrigan if he had anything to say. Landrigan made a brief statement that concluded, "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." *Id.*, at D–16.

The trial judge found two statutory aggravating circumstances: that Landrigan murdered Dyer in expectation of pecuniary gain and that Landrigan was previously convicted of two felonies involving the use or threat of violence on another person. *Id.*, at D–23. In addition, the judge found two nonstatutory mitigating circumstances: that Landrigan's family loved him and an absence of premeditation. *Ibid.*

Finally, the trial judge stated that she considered Landrigan "a person who has no scruples and no regard for human life and human beings." *Ibid.* Based on these findings, the court sentenced Landrigan to death. On direct appeal, the Arizona Supreme Court unanimously affirmed Landrigan's sentence and conviction. In addressing an ineffective-assistance-of-counsel claim not relevant here, the court noted that Landrigan had stated his "desire not to have mitigating evidence presented in his behalf." *State* v. *Landrigan*, 176 Ariz. 1, 8, 859 P. 2d 111, 118 (1993).

On January 31, 1995, Landrigan filed a petition for state postconviction relief and alleged his counsel's "fail[ure] to explore additional grounds for arguing mitigation evidence." App. to Pet. for Cert. F–3 (internal quotation marks omitted). Specifically, Landrigan maintained that his counsel should have investigated the "biological component" of his violent behavior by interviewing his biological father and other relatives. *Id.*, at E–2. In addition, Landrigan stated that his biological father could confirm that his biological mother used drugs and alcohol while pregnant with Landrigan. *Ibid.*

The Arizona postconviction court, presided over by the same judge who tried and sentenced Landrigan, rejected Landrigan's claim. The court found that "[Landrigan] instructed his attorney not to present any evidence at the sentencing hearing, [so] it is difficult to comprehend how [Landrigan] can claim counsel should have presented other evidence at sentencing." *Id.*, at F–4. Noting Landrigan's contention that he "'would have cooperated'" had other mitigating evidence been presented, the court concluded that Landrigan's "statements at sentencing belie his new-found sense of cooperation." *Ibid.* Describing Landrigan's claim as "frivolous," *id.*, at F–5, the court declined to hold an evidentiary hearing and dismissed Landrigan's petition. The Arizona Supreme Court denied Landrigan's petition for review on June 19, 1996.

Landrigan then filed a federal habeas application under § 2254. The District Court determined, after "expand[ing] the record to include . . . evidence of [Landrigan's] troubled background, his history of drug and alcohol abuse, and his family's history of criminal behavior," *id.*, at C–22, that Landrigan could not demonstrate that he was prejudiced by any error his counsel may have made. Because Landrigan could not make out even a "colorable" ineffective-assistance-of-counsel claim, *id.*, at C–46, the District Court refused to grant him an evidentiary hearing.

On appeal, a unanimous panel of the Court of Appeals for the Ninth Circuit affirmed, but the full court granted rehearing en banc, *Landrigan* v. *Stewart*, 397 F. 3d 1235 (2005), and reversed. The en banc Court of Appeals held that Landrigan was entitled to an evidentiary hearing because he raised a "colorable claim" that his counsel's performance fell below the standard required by *Strickland* v. *Washington*, 466 U. S. 668 (1984). 441 F. 3d 638, 650 (2006). With respect to counsel's performance, the Ninth Circuit found that he "did little to prepare for the sentencing aspect of the case," *id.*, at 643, and that investigation would have revealed a wealth of mitigating evidence, including the family's history of drug and alcohol abuse and propensity for violence.

Turning to prejudice, the court held the Arizona post-conviction court's determination that Landrigan refused to permit his counsel to present any mitigating evidence was "an 'unreasonable determination of the facts.'" *Id.*, at 647 (quoting 28 U. S. C. § 2254(d)(2)). The Court of Appeals found that when Landrigan stated that he did not want his counsel to present any mitigating evidence, he was clearly referring only to the evidence his attorney was about to introduce—that of his ex-wife and birth mother. 441 F. 3d, at 646. The court further held that, even if Landrigan intended to forgo the presentation of all mitigation evidence, such a "last-minute decision cannot excuse his counsel's failure to conduct an adequate investigation *prior* to the sen-

tencing." *Id.*, at 647. In conclusion, the court found "a reasonable probability that, if Landrigan's allegations are true, the sentencing judge would have reached a different conclusion." *Id.*, at 650. The court therefore remanded the case for an evidentiary hearing.

We granted certiorari, 548 U. S. 941 (2006), and now reverse.

II

Prior to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, the decision to grant an evidentiary hearing was generally left to the sound discretion of district courts. *Brown* v. *Allen*, 344 U. S. 443, 463–464 (1953); see also *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963). That basic rule has not changed. See 28 U. S. C. § 2254, Rule 8(a) ("[T]he judge must review the answer [and] any transcripts and records of state-court proceedings . . . to determine whether an evidentiary hearing is warranted").

AEDPA, however, changed the standards for granting federal habeas relief.[1] Under AEDPA, Congress prohibited federal courts from granting habeas relief unless a state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or the relevant state-court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold. See *Williams* v. *Taylor*, 529 U. S. 362, 410 (2000). AEDPA also requires federal habeas courts to presume the

[1] Although not at issue here, AEDPA generally prohibits federal habeas courts from granting evidentiary hearings when applicants have failed to develop the factual bases for their claims in state courts. 28 U. S. C. § 2254(e)(2).

correctness of state courts' factual findings unless applicants rebut this presumption with "clear and convincing evidence." § 2254(e)(1).

In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. See, *e. g.*, *Mayes* v. *Gibson*, 210 F. 3d 1284, 1287 (CA10 2000). Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate. See *id.*, at 1287–1288 ("Whether [an applicant's] allegations, if proven, would entitle him to habeas relief is a question governed by [AEDPA]").[2]

It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing. The Ninth Circuit has recognized this point in other cases, holding that "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record." *Totten* v. *Merkle*, 137 F. 3d 1172, 1176 (1998) (emphasis deleted) (affirming the denial of an evidentiary hearing where the applicant's factual allegations "fl[ew] in the face of logic in light of . . . [the applicant's] deliberate acts which are easily discernible from the record"). This approach is not unique to the Ninth Circuit. See *Anderson* v. *Attorney General of Kan.*, 425 F. 3d 853, 858–859 (CA10 2005) (holding that no evidentiary hearing is required if the applicant's allegations are contravened by the existing record); cf. *Clark* v. *Johnson*, 202 F. 3d 760, 767 (CA5 2000) (holding that no hearing is required when the applicant has failed to present clear and

[2] Indeed, the Court of Appeals below, recognizing this point, applied § 2254(d)(2) to reject certain of the Arizona court's factual findings that established a hearing would be futile.

convincing evidence to rebut a state court's factual findings); *Campbell* v. *Vaughn*, 209 F. 3d 280, 290 (CA3 2000) (same).

This principle accords with AEDPA's acknowledged purpose of "reduc[ing] delays in the execution of state and federal criminal sentences." *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003) (citing *Williams* v. *Taylor*, *supra*, at 386 (opinion of STEVENS, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law")). If district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts. With these standards in mind, we turn to the facts of this case.

III

For several reasons, the Court of Appeals believed that Landrigan might be entitled to federal habeas relief and that the District Court, therefore, abused its discretion by denying Landrigan an evidentiary hearing. To the contrary, the District Court was well within its discretion to determine that, even with the benefit of an evidentiary hearing, Landrigan could not develop a factual record that would entitle him to habeas relief.

A

The Court of Appeals first addressed the State's contention that Landrigan instructed his counsel not to offer any mitigating evidence. If Landrigan issued such an instruction, counsel's failure to investigate further could not have been prejudicial under *Strickland*. The Court of Appeals rejected the findings of "the Arizona Supreme Court (on direct appeal) and the Arizona Superior Court (on habeas review)" that Landrigan instructed his counsel not to introduce any mitigating evidence. 441 F. 3d, at 646. According to the Ninth Circuit, those findings took Landrigan's colloquy

with the sentencing court out of context in a manner that "amounts to an 'unreasonable determination of the facts.'" *Id.*, at 647 (quoting 28 U. S. C. § 2254(d)(2)).

Upon review of record material and the transcripts from the state courts, we disagree. As a threshold matter, the language of the colloquy plainly indicates that Landrigan informed his counsel not to present any mitigating evidence. When the Arizona trial judge asked Landrigan if he had instructed his lawyer not to present mitigating evidence, Landrigan responded affirmatively. Likewise, when asked if there was any relevant mitigating evidence, Landrigan answered, "Not as far as I'm concerned." App. to Pet. for Cert. D–4. These statements establish that the Arizona postconviction court's determination of the facts was reasonable. And it is worth noting, again, that the judge presiding on postconviction review was ideally situated to make this assessment because she is the same judge who sentenced Landrigan and discussed these issues with him.

Notwithstanding the plainness of these statements, the Court of Appeals concluded that they referred to only the specific testimony that counsel planned to offer—that of Landrigan's ex-wife and birth mother. The Court of Appeals further concluded that Landrigan, due to counsel's failure to investigate, could not have known about the mitigating evidence he now wants to explore. The record conclusively dispels that interpretation. First, Landrigan's birth mother would have offered testimony that overlaps with the evidence Landrigan now wants to present. For example, Landrigan wants to present evidence from his biological father that would "confirm [his biological mother's] alcohol and drug use during her pregnancy." *Id.*, at E–2. But the record shows that counsel planned to call Landrigan's birth mother to testify about her "drug us[e] during her pregnancy," *id.*, at D–10, and the possible effects of such drug use. Second, Landrigan interrupted repeatedly when counsel tried to proffer anything that could have been con-

sidered mitigating. He even refused to allow his attorney to proffer that he had worked a regular job at one point. *Id.*, at D–6, D–7. This behavior confirms what is plain from the transcript of the colloquy: that Landrigan would have undermined the presentation of any mitigating evidence that his attorney might have uncovered.

On the record before us, the Arizona court's determination that Landrigan refused to allow the presentation of any mitigating evidence was a reasonable determination of the facts. In this regard, we agree with the initial Court of Appeals panel that reviewed this case:

> "In the constellation of refusals to have mitigating evidence presented . . . this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one. No flashes of insight could be more fulgurous than those which this record supplies." *Landrigan* v. *Stewart*, 272 F. 3d 1221, 1226 (CA9 2001).

Because the Arizona postconviction court reasonably determined that Landrigan "instructed his attorney not to bring any mitigation to the attention of the [sentencing] court," App. to Pet. for Cert. F–4, it was not an abuse of discretion for the District Court to conclude that Landrigan could not overcome § 2254(d)(2)'s bar to granting federal habeas relief. The District Court was entitled to conclude that regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence. Accordingly, the District Court could conclude that because of his established recalcitrance, Landrigan could not demonstrate prejudice under *Strickland* even if granted an evidentiary hearing.

B

The Court of Appeals offered two alternative reasons for holding that Landrigan's inability to make a showing of prej-

udice under *Strickland* did not bar any potential habeas relief and, thus, an evidentiary hearing.

1

The Court of Appeals held that, even if Landrigan did not want any mitigating evidence presented, the Arizona courts' determination that Landrigan's claims were "'frivolous' and 'meritless' was an unreasonable application of United States Supreme Court precedent." 441 F. 3d, at 647 (citing 28 U. S. C. §2254(d)(1)). This holding was founded on the belief, derived from *Wiggins* v. *Smith*, 539 U. S. 510 (2003), that "Landrigan's apparently last-minute decision cannot excuse his counsel's failure to conduct an adequate investigation *prior* to the sentencing." 441 F. 3d, at 647.

Neither *Wiggins* nor *Strickland* addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court. *Wiggins, supra*, at 523 ("[W]e focus on whether the investigation supporting *counsel's* decision not to introduce mitigating evidence of Wiggins' background was itself reasonable" (emphasis added and deleted)). Indeed, we have never addressed a situation like this. In *Rompilla* v. *Beard*, 545 U. S. 374, 381 (2005), on which the Court of Appeals also relied, the defendant refused to assist in the development of a mitigation case, but did not inform the court that he did not want mitigating evidence presented. In short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence.

2

The Court of Appeals also stated that the record does not indicate that Landrigan's decision not to present mitigating evidence was "informed and knowing," 441 F. 3d, at 647, and that "[t]he trial court's dialogue with Landrigan tells us little

about his understanding of the consequences of his decision," *ibid.* We have never imposed an "informed and knowing" requirement upon a defendant's decision not to introduce evidence. Cf., *e. g.*, *Iowa* v. *Tovar*, 541 U. S. 77, 88 (2004) (explaining that waiver of the right to counsel must be knowing and intelligent). Even assuming, however, that an "informed and knowing" requirement exists in this case, Landrigan cannot benefit from it, for three reasons.

First, Landrigan never presented this claim to the Arizona courts.[3] Rather, he argued that he would have complied had other evidence been offered. Thus, Landrigan failed to develop this claim properly before the Arizona courts, and § 2254(e)(2) therefore barred the District Court from granting an evidentiary hearing on that basis.

Second, in Landrigan's presence, his counsel told the sentencing court that he had carefully explained to Landrigan the importance of mitigating evidence, "especially concerning the fact that the State is seeking the death penalty." App. to Pet. for Cert. D–3. Counsel also told the court that he had explained to Landrigan that as counsel, he had a duty to disclose "any and all mitigating factors . . . to th[e] [c]ourt for consideration regarding the sentencing." *Ibid.* In light of Landrigan's demonstrated propensity for interjecting himself into the proceedings, it is doubtful that Landrigan would have sat idly by while his counsel lied about having previously discussed these issues with him. And as Landrigan's counsel conceded at oral argument before this Court, we have never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence. Tr. of Oral Arg. 26.

Third, the Court of Appeals overlooked Landrigan's final statement to the sentencing court: "I think if you want to

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[3] Landrigan made this argument for the first time in a motion for rehearing from the denial of his postconviction petition. Under Arizona law, a defendant cannot raise new claims in a motion for rehearing. *State* v. *Byers*, 126 Ariz. 139, 142, 613 P. 2d 299, 302 (App. 1980), overruled on other grounds, *State* v. *Pope*, 130 Ariz. 253, 635 P. 2d 846 (1981).

give me the death penalty, just bring it right on. I'm ready for it." App. to Pet. for Cert. D–16. It is apparent from this statement that Landrigan clearly understood the consequences of telling the judge that, "as far as [he was] concerned," there were no mitigating circumstances of which she should be aware. *Id.*, at D–4.

IV

Finally, the Court of Appeals erred in rejecting the District Court's finding that the poor quality of Landrigan's alleged mitigating evidence prevented him from making "a colorable claim" of prejudice. *Id.*, at C–46. As summarized by the Court of Appeals, Landrigan wanted to introduce as mitigation evidence

> "[that] he was exposed to alcohol and drugs *in utero*, which may have resulted in cognitive and behavioral deficiencies consistent with fetal alcohol syndrome. He was abandoned by his birth mother and suffered abandonment and attachment issues, as well as other behavioral problems throughout his childhood.
>
> "His adoptive mother was also an alcoholic, and Landrigan's own alcohol and substance abuse began at an early age. Based on his biological family's history of violence, Landrigan claims he may also have been genetically predisposed to violence." 441 F. 3d, at 649.

As explained above, all but the last sentence refer to information that Landrigan's birth mother and ex-wife could have offered if Landrigan had allowed them to testify. Indeed, the state postconviction court had much of this evidence before it by way of counsel's proffer. App. to Pet. for Cert. D–21. The District Court could reasonably conclude that any additional evidence would have made no difference in the sentencing.

In sum, the District Court did not abuse its discretion in finding that Landrigan could not establish prejudice based

on his counsel's failure to present the evidence he now wishes to offer. Landrigan's mitigation evidence was weak, and the postconviction court was well acquainted with Landrigan's exceedingly violent past and had seen first hand his belligerent behavior. Again, it is difficult to improve upon the initial Court of Appeals panel's conclusion:

> "The prospect was chilling; before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, '[i]n his comments [to the sentencing judge], defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior.' On this record, assuring the court that genetics made him the way he is could not have been very helpful. There was no prejudice." 272 F. 3d, at 1229 (citations and footnote omitted).

V

The Court of Appeals erred in holding that the District Court abused its discretion in declining to grant Landrigan an evidentiary hearing. Even assuming the truth of all the facts Landrigan sought to prove at the evidentiary hearing, he still could not be granted federal habeas relief because the state courts' factual determination that Landrigan would not have allowed counsel to present any mitigating evidence at sentencing is not an unreasonable determination of the facts under § 2254(d)(2), and the mitigating evidence he seeks to introduce would not have changed the result. In such circumstances, a District Court has discretion to deny an evidentiary hearing. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Significant mitigating evidence—evidence that may well have explained respondent's criminal conduct and unruly behavior at his capital sentencing hearing—was unknown at the time of sentencing. Only years later did respondent learn that he suffers from a serious psychological condition that sheds important light on his earlier actions. The reason why this and other mitigating evidence was unavailable is that respondent's counsel failed to conduct a constitutionally adequate investigation. See *Wiggins* v. *Smith*, 539 U. S. 510 (2003). In spite of this, the Court holds that respondent is not entitled to an evidentiary hearing to explore the prejudicial impact of his counsel's inadequate representation. It reasons that respondent "would have" waived his right to introduce any mitigating evidence that counsel might have uncovered, *ante*, at 476, 479, and that such evidence "would have" made no difference in the sentencing anyway, *ante*, at 480. Without the benefit of an evidentiary hearing, this is pure guesswork.

The Court's decision rests on a parsimonious appraisal of a capital defendant's constitutional right to have the sentencing decision reflect meaningful consideration of all relevant mitigating evidence, see, *e. g.*, *Abdul-Kabir* v. *Quarterman*, *ante*, p. 233; *Skipper* v. *South Carolina*, 476 U. S. 1 (1986); *Lockett* v. *Ohio*, 438 U. S. 586 (1978), a begrudging appreciation of the need for a knowing and intelligent waiver of constitutionally protected trial rights, see, *e. g.*, *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and a cramped reading of the record. Unlike this Court, the en banc Court of Appeals properly accounted for these important constitutional and factual considerations. Its narrow holding that the District Court abused its discretion in denying respondent an evidentiary hearing should be affirmed. See *Townsend* v. *Sain*, 372

U. S. 293, 312, 318 (1963); see also 28 U. S. C. § 2254 Rule 8(a) (2000 ed., Supp. IV).

I

No one, not even the Court, seriously contends that counsel's investigation of possible mitigating evidence was constitutionally sufficient. See *Wiggins,* 539 U. S., at 521; *Strickland* v. *Washington,* 466 U. S. 668, 688 (1984). Indeed, both the majority and dissenting judges on the en banc Court of Appeals agreed that "counsel's limited investigation of Landrigan's background fell below the standards of professional representation prevailing" at the time of his sentencing hearing. 441 F. 3d 638, 650 (CA9 2006) (Bea, J., dissenting); see *id.*, at 643–645 ("On the record before us, it appears that Landrigan's counsel did little to prepare for the sentencing aspect of the case. . . . A comparison of the results of the minimal investigation by [counsel] with the amount of available mitigating evidence Landrigan claims was available leaves us with grave doubts whether Landrigan received effective assistance of counsel during his penalty phase proceeding"). The list of evidence that counsel failed to investigate is long. For instance, counsel did not complete a psychological evaluation of respondent, which we now know would have uncovered a serious organic brain disorder. He failed to consult an expert to explore the effects of respondent's birth mother's drinking and drug use during pregnancy. And he never developed a history of respondent's troubled childhood with his adoptive family—a childhood marked by physical and emotional abuse, neglect by his adoptive parents, his own serious substance abuse problems (including an overdose in his eighth or ninth grade classroom), a stunted education, and recurrent placement in substance abuse rehabilitation facilities, a psychiatric ward, and police custody. See Declaration of Shannon Sumter, App. 180–192. Counsel's failure to develop this background evidence was so glaring that even the sentencing judge noted that she had "received very little information concerning the defendant's

difficult family history." App. to Pet. for Cert. D–21.[1] At the time of sentencing, counsel was only prepared to put on the testimony by respondent's ex-wife and birth mother. By any measure, and especially for a capital case, this meager investigation "fell below an objective standard of reasonableness." *Strickland*, 466 U. S., at 688.

Given this deficient performance, the only issue is whether counsel's inadequate investigation prejudiced the outcome of sentencing. The bulk of the Court's opinion argues that the District Court reasonably found that respondent waived his right to present any and all mitigating evidence. See *ante*, at 475–480. As I shall explain, this argument finds no support in the Constitution or the record of this case.

II

It is well established that a citizen's waiver of a constitutional right must be knowing, intelligent, and voluntary. As far back as *Johnson* v. *Zerbst*, we held that courts must " 'indulge every reasonable presumption against waiver' of fundamental constitutional rights." 304 U. S., at 464. Since then, "[w]e have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.' " *Illinois* v. *Rodriguez*, 497 U. S. 177, 183 (1990) (citing *Zerbst*, 304 U. S. 458).

Twenty-five years after *Zerbst*, our decision in *Schneckloth* v. *Bustamonte* added crucial content to our jurisprudence on the knowing and intelligent waiver of constitutional rights. That case considered whether *Zerbst*'s

[1] Even more troubling is that prior to sentencing, counsel had clues for where to find this important mitigating evidence. As the Court of Appeals noted, respondent has alleged that his birth mother sent a letter to counsel explaining that "(1) Landrigan began drinking at an early age because his adoptive mother was an alcoholic and would walk around nude in front of him, (2) Landrigan's father was on death row in Arkansas and the 'blood link to Darrel [and] I are what has messed up his whole life,' and (3) 'Jeff needs help mentally like his father did.' " 441 F. 3d 638, 644 (CA9 2006) (en banc). Counsel failed to follow up on any of these leads.

requirement applied to a citizen's consent to a search or seizure. In determining that it did not, our decision turned on the "vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." 412 U. S., at 241. We explained:

> "The requirement of a 'knowing' and 'intelligent' waiver was articulated in a case involving the validity of a defendant's decision to forgo a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process. . . . Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." *Id.*, at 236–237.

We then ran through the extensive list of trial rights to which the knowing-and-intelligent-waiver requirement had already been applied.[2] We further noted that the *Zerbst* requirement had been applied to the "waiver of trial rights in trial-type situations,"[3] and to guilty pleas, which we said must be "carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled at trial."[4] 412 U. S., at 238. If our emphasis on trial rights was not already clear, we went on to state:

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[2] See, *e. g.*, *Brookhart* v. *Janis*, 384 U. S. 1 (1966) (right to confrontation); *Adams* v. *United States ex rel. McCann*, 317 U. S. 269 (1942) (right to jury trial); *Barker* v. *Wingo*, 407 U. S. 514 (1972) (right to speedy trial); *Green* v. *United States*, 355 U. S. 184 (1957) (right to be free from double jeopardy).

[3] See, *e. g.*, *Smith* v. *United States*, 337 U. S. 137 (1949) (waiver of the privilege against compulsory self-incrimination before an administrative agency); *Emspak* v. *United States*, 349 U. S. 190 (1955) (waiver of the privilege against compulsory self-incrimination before a congressional committee); *In re Gault*, 387 U. S. 1 (1967) (waiver of counsel in a juvenile proceeding).

[4] See, *e. g.*, *McCarthy* v. *United States*, 394 U. S. 459 (1969); *Boykin* v. *Alabama*, 395 U. S. 238 (1969); *Von Moltke* v. *Gillies*, 332 U. S. 708 (1948); *Uveges* v. *Pennsylvania*, 335 U. S. 437 (1948).

> "A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. . . . The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial." *Id.*, at 241–242.

Given this unmistakable focus on trial rights, it makes little difference that we have not specifically "imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." *Ante,* at 479. A capital defendant's right to present mitigating evidence is firmly established[5] and can only be exercised at a sentencing *trial.* For a capital defendant, the right to have the sentencing authority give full consideration to mitigating evidence that might support a sentence other than death is of paramount importance—in some cases just as important as the right to representation by counsel protected in *Zerbst* or any of the trial rights discussed in *Schneckloth.* Our longstanding precedent—from *Zerbst* to *Schneckloth* to the only waiver case that the majority cites, *Iowa* v. *Tovar,* 541 U. S. 77 (2004)[6]—requires that any waiver of the right to adduce such

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[5] See, *e. g., Abdul-Kabir* v. *Quarterman, ante,* p. 233; *Brewer* v. *Quarterman, ante,* p. 286; *Skipper* v. *South Carolina,* 476 U. S. 1 (1986); *Lockett* v. *Ohio,* 438 U. S. 586 (1978).

[6] See *Tovar,* 541 U. S., at 81 ("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'" (quoting *Brady* v. *United States,* 397 U. S. 742, 748 (1970); emphasis added)).

evidence be knowing, intelligent, and voluntary. As such, the state postconviction court's conclusion that respondent completely waived his right to present mitigating evidence involved an unreasonable application of clearly established federal law as determined by this Court. See 28 U. S. C. § 2254(d)(1).

Respondent's statements at the sentencing hearing do not qualify as an informed waiver under our precedents. To understand why, it is important to remember the context in which the waiver issue arose. In all of his postconviction proceedings, respondent has never brought a freestanding claim that he failed to knowingly or intelligently waive his right to present mitigating evidence. See *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992) (considering a claim that a defendant's guilty plea was not knowing and intelligent). That is because respondent believes he never waived his right to present all available mitigating evidence. See Brief for Respondent 20 ("Landrigan has alleged that . . . he intended at most to forgo his right to put on his ex-wife and birth mother as witnesses"); Part III, *infra*. Respondent's only claim is that his counsel was ineffective for failing to investigate and present mitigating evidence.

In light of this posture, the Court's conclusion that respondent cannot make a knowing-and-intelligent-waiver argument because he failed to present it in the Arizona courts is nothing short of baffling. See *ante*, at 479. Respondent never intended for waiver to become an issue because he never thought it was an issue. Waiver only became a concern when he was forced to answer: (1) the State's argument that he could not establish prejudice under *Strickland* because he waived the right to present all mitigating evidence; and (2) the state postconviction court's conclusion that "[s]ince the defendant instructed his attorney not to bring any mitigation to the attention of the court, he cannot now claim counsel was ineffective because he did not 'explore additional grounds for arguing mitigation evidence.' " App.

to Pet. for Cert. F–4. It is instructive that both the State and the postconviction court considered the waiver issue within the context of the prejudice prong of respondent's ineffective-assistance-of-counsel claim. Even now, respondent's only "claim" within the meaning of 28 U. S. C. § 2254(e)(2) is that his counsel was ineffective for not adequately investigating and presenting mitigating evidence. An *argument*—particularly one made in the alternative and in response to another party—is fundamentally different from a *claim*. Cf. *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992).[7]

Turning back to that claim, respondent's purported waiver can only be appreciated in light of his counsel's deficient performance. To take just one example, respondent's counsel asked a psychologist, Dr. Mickey McMahon, to conduct an initial interview with respondent. But Dr. McMahon has submitted an affidavit stating that his experience was "quite different from the working relationship [he] had with counsel on other death penalty cases in which the psychological study went through a series of steps." Declaration of

[7] The Court also misapplies § 2254(e)(2) by failing to account for our holding that "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is *lack of diligence*, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams* v. *Taylor*, 529 U. S. 420, 432 (2000) (emphasis added). "Diligence . . . depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Id.*, at 435. At the time respondent filed his state postconviction petition, he was under the impression that he had not waived his right to present all mitigating evidence. Once the state postconviction court informed him otherwise, he immediately raised this argument in a motion for rehearing. See *ante*, at 479, n. 3. The consequence of today's decision is that prisoners will be forced to file separate claims in anticipation of every possible argument that might be made in response to their genuine claims. That is no way to advance "[the Antiterrorism and Effective Death Penalty Act of 1996's] acknowledged purpose of reduc[ing] delays in the execution of state and federal criminal sentences." *Ante*, at 475 (internal quotation marks omitted).

Mickey McMahon, App. 247. In this case, Dr. McMahon was "not authorized to conduct the next step in psychological testing that would have told [him] if . . . there were any cognitive or neuropsychological deficits not observed during just an interview." *Id.*, at 246. Even though Dr. McMahon told respondent's counsel that "much more work was needed to provide an appropriate psychological study for a death penalty case," *ibid.*, counsel refused to let him investigate any further.[8]

A more thorough investigation would have revealed that respondent suffers from an organic brain disorder. See *Abdul-Kabir*, *ante*, at 262 (recognizing that "possible neurological damage" is relevant mitigating evidence). Years after Dr. McMahon's aborted examination, another psychologist, Dr. Thomas C. Thompson, conducted a complete analysis of respondent. Based on extensive interviews with respondent and several of his family members, a review of his family history, and multiple clinical tests, Dr. Thompson diagnosed respondent with Antisocial Personality Disorder. See Declaration of Thomas C. Thompson, App. 149. Dr. Thompson filed an affidavit in the District Court describing his diagnosis:

> "[Respondent's] actions did not constitute a lifestyle choice in the sense of an individual operating with a large degree of freedom, as we have come to define free will. The inherited, prenatal, and early developmental factors severely impaired Mr. Landrigan's ability to function in a society that expects individuals to operate in an organized and adaptive manner, taking into ac-

[8] An investigator named George LaBash had a similar experience with respondent's counsel. Although counsel had hired LaBash to look into respondent's case, LaBash stated in an affidavit that counsel "did not ask me to do much." Declaration of George LaBash, App. 242. In fact, LaBash spent only 13 hours working on the case, never conducted a mitigation investigation, and described his experience working with respondent's counsel as "quite frustrating." *Id.*, at 242–243.

> count the actions and consequences of their behaviors and their impact on society and its individual members. Based on evaluation and investigation along with other relevant data, this type of responsible functioning is simply beyond Mr. Landrigan and, as far back as one can go, there is no indication that he ever had these capacities." *Id.*, at 160.

On the day of the sentencing hearing, the only mitigating evidence that respondent's counsel had investigated was the testimony of respondent's birth mother and ex-wife. None of this neuropsychological information was available to respondent at the time of his purported waiver. Yet the Court conspicuously avoids any mention of respondent's organic brain disorder. It instead provides an incomplete list of other mitigating evidence that respondent would have presented and incorrectly assumes that respondent's birth mother and ex-wife would have covered it all. See *ante*, at 476, 480. Unless I missed the portion of the record indicating that respondent's ex-wife and birth mother were trained psychologists, neither could have offered expert testimony about respondent's organic brain disorder.

It is of course true that respondent was aware of many of the individual pieces of mitigating evidence that contributed to Dr. Thompson's subsequent diagnosis. He knew that his birth mother abandoned him at the age of six months, see App. 147; that his biological family had an extensive criminal history, see *id.*, at 146–147; that his adoptive mother had "affective disturbances and chronic alcoholism," *id.*, at 148; that she routinely drank vodka until she passed out, see *id.*, at 184; that she would frequently strike him, once even "hit[ting him] with a frying pan hard enough to leave a dent," *id.*, at 183, 185; that his childhood was difficult, and he exhibited abandonment and attachment problems at an early age, see *id.*, at 148; that he had a bad temper and often threw violent tantrums as a child, see *id.*, at 182; and that he "began getting into trouble and using alcohol and drugs at an early age

and, by adolescence, he had begun a series of placements in juvenile detention facilities, a psychiatric ward, and twice in drug abuse rehabilitation programs," *id.*, at 148. Perhaps respondent also knew that his biological mother abused alcohol and amphetamines during her pregnancy, and that *in utero* exposure to drugs and alcohol has deleterious effects on the child. See *id.*, at 155–156.

But even if respondent knew all these things, we cannot assume that he could understand their consequences the way an expert psychologist could. Without years of advanced education and a battery of complicated testing, respondent could not know that these experiences resulted in a serious organic brain disorder or what effect such a disorder might have on his behavior. And precisely because his counsel failed to conduct a proper investigation, he did not know that this important evidence was available to him when he purportedly waived the right to present mitigating evidence. It is hard to see how respondent's claim of *Strickland* prejudice can be prejudiced by counsel's *Strickland* error. See *Hill* v. *Lockhart*, 474 U. S. 52, 58–59 (1985).

Without ever acknowledging that respondent lacked this information, the Court clings to counsel's discussion with respondent about "the importance of mitigating evidence." *Ante*, at 479. The majority also places great weight on the fact that counsel explained to respondent that, as counsel, he had a "duty to disclose 'any and all mitigating factors . . . to th[e] [c]ourt for consideration regarding the sentencing.'" *Ibid.* Leaving aside the fact that counsel's deficient performance did not demonstrate an understanding of the "importance of mitigating evidence"—let alone knowledge of "'any and all'" such evidence—counsel's abstract explanation cannot satisfy the demands of *Zerbst* and *Schneckloth*. Unless respondent knew of the most significant mitigation evidence available to him, he could not have made a knowing and intelligent waiver of his constitutional rights. See *Battenfield* v. *Gibson*, 236 F. 3d 1215, 1229–1233 (CA10 2001)

(holding a defendant's waiver invalid where there was "no indication [counsel] explained . . . what specific mitigation evidence was available"); *Coleman* v. *Mitchell*, 268 F. 3d 417, 447–448 (CA6 2001); see generally *Tovar*, 541 U. S., at 88.

III

Even if the putative waiver had been fully informed, the Arizona postconviction court's determination that respondent "instructed his attorney not to bring any mitigation to the attention of the [sentencing] court" is plainly contradicted by the record. App. to Pet. for Cert. F–4. The Court nevertheless defers to this finding, concluding that it was not an "unreasonable determination of the facts" under 28 U. S. C. § 2254(d)(2). "[I]n the context of federal habeas," however, "deference does not imply abandonment or abdication of judicial review." *Miller-El* v. *Cockrell*, 537 U. S. 322, 340 (2003). A careful examination of the "record material and the transcripts from the state courts," *ante*, at 476, does not indicate that respondent intended to make a waiver that went beyond the testimony of his birth mother and ex-wife.

The Court reads the following exchange as definitive proof that respondent "informed his counsel not to present any mitigating evidence," *ibid.:*

> "THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> "THE DEFENDANT: Yeah.
>
> "THE COURT: Do you know what that means?
>
> "THE DEFENDANT: Yeah.
>
> "THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?
>
> "THE DEFENDANT: Not as far as I'm concerned." App. to Pet. for Cert. D–3 to D–4.

The Court also infers from respondent's disruptive behavior at the sentencing hearing that he "would have undermined

the presentation of any mitigating evidence that his attorney might have uncovered." *Ante*, at 477. But this record material does not conclusively establish that respondent would have waived his right to present other mitigating evidence if his counsel had made it available to him.

The brief exchange between respondent and the trial court must be considered in the context of the *entire* sentencing proceeding. The above-quoted dialogue came immediately after a lengthy colloquy between the trial court and respondent's counsel:

> "MR. FARRELL: Your Honor, at this time . . . I have two witnesses that I wished to testify before this Court, one I had brought in from out of state and is my client's ex-wife, Ms. Sandy Landrigan. The second witness is my client's natural mother, Virginia Gipson. I believe both of those people had some important evidence that I believed the Court should take into mitigation concerning my client. *However, Mr. Landrigan has made it clear to me . . . that he does not wish anyone from his family to testify on his behalf today.*
>
> "I have talked with Sandra Landrigan, his ex-wife. I have talked a number of times with her and confirmed what I thought was important evidence that she should present for the Court. And I have also talked with Ms. Gipson, and her evidence I think is very important and should have been brought to this Court's attention. Both of them, after talking with Jeff today, have agreed with their, in one case son and the other ex-husband, they will not testify in his behalf.
>
> "THE COURT: Why not?
>
> "MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this

> Court for consideration regarding the sentencing. *He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.*" App. to Pet. for Cert. D–2 to D–3 (emphasis added).

Respondent's answers to the trial judge's questions must be read in light of this discussion. When the judge immediately turned from counsel to respondent and asked about "any mitigating circumstances," the entire proceeding to that point had been about the possible testimony of his birth mother or ex-wife. Counsel had only informed the court that respondent did not want any testimony "from his family." *Id.*, at D–3. Neither counsel nor respondent said anything about other mitigating evidence. A fair reading of the full sentencing transcript makes clear that respondent's answers referred only to the testimony of his ex-wife and birth mother.[9]

What is more, respondent's answers were necessarily infected by his counsel's failure to investigate. Respondent does not dispute that he instructed his counsel not to present his family's testimony. Brief for Respondent 47 ("Landrigan contends that his intent was not to effect a broad waiver but, instead, merely to waive presentation of testimony from his mother and his ex-wife"). But his limited waiver cannot change the fact that he was unaware that the words "any

[9] The Court disregards another important contextual clue—that respondent's counsel requested three 30-day continuances to investigate and prepare a mitigation case, and that respondent consented on the record to each one. App. 10, 12–13, 15. If respondent had instructed his counsel not to develop any mitigating evidence, his consent would be difficult to explain. Similarly, there is clear evidence that respondent cooperated with counsel's minimal investigation. He allowed counsel to interview his birth mother and ex-wife, he assisted in counsel's gathering of his medical records, and he freely met with Dr. McMahon. See App. to Pet. for Cert. D–2 to D–3; App. 12; *id.*, at 129. These are not the actions of a man who wanted to present no mitigating evidence.

mitigating circumstances" could include his organic brain disorder, the medical consequences of his mother's drinking and drug use during pregnancy, and his abusive upbringing with his adoptive family.[10] In respondent's mind, the words "any mitigating circumstances" just meant the incomplete evidence that counsel offered to present. As the en banc Court of Appeals explained, "[h]ad his lawyer conducted an investigation and uncovered other types of mitigating evidence, Landrigan might well have been able to direct the court to other mitigating circumstances." 441 F. 3d, at 646. It is therefore error to read respondent's simple "Yeah" and "Not as far as I'm concerned" as waiving anything other than the little he knew was available to him.

Accordingly, the state postconviction court's finding that petitioner waived his right to present any mitigating evidence was an unreasonable determination of the facts under § 2254(d)(2). While the Court is correct that the postconviction judge was the same judge who sentenced respondent, we must remember that her postconviction opinion was written in 1995—*five years* after the sentencing proceeding. Although the judge's memory deserves some deference, her opinion reflects many of the same flaws as does the Court's opinion. Instead of reexamining the entire trial transcript, she only quoted the same two-question exchange with respondent. App. to Pet. for Cert. F–4. And unlike this

[10] Contrary to the Court's contention, see *ante*, at 476, 480, respondent's *birth* mother could not have testified about his difficult childhood with his *adoptive* family. In fact, respondent sought a state postconviction evidentiary hearing so that his adoptive sister could present such evidence. See Petition for Post-Conviction Relief, App. 88 ("Petitioner's sister, Shannon Sumter, would also have verified that their mother, Mrs. Landrigan, was an alcoholic and that that disease caused significant problems within the family which impacted adversely on Petitioner as he was growing up. . . . She would, moreover, have provided additional information concerning familial problems which preceded the time of sentencing and which may have offered at least a partial explanation of Petitioner's conduct at sentencing").

Court's repeated reference to respondent's behavior at sentencing, she did not mention it at all. Her analysis consists of an incomplete review of the transcript and an unsupported summary conclusion that respondent told his attorney not to present any mitigating evidence.

While I believe that neither the Constitution nor the record supports the Court's waiver holding, respondent is at least entitled to an evidentiary hearing on this question as well as his broader claim of ineffective assistance of counsel. Respondent insists that he never instructed his counsel not to investigate other mitigating evidence. Even the State concedes that there has been no finding on this issue. See, *e. g.*, Brief for Respondent 37 ("'[Judge Kozinski]: There's no [state court] finding at all even by inference as to investigation? There's . . . no finding that . . . the trial court made that goes to Landrigan's attitude about allowing his lawyer to investigate? . . . [Counsel for State]: I would agree'" (quoting Ninth Circuit Oral Argument Audio 43:55–44:30)). He has long maintained that he would have permitted the presentation of mitigating evidence if only counsel was prepared to introduce evidence other than testimony from his birth mother and ex-wife. See, *e. g.*, App. to Pet. for Cert. E–2. Respondent planned to call his counsel at an evidentiary hearing to testify about these very assertions. See App. 126. Because counsel is in the best position to clarify whether respondent gave any blanket instructions not to investigate or present mitigating evidence, the Court is wrong to decide this case before any evidence regarding respondent's instructions can be developed.

IV

Almost as an afterthought, the Court holds in the alternative that "the District Court did not abuse its discretion in finding that Landrigan could not establish prejudice based on his counsel's failure to present the evidence he now wishes to offer." *Ante*, at 480–481. It of course does this on a cold and

incomplete factual record. Describing respondent's mitigation case as "weak," and emphasizing his "exceedingly violent past" and "belligerent behavior" at sentencing, the Court concludes that there is no way that respondent can establish prejudice with the evidence he seeks to introduce. *Ante*, at 481. This reasoning is flawed in several respects.

First, as has been discussed above but bears repeating, the Court thoroughly misrepresents respondent's mitigating evidence. It is all too easy to view respondent's mitigation case as "weak" when you assume away his most powerful evidence. The Court ignores respondent's organic brain disorder, which would have explained not only his criminal history but also the repeated outbursts at sentencing.[11] It mistakenly assumes that respondent's birth mother and ex-wife could have testified about the medical consequences of fetal alcohol syndrome. And it inaccurately states that these women could have described his turbulent childhood with his adoptive family. We have repeatedly said that evidence of this kind can influence a sentencer's decision as to whether death is the proper punishment. See, *e. g.*, *Wiggins*, 539 U. S., at 535 ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background [or to emotional and mental problems] may be less culpable than defendants who have no such excuse" (internal quotation marks omitted)); *Eddings* v. *Oklahoma*, 455 U. S. 104, 115 (1982) ("[T]here can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe

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[11] See Declaration of Thomas C. Thompson, App. 149 (stating that tests revealed that respondent has "deficits with cognitive processing, poor adaptability, incomplete understanding of his surroundings and his effect on others, and *very limited impulse control*" (emphasis added)); *id.*, at 150 (noting that individuals with antisocial personality disorder typically act "irresponsibl[y] across areas of their daily lives with decisions characterized by *impulsivity*" (emphasis added)).

emotional disturbance is particularly relevant"). The evidence here might well have convinced a sentencer that a death sentence was not appropriate.

Second, the aggravating circumstances relied on by the sentencing judge are not as strong as the Court makes them out to be.[12] To be sure, respondent had already committed two violent offenses. But so had Terry Williams, and this Court still concluded that he suffered prejudice when his attorney failed to investigate and present mitigating evidence. See *Williams* v. *Taylor*, 529 U. S. 362, 368 (2000) (noting that Williams confessed to "two separate violent assaults on elderly victims," including one that left an elderly woman in a "'vegetative state'"); *id.*, at 398 ("[T]he graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability"). The only other aggravating factor was that Landrigan committed his crime for pecuniary gain[13]—but there are serious doubts about that. As the en banc Court

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[12] In fact, while the Court's terse prejudice analysis relies heavily on a colorful quote from the original Ninth Circuit panel, see *ante*, at 481, it declines to mention that one judge on that panel switched her vote and joined the en banc majority after further consideration of respondent's mitigating evidence.

[13] Notwithstanding the Court's repeated assertions, the sentencing judge did not consider respondent's courtroom behavior as an aggravating factor. Compare *ibid.* with App. to Pet. for Cert. D–17 to D–18. In fact, the sentencing judge noted that until the day of sentencing, respondent had "acted appropriately in the courtroom" and his conduct had been "good." *Id.*, at D–22. Even more importantly, she understood his behavior that day to be a mere "release . . . of his frustration," *ibid.*—not as an aggravating factor and certainly not as an indication of his intent to waive his right to present mitigating evidence. At most, the sentencing judge treated respondent's behavior on the day of sentencing as a reason not to credit his earlier "good" behavior as a mitigating circumstance. In any event, a defendant's poor behavior at trial is not listed as an aggravating factor under Arizona's capital sentencing statute. See Ariz. Rev. Stat. Ann. § 13–703(F) (West Supp. 2006).

of Appeals explained, "[t]here was limited evidence regarding the pecuniary gain aggravator. The judge noted that the victim's apartment had been ransacked as if the perpetrator were looking for something, and that this demonstrated an expectation of pecuniary gain, *even though Landrigan did not actually steal anything of value.*" 441 F. 3d, at 649 (emphasis added). Thus, while we should not ignore respondent's violent past, it is certainly possible—even likely—that evidence of his neurological disorder, fetal alcohol syndrome, and abusive upbringing would have influenced the sentencing judge's assessment of his moral blameworthiness and altered the outcome of his sentencing. As such, respondent has plainly alleged facts that, if substantiated at an evidentiary hearing, would entitle him to relief. See *Townsend*, 372 U. S., at 312.

V

In the end, the Court's decision can only be explained by its increasingly familiar effort to guard the floodgates of litigation. Immediately before turning to the facts of this case, it states that "[i]f district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts." *Ante*, at 475. However, habeas cases requiring evidentiary hearings have been "few in number," and "there is no clear evidence that this particular classification of habeas proceedings has burdened the dockets of the federal courts." *Keeney*, 504 U. S., at 24 (KENNEDY, J., dissenting). Even prior to the passage of the Antiterrorism and Effective Death Penalty Act of 1996, district courts held evidentiary hearings in only *1.17%* of all federal habeas cases. See Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and their Relation to the States (Mar. 12, 1990) (Richard A. Posner, Chair), in 1 Federal Courts Study Committee,

Working Papers and Subcommittee Reports 468–515 (July 1, 1990). This figure makes it abundantly clear that doing justice does not always cause the heavens to fall. The Court would therefore do well to heed JUSTICE KENNEDY's just reminder that "[w]e ought not to take steps which diminish the likelihood that [federal] courts will base their legal decision on an accurate assessment of the facts." *Keeney*, 504 U. S., at 24 (dissenting opinion).

It may well be true that respondent would have completely waived his right to present mitigating evidence if that evidence had been adequately investigated at the time of sentencing. It may also be true that respondent's mitigating evidence could not outweigh his violent past. What is certainly true, however, is that an evidentiary hearing would provide answers to these questions. I emphatically agree with the majority of judges on the en banc Court of Appeals that it was an abuse of discretion to refuse to conduct such a hearing in this capital case.

Accordingly, I respectfully dissent.

Syllabus

HINCK ET UX. *v.* UNITED STATES

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

No. 06–376. Argued April 23, 2007—Decided May 21, 2007

A 1986 amendment to the Internal Revenue Code permits the Treasury Secretary to abate interest that accrues on unpaid federal income taxes if the interest assessment is attributable to Internal Revenue Service (IRS) error or delay. 26 U. S. C. § 6404(e)(1). Subsequently, the federal courts uniformly held that the Secretary's decision not to abate was not subject to judicial review. In 1996, Congress added what is now § 6404(h), which states that the Tax Court has "jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate . . . was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate . . . ." § 6404(h)(1). Section 7430(c)(4)(A)(ii) in turn incorporates 28 U. S. C. § 2412(d)(2)(B), which refers to individuals with a net worth not exceeding $2 million and businesses with a net worth not exceeding $7 million. The IRS denied petitioner Hincks' request for abatement of interest assessed in 1999 for the period March 21, 1989, to April 1, 1993. The Hincks then filed suit in the Court of Federal Claims seeking review of the refusal to abate. The court granted the Government's motion to dismiss, and the Federal Circuit affirmed, holding that § 6404(h) vests exclusive jurisdiction to review interest abatement claims in the Tax Court.

Held: The Tax Court provides the exclusive forum for judicial review of a failure to abate interest under § 6404(e)(1). This Court's analysis is governed by the well-established principle that, in most contexts, "'a precisely drawn, detailed statute pre-empts more general remedies,'" *EC Term of Years Trust* v. *United States*, *ante*, at 433; it is also guided by the recognition that when Congress enacts a specific remedy when none was previously recognized, or when previous remedies were "problematic," the remedy provided is generally regarded as exclusive, *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 285. Section 6404(h) fits the bill on both counts. In a single sentence, it provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief; it was also enacted against a backdrop of decisions uniformly rejecting the possibility of any review of the Secretary's § 6404(e)(1)

determinations. Though Congress failed explicitly to define the Tax Court's jurisdiction as exclusive, it is quite plain that the terms of § 6404(h)—a "precisely drawn, detailed statute" filling a perceived hole in the law—control all requests for review of § 6404(e)(1) decisions, including the forum for adjudication. The Hincks correctly argue that Congress's provision of an abuse-of-discretion standard removed one of the obstacles courts had held foreclosed judicial review of such determinations, but Congress did not simply supply this single missing ingredient in enacting § 6404(h). Rather, it set out a carefully circumscribed, time-limited, plaintiff-specific provision, which also precisely defined the appropriate forum. This Court will not isolate one feature of this statute and use it to permit taxpayers to circumvent the other limiting features in the *same* statute, such as a shorter statute of limitations than in general refund suits or a net-worth ceiling for plaintiffs eligible to bring suit. Taxpayers could "effortlessly evade" these specific limitations by bringing interest abatement claims as tax refund actions in the district courts or the Court of Federal Claims, disaggregating a statute Congress plainly envisioned as a package deal. *EC Term of Years Trust*, *ante*, at 434. Equally unavailing are the Hincks' contentions that reading § 6404(h) to vest exclusive jurisdiction in the Tax Court impliedly repeals the pre-existing jurisdiction of the district courts and Court of Federal Claims, runs contrary to the structure of tax controversy jurisdiction, and would lead to the "unreasonable" result that taxpayers with net worths exceeding the specified ceilings would be foreclosed from seeking judicial review of § 6404(e)(1) refusals to abate. Pp. 506–510.

446 F. 3d 1307, affirmed.

ROBERTS, C. J., delivered the opinion for a unanimous Court.

Thomas E. Redding argued the cause for petitioners. With him on the briefs were *Teresa J. Womack* and *Sallie W. Gladney.*

Jonathan L. Marcus argued the cause for the United States. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General O'Connor*, *Deputy Solicitor General Hungar*, and *Kenneth L. Greene.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Bad things happen if you fail to pay federal income taxes when due. One of them is that interest accrues on the un-

paid amount. Sometimes it takes a while for the Internal Revenue Service (IRS) to determine that taxes should have been paid that were not. Section 6404(e)(1) of the Internal Revenue Code permits the Secretary of the Treasury to abate interest—to forgive it, partially or in whole—if the assessment of interest on a deficiency is attributable to unreasonable error or delay on the part of the IRS. Section 6404(h) allows for judicial review of the Secretary's decision not to grant such relief. The question presented in this case is whether this review may be obtained only in the Tax Court, or may also be secured in the district courts and the Court of Federal Claims. We hold that the Tax Court provides the exclusive forum for judicial review of a refusal to abate interest under § 6404(e)(1), and affirm.

I

The Internal Revenue Code provides that if any amount of assessed federal income tax is not paid "on or before the last date prescribed for payment," interest "shall be paid for the period from such last date to the date paid." 26 U. S. C. § 6601(a). Section 6404 of the Code authorizes the Secretary of the Treasury to abate any tax or related liability in certain circumstances. As part of the Tax Reform Act of 1986, Congress amended § 6404 to add subsection (e)(1), which, as enacted, provided in pertinent part:

> "In the case of any assessment of interest on . . . any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act . . . the Secretary may abate the assessment of all or any part of such interest for any period." 26 U. S. C. § 6404(e)(1) (1994 ed.).

In the years following passage of § 6404(e)(1), the federal courts uniformly held that the Secretary's decision not to grant an abatement was not subject to judicial review. See,

e. g., *Argabright* v. *United States*, 35 F. 3d 472, 476 (CA9 1994); *Selman* v. *United States*, 941 F. 2d 1060, 1064 (CA10 1991); *Horton Homes, Inc.* v. *United States*, 936 F. 2d 548, 554 (CA11 1991); see also *Bax* v. *Commissioner*, 13 F. 3d 54, 58 (CA2 1993). These decisions recognized that § 6404(e)(1) gave the Secretary complete discretion to determine whether to abate interest, "neither indicat[ing] that such authority should be used universally nor provid[ing] any basis for distinguishing between the instances in which abatement should and should not be granted." *Selman*, *supra*, at 1063. Any decision by the Secretary was accordingly "committed to agency discretion by law" under the Administrative Procedure Act, 5 U. S. C. § 701(a)(2), and thereby insulated from judicial review. See, *e. g.*, *Webster* v. *Doe*, 486 U. S. 592, 599 (1988); *Heckler* v. *Chaney*, 470 U. S. 821, 830 (1985).

In 1996, as part of the Taxpayer Bill of Rights 2, Congress again amended § 6404, adding what is now subsection (h). As relevant, that provision states:

> "Review of denial of request for abatement of interest
>
> "(1) In general
>
> "The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest." 26 U. S. C. § 6404(h)(1) (2000 ed., Supp. IV).

Section 7430(c)(4)(A)(ii) in turn incorporates 28 U. S. C. § 2412(d)(2)(B), which refers to individuals with a net worth not exceeding $2 million and businesses with a net worth not exceeding $7 million. Congress made subsection (h) effective for all requests for abatement submitted to the IRS

after July 30, 1996, regardless of the tax year involved. § 302(b), 110 Stat. 1458.[1]

II

In 1986, petitioner John Hinck was a limited partner in an entity called Agri-Cal Venture Associates (ACVA). Along with his wife, petitioner Pamela Hinck, Hinck filed a joint return for 1986 reporting his share of losses from the partnership. The IRS later examined the tax returns for ACVA and proposed adjustments to deductions that the partnership had claimed for 1984, 1985, and 1986. In 1990, the IRS issued a final notice regarding the partnership's returns, disallowing tens of millions of dollars of deductions. While the partnership sought administrative review of this decision, the Hincks, in May 1996, made an advance remittance of $93,890 to the IRS toward any personal deficiency that might result from a final adjustment of ACVA's returns. In March 1999, the Hincks reached a settlement with the IRS concerning the ACVA partnership adjustments, to the extent they affected the Hincks' return. Shortly thereafter, as a result of the adjustments, the IRS imposed additional liability against the Hincks: $16,409 in tax and $21,669.22 in interest. The IRS applied the Hincks' advance remittance to this amount and refunded them the balance of $55,811.78.

The Hincks filed a claim with the IRS contending that, because of IRS errors and delays, the interest assessed against them for the period from March 21, 1989, to April 1, 1993, should be abated under § 6404(e)(1). The IRS denied the request. The Hincks then filed suit in the United States Court of Federal Claims seeking review of the refusal to

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[1] The Taxpayer Bill of Rights 2 also modified 26 U. S. C. § 6404(e)(1)(A) to add the word "unreasonable" before the words "error or delay" and to change "ministerial act" to "ministerial or managerial act." § 301(a), 110 Stat. 1457. These changes, however, only apply to interest accruing on deficiencies for tax years beginning after July 30, 1996, see § 301(c), *ibid.*, and thus are not implicated in this case.

abate. That court granted the Government's motion to dismiss, 64 Fed. Cl. 71, 81 (2005), and the United States Court of Appeals for the Federal Circuit affirmed, 446 F. 3d 1307, 1313–1314 (2006), holding that § 6404(h) vests exclusive jurisdiction to review interest abatement claims under § 6404(e)(1) in the Tax Court. Because this decision conflicted with the Fifth Circuit's decision in *Beall* v. *United States*, 336 F. 3d 419, 430 (2003) (holding that § 6404(h) grants concurrent rather than exclusive jurisdiction to the Tax Court), we granted certiorari, 549 U. S. 1162 (2007).

III

Our analysis is governed by the well-established principle that, in most contexts, "'a precisely drawn, detailed statute pre-empts more general remedies.'" *EC Term of Years Trust* v. *United States*, *ante*, at 433 (quoting *Brown* v. *GSA*, 425 U. S. 820, 834 (1976)); see also *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 284–286 (1983). We are also guided by our past recognition that when Congress enacts a specific remedy when no remedy was previously recognized, or when previous remedies were "problematic," the remedy provided is generally regarded as exclusive. *Id.*, at 285; *Brown*, *supra*, at 826–829.

Section 6404(h) fits the bill on both counts. It is a "precisely drawn, detailed statute" that, in a single sentence, provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief. And Congress enacted this provision against a backdrop of decisions uniformly rejecting the possibility of any review for taxpayers wishing to challenge the Secretary's § 6404(e)(1) determination. Therefore, despite Congress's failure explicitly to define the Tax Court's jurisdiction as exclusive, we think it quite plain that the terms of § 6404(h)—a "precisely drawn, detailed statute" filling a perceived hole in the law—control all requests for review of § 6404(e)(1) determinations. Those terms include the forum for adjudication.

The Hincks' primary argument against exclusive Tax Court jurisdiction is that by providing a standard of review—abuse of discretion—in § 6404(h), Congress eliminated the primary barrier to judicial review that courts had previously recognized; accordingly, they maintain, taxpayers may seek review of § 6404(e)(1) determinations under statutes granting jurisdiction to the district courts and the Court of Federal Claims to review tax refund actions. See 28 U. S. C. §§ 1346(a)(1), 1491(a)(1); 26 U. S. C. § 7422(a). Or, as the Fifth Circuit reasoned: "[T]he federal district courts have always possessed *jurisdiction* over challenges brought to section 6404(e)(1) denials[;] they simply determined that the taxpayers had no *substantive right* whatever to a favorable exercise of the Secretary's discretion . . . . [I]n enacting section 6404(h), Congress indicated that such is no longer the case, and thereby removed any impediment to district court review." *Beall*, *supra*, at 428 (emphasis in original).

It is true that by providing an abuse-of-discretion standard, Congress removed one of the obstacles courts had held foreclosed judicial review of § 6404(e)(1) determinations. See, *e. g.*, *Argabright*, 35 F. 3d, at 476 (noting an absence of "'judicially manageable standards'" (quoting *Heckler*, 470 U. S., at 830)). But in enacting § 6404(h), Congress did not simply supply this single missing ingredient; rather, it set out a carefully circumscribed, time-limited, plaintiff-specific provision, which also precisely defined the appropriate forum. We cannot accept the Hincks' invitation to isolate one feature of this "precisely drawn, detailed statute"—the portion specifying a standard of review—and use it to permit taxpayers to circumvent the other limiting features Congress placed in the *same* statute—restrictions such as a shorter statute of limitations than general refund suits, compare § 6404(h) (180-day limitations period) with § 6532(a)(1) (2-year limitations period), or a net-worth ceiling for plaintiffs eligible to bring suit. Taxpayers could "effortlessly evade" these specific limitations by bringing interest abate-

ment claims as tax refund actions in the district courts or the Court of Federal Claims, disaggregating a statute Congress plainly envisioned as a package deal. *EC Term of Years Trust*, *ante*, at 434; see also *Block*, *supra*, at 284–285; *Brown*, *supra*, at 832–833.

The Hincks' other contentions are equally unavailing. First, they claim that reading § 6404(h) to vest exclusive jurisdiction in the Tax Court impliedly repeals the pre-existing jurisdiction of the district courts and Court of Federal Claims, despite our admonition that "repeals by implication are not favored." *Morton* v. *Mancari*, 417 U. S. 535, 549 (1974) (internal quotation marks omitted). But the implied-repeal doctrine is not applicable here, for when Congress passed § 6404(h), § 6404(e)(1) had been interpreted not to provide *any* right of review for taxpayers. There is thus no indication of any "language on the statute books that [Congress] wishe[d] to change," *United States* v. *Fausto*, 484 U. S. 439, 453 (1988), implicitly or explicitly. Congress simply prescribed a limited form of review where none had previously been found to exist.

Second, the Hincks assert that vesting jurisdiction over § 6404(e)(1) abatement decisions exclusively in the Tax Court runs contrary to the "entire structure of tax controversy jurisdiction," Brief for Petitioners 30, under which the Tax Court generally hears prepayment challenges to tax liability, see § 6213(a), while postpayment actions are brought in the district courts or Court of Federal Claims. In a related vein, the Hincks point out that the Government's position would force taxpayers seeking postpayment review of their tax liabilities to separate their § 6404(e)(1) abatement claims from their refund claims and bring each in a different court. Even assuming, *arguendo*, that we were inclined to depart from the face of the statute, these arguments are undercut on two fronts. To begin with, by expressly granting to the Tax Court *some* jurisdiction over § 6404(e)(1) decisions, Congress has already broken with the general scheme the

Hincks identify. No one doubts that an action seeking review of a § 6404(e)(1) determination may be maintained in the Tax Court even if the interest has already been paid, see, *e. g.*, *Dadian* v. *Commissioner*, 87 TCM 1344 (2004), ¶ 2004–121 RIA Memo TC, p. 790–2004; *Miller* v. *Commissioner*, 79 TCM 2213 (2000), ¶ 2000–196 RIA Memo TC, p. 1120–2000, aff'd, 310 F. 3d 640 (CA9 2002), and the Hincks point to no case where the Tax Court has refused to exercise jurisdiction under such circumstances.

In addition, an interest abatement claim under § 6404(e)(1) involves no questions of substantive tax law, but rather is premised on issues of bureaucratic administration (whether, for example, there was "error or delay" in the performance of a "ministerial" act, § 6404(e)(1)(A)). Judicial review of decisions not to abate requires an evaluation of the internal processes of the IRS, not the underlying tax liability of the taxpayer. We find nothing tellingly awkward about channeling such discrete and specialized questions of administrative operations to one particular court, even if in some respects it "may not appear to be efficient" as a policy matter to separate refund and interest abatement claims. 446 F. 3d, at 1316.[2]

Last, the Hincks contend that Congress would not have intended to vest jurisdiction exclusively in the Tax Court because it would lead to the "unreasonable" result that taxpayers with net worths greater than $2 million (for individuals) or $7 million (for businesses) would be foreclosed from seeking judicial review of § 6404(e)(1) refusals to abate. Brief for Petitioners 46; see also *Beall*, 336 F. 3d, at 430. But we agree with the Federal Circuit that this outcome "was contemplated by Congress." 446 F. 3d, at 1316. The net-worth limitation in § 6404(h) reflects Congress's judgment that wealthier taxpayers are more likely to be able to

[2] We note that the Hincks sought only interest abatement in the Court of Federal Claims, thus failing to implicate the "claim-splitting" and efficiency concerns they condemn. See Brief for Petitioners 49.

pay a deficiency before contesting it, thereby avoiding accrual of interest during their administrative and legal challenges. In contrast, taxpayers with comparatively fewer resources are more likely to contest their assessed deficiency before first paying it, thus exposing themselves to interest charges if their challenge is ultimately unsuccessful. There is nothing "unreasonable" about Congress's decision to grant the possibility of judicial relief only to those taxpayers most likely to be in need of it.[3]

The judgment of the United States Court of Appeals for the Federal Circuit is affirmed.

It is so ordered.

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[3] The Hincks also argue that the net-worth limitations on § 6404(h) review violate the due process rights of those taxpayers who exceed them. The court below did not pass upon this constitutional challenge, nor do we, for as the Hincks concede, the record contains no findings concerning their own net worth, Brief for Petitioners 44, and they offer no reasons to deviate from our general rule that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," *Kowalski* v. *Tesmer*, 543 U. S. 125, 129 (2004) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); internal quotation marks omitted).

Syllabus

OFFICE OF SENATOR MARK DAYTON *v.* HANSON

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06–618. Argued April 24, 2007—Decided May 21, 2007

After his discharge from employment with former Senator Dayton, appellee Hanson sued appellant, the Senator's office (Office), invoking the District Court's jurisdiction under the Congressional Accountability Act of 1995 (Act). The court denied a motion to dismiss based on a claim of immunity under the Constitution's Speech or Debate Clause, and the D. C. Circuit affirmed. The Office then sought to appeal under § 412 of the Act, which authorizes review in this Court of "any . . . judgment . . . upon the constitutionality of any provision" of the Act.

Held: This Court lacks jurisdiction under § 412 because neither the dismissal denial nor the D. C. Circuit's affirmance can fairly be characterized as a ruling "upon the constitutionality" of any Act provision. The District Court's order does not state any grounds for decision, so it cannot be characterized as a constitutional holding. Moreover, neither the Court of Appeals' rejection of the Office's argument that forcing the Senator to defend against Hanson's allegations would necessarily contravene the Speech or Debate Clause, nor that court's leaving open the possibility that the Clause may limit the proceedings' scope in some respects, qualifies as a ruling on the Act's validity. The Office's argument that the appeals court's holding amounts to a ruling that the Act is constitutional "as applied" cannot be reconciled with § 413's declaration that the Act's authorization to sue "shall not constitute a waiver of . . . the privileges of any Senator . . . under [the Clause]." Nor do any special circumstances justify exercise of this Court's discretionary certiorari jurisdiction, the D. C. Circuit having abandoned an earlier decision that was in conflict with another Circuit on the Clause's application to suits challenging a congressional Member's personnel decisions. Pp. 513–515.

459 F. 3d 1, appeal dismissed; certiorari denied.

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

Jean M. Manning argued the cause for appellant. With her on the briefs were *Toby R. Hyman*, *Claudia A. Kostel*, *Dawn Bennett-Ingold*, and *Thomas C. Goldstein*.

Richard A. Salzman argued the cause for appellee. With him on the brief were *Douglas B. Huron* and *Tammany M. Kramer*.

Thomas E. Caballero argued the cause for the United States Senate as *amicus curiae* urging affirmance. With him on the brief were *Morgan J. Frankel*, *Patricia Mack Bryan*, and *Grant R. Vinik*.*

JUSTICE STEVENS delivered the opinion of the Court.

Prior to January 3, 2007, Mark Dayton represented the State of Minnesota in the United States Senate. Appellee, Brad Hanson, was employed in the Senator's Ft. Snelling office prior to his discharge by the Senator, which he alleges occurred on July 3, 2002. Hanson brought this action for damages against appellant, the Senator's office (Office), invoking the District Court's jurisdiction under the Congressional Accountability Act of 1995 (Act), 109 Stat. 3, as amended, 2 U. S. C. § 1301 *et seq.* (2000 ed. and Supp. IV), and alleging violations of three other federal statutes.[1] The District Court denied appellant's motion to dismiss the complaint based on a claim of immunity under the Speech or

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*A brief of *amicus curiae* urging reversal was filed for the President *pro tempore* of the Senate of Pennsylvania by *John P. Krill, Jr.*, *Linda J. Shorey*, and *George A. Bibikos*.

A brief of *amici curiae* urging affirmance was filed for Congressman Barney Frank et al. by *Glen D. Nager*, *Traci L. Lovitt*, and *Virginia A. Seitz*.

A brief of *amicus curiae* was filed for AARP by *Thomas W. Osborne* and *Melvin Radowitz*.

[1] Appellee alleged violations of the Family and Medical Leave Act of 1993, 107 Stat. 6, as amended, 29 U. S. C. § 2601 *et seq.* (2000 ed. and Supp. IV), the Americans with Disabilities Act of 1990, 104 Stat. 327, 42 U. S. C. § 12101 *et seq.* (2000 ed. and Supp. IV), and the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.* (2000 ed. and Supp. IV).

Debate Clause of the Constitution.[2] The Court of Appeals affirmed, *Fields* v. *Office of Eddie Bernice Johnson, Employing Office, United States Congress*, 459 F. 3d 1 (CADC 2006), the Office invoked our appellate jurisdiction under § 412 of the Act, 2 U. S. C. § 1412, and we postponed consideration of jurisdiction pending hearing the case on the merits, 549 U. S. 1177 (2007). Because we do not have jurisdiction under § 412, we dismiss the appeal. Treating appellant's jurisdictional statement as a petition for a writ of certiorari, we deny the petition.

Under § 412 of the Act, direct review in this Court is available "from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision" of the statute.[3] Neither the order of the District Court denying appellant's motion to dismiss nor the judgment of the Court of Appeals affirming that order can fairly be characterized as a ruling "upon the constitutionality" of any provision of the Act. The District Court's minute order denying the motion to dismiss does not state any grounds for decision. App. to Juris. Statement 59a. Both parties agree that that order cannot, therefore, be characterized as a constitutional holding.[4] The Court of Appeals' opinion rejects appellant's

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[2] "[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." Art. I, § 6, cl. 1.

[3] Section 412 reads in full:

"Expedited review of certain appeals

"(a) In general

"An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this chapter.

"(b) Jurisdiction

"The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in subsection (a) of this section, advance the appeal on the docket, and expedite the appeal to the greatest extent possible." 2 U. S. C. § 1412.

[4] Had the District Court's order qualified as a ruling "upon the constitutionality" of a provision of the Act, the Court of Appeals' jurisdiction to hear the appeal would have been called into serious doubt. See 28

argument that forcing Senator Dayton to defend against the allegations in this case would necessarily contravene the Speech or Debate Clause, although it leaves open the possibility that the Speech or Debate Clause may limit the scope of the proceedings in some respects. Neither of those holdings qualifies as a ruling on the validity of the Act itself.

The Office argues that the Court of Appeals' holding amounts to a ruling that the Act is constitutional "as applied." According to the Office, an "as applied" constitutional holding of that sort satisfies the jurisdictional requirements of § 412. We find this reading difficult to reconcile with the statutory scheme. Section 413 of the Act provides that

> "[t]he authorization to bring judicial proceedings under [the Act] shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under [the Speech or Debate Clause] of the Constitution." 2 U. S. C. § 1413.

This provision demonstrates that Congress did not intend the Act to be interpreted to permit suits that would otherwise be prohibited under the Speech or Debate Clause. Consequently, a court's determination that jurisdiction attaches despite a claim of Speech or Debate Clause immunity is best read as a ruling on the scope of the Act, not its constitutionality. This reading is faithful, moreover, to our established practice of interpreting statutes to avoid constitutional difficulties.[5] See *Clark* v. *Martinez*, 543 U. S. 371, 381–382 (2005).

U. S. C. § 1291 (granting jurisdiction to the courts of appeals from final decisions of federal district courts "except where a direct review may be had in the Supreme Court").

[5] Nor does this reading make a dead letter out of § 412's limitation of appellate review in this Court to constitutional rulings. The possibility remains that provisions of the Act could be challenged on constitutional grounds unrelated to the Speech or Debate Clause.

The provision for appellate review is best understood as responding to a congressional concern that if a provision of the statute is declared invalid there is an interest in prompt adjudication by this Court. To extend that review to instances in which the statute itself has not been called into question, giving litigants under the Act preference over litigants in other cases, does not accord with that rationale. This is also consistent with our cases holding that "statutes authorizing appeals are to be strictly construed." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 43 (1983); see also *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 42, n. 1 (1970) *(per curiam)*.

Nor are there special circumstances that justify the exercise of our discretionary certiorari jurisdiction to review the Court of Appeals' affirmance of the interlocutory order entered by the District Court. Having abandoned its decision in *Browning* v. *Clerk, U. S. House of Representatives*, 789 F. 2d 923 (1986), the D. C. Circuit is no longer in obvious conflict with any other Circuit on the application of the Speech or Debate Clause to suits challenging the personnel decisions of Members of Congress. Compare 459 F. 3d 1 (case below) with *Bastien* v. *Office of Sen. Ben Nighthorse Campbell*, 390 F. 3d 1301 (CA10 2004).

Accordingly, the appeal is dismissed for want of jurisdiction, and certiorari is denied. We express no opinion on the merits, nor do we decide whether this action became moot upon the expiration of Senator Dayton's term in office.

It is so ordered.

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

Syllabus

WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, WINKELMAN ET UX., ET AL. *v.* PARMA CITY SCHOOL DISTRICT

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

No. 05–983. Argued February 27, 2007—Decided May 21, 2007

Respondent school district receives federal funds under the Individuals with Disabilities Education Act (Act or IDEA), so it must provide children such as petitioner Winkelmans' son Jacob a "free appropriate public education," 20 U. S. C. § 1400(d)(1)(A), in accordance with an individualized education program (IEP) that the parents, school officials, and others develop as members of the student's "IEP Team." Regarding Jacob's IEP as deficient, the Winkelmans unsuccessfully appealed through IDEA's administrative review process. Proceeding without counsel, they then filed a federal-court complaint on their own behalf and on Jacob's behalf. The District Court granted respondent judgment on the pleadings. The Sixth Circuit entered an order dismissing the Winkelmans' subsequent appeal unless they obtained an attorney, citing Circuit precedent holding that because the right to a free appropriate public education belongs only to the child, and IDEA does not abrogate the common-law rule prohibiting nonlawyer parents from representing minor children, IDEA does not allow nonlawyer parents to proceed *pro se* in federal court.

Held:

1. IDEA grants parents independent, enforceable rights, which are not limited to procedural and reimbursement-related matters but encompass the entitlement to a free appropriate public education for their child. Pp. 522–535.

(a) IDEA's text resolves the question whether parents or only children have rights under the Act. Proper interpretation requires considering the entire statutory scheme. IDEA's goals include "ensur[ing] that all children with disabilities have available to them a free appropriate public education" and "that the rights of children with disabilities and parents of such children are protected," 20 U. S. C. §§ 1400(d)(1)(A)–(B), and many of its terms mandate or otherwise describe parental involvement. Parents play "a significant role," *Schaffer* v. *Weast*, 546 U. S. 49, 53, in the development of each child's IEP, see §§ 1412(a)(4), 1414(d). They are IEP team members, § 1414(d)(1)(B), and their "concerns" "for enhancing [their child's] education" must be considered by

the team, § 1414(d)(3)(A)(ii). A State must, moreover, give "any party" who objects to the adequacy of the education provided, the IEP's construction, or related matter the opportunity "to present a complaint . . . ," § 1415(b)(6), and engage in an administrative review process that culminates in an "impartial due process hearing," § 1415(f)(1)(A), before a hearing officer. "Any party aggrieved by the [hearing officer's] findings and decision . . . [has] the right to bring a civil action with respect to the complaint." § 1415(i)(2)(A). A court or hearing officer may require a state agency "to reimburse the parents for the cost of [private school] enrollment if . . . the agency had not made a free appropriate public education available to the child." § 1412(a)(10)(C)(ii). IDEA also governs when and to what extent a court may award attorney's fees, see § 1415(i)(3)(B), including an award "to a prevailing party who is the parent of a child with a disability," § 1415(i)(3)(B)(i)(I). Pp. 523–526.

(b) These various provisions accord parents independent, enforceable rights. Parents have enforceable rights at the administrative stage, and it would be inconsistent with the statutory scheme to bar them from continuing to assert those rights in federal court at the adjudication stage. Respondent argues that parental involvement is contemplated only to the extent parents represent their child's interests, but this view is foreclosed by the Act's provisions. The grammatical structure of IDEA's purpose of protecting "the rights of children with disabilities and parents of such children," § 1400(d)(1)(B), would make no sense unless "rights" refers to the parents' rights as well as the child's. Other provisions confirm this view. See, *e. g.,* § 1415(a). Even if this Court were inclined to ignore the Act's plain text and adopt respondent's countertextual reading, the Court disagrees that the sole purpose driving IDEA's involvement of parents is to facilitate vindication of a child's rights. It is not novel for parents to have a recognized legal interest in their child's education and upbringing.

The Act's provisions also contradict the variation on respondent's argument that parents can be "parties aggrieved" for aspects of the hearing officer's findings and decision relating to certain procedures and reimbursements, but not "parties aggrieved" with regard to any challenge not implicating those limited concerns. The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. The Act also allows expansive challenge by parents of "any matter" related to the proceedings and requires that administrative resolution be based on whether the child "received a free appropriate public education," § 1415(f)(3)(E), with judicial review to follow. The text and structure of IDEA create in parents an independent stake not only in

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the procedures and costs implicated by the process but also in the substantive decision to be made. Incongruous results would follow, moreover, were the Court to accept the proposition that parents' IDEA rights are limited to certain nonsubstantive matters. It is difficult to disentangle the Act's procedural and reimbursement-related rights from its substantive ones, and attempting to do so would impose upon parties a confusing and onerous legal regime, one worsened by the absence of any express guidance in IDEA concerning how a court might differentiate between these matters. This bifurcated regime would also leave some parents without any legal remedy. Pp. 526–533.

(c) Respondent misplaces its reliance on *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, when it contends that because IDEA was passed pursuant to the Spending Clause, it must provide clear notice before it can be interpreted to provide independent rights to parents. *Arlington* held that IDEA had not furnished clear notice before requiring States to reimburse experts' fees to prevailing parties in IDEA actions. However, this case does not invoke *Arlington*'s rule, for the determination that IDEA gives parents independent, enforceable rights does not impose any substantive condition or obligation on States that they would not otherwise be required by law to observe. The basic measure of monetary recovery is not expanded by recognizing that some rights repose in both the parent and the child. Increased costs borne by States defending against suits brought by nonlawyers do not suffice to invoke Spending Clause concerns, particularly in light of provisions in IDEA that empower courts to award attorney's fees to prevailing educational agencies if a parent files an action for an "improper purpose," § 1415(i)(3)(B)(i)(III). Pp. 533–535.

2. The Sixth Circuit erred in dismissing the Winkelmans' appeal for lack of counsel. Because parents enjoy rights under IDEA, they are entitled to prosecute IDEA claims on their own behalf. In light of this holding, the Court need not reach petitioners' argument concerning whether IDEA entitles parents to litigate their child's claims *pro se*. P. 535.

Reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which THOMAS, J., joined, *post*, p. 535.

Jean-Claude André argued the cause and filed briefs for petitioners.

David B. Salmons argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Kim*, *Deputy Solicitor General Garre*, *David K. Flynn*, *Gregory B. Friel*, and *Kent D. Talbert.*

Pierre H. Bergeron argued the cause for respondent. With him on the brief was *Christina Henagen Peer.**

JUSTICE KENNEDY delivered the opinion of the Court.

Some four years ago, Mr. and Mrs. Winkelman, parents of five children, became involved in lengthy administrative and legal proceedings. They had sought review related to concerns they had over whether their youngest child, 6-year-old Jacob, would progress well at Pleasant Valley Elementary School, which is part of the Parma City School District in Parma, Ohio.

Jacob has autism spectrum disorder and is covered by the Individuals with Disabilities Education Act (Act or IDEA), 84 Stat. 175, as amended, 20 U. S. C. § 1400 *et seq.* (2000 ed. and Supp. IV). His parents worked with the school district to develop an individualized education program (IEP), as required by the Act. All concede that Jacob's parents had the statutory right to contribute to this process and, when agree-

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*Briefs of *amici curiae* urging reversal were filed for the Autism Society of America et al. by *Barbara E. Etkind* and *Ilise L. Feitshans;* for the Council of Parent Attorneys and Advocates, Inc., et al. by *Lynn S. Preece*, *Erin McCloskey Maus*, and *Angela C. Vigil;* for the Equal Justice Foundation et al. by *Benson A. Wolman*, *Robert J. Krummen*, and *Robert M. Clyde, Jr.;* for the Ohio Coalition for the Education of Children with Disabilities et al. by *Thomas C. Goldstein*, *Eric H. Zagrans*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Amy Howe*, and *Kevin K. Russell;* and for Senator Edward M. Kennedy et al. by *Jody Manier Kris.*

Julie Wright Halbert and *Pammela Quinn* filed a brief for the Council of the Great City Schools as *amicus curiae* urging affirmance.

Julie Carleton Martin, *Francisco M. Negrón, Jr.*, *Naomi E. Gittins*, *Thomas E. M. Hutton*, and *Lisa E. Soronen* filed a brief for the National School Boards Association et al. as *amici curiae.*

ment could not be reached, to participate in administrative proceedings including what the Act refers to as an "impartial due process hearing." § 1415(f)(1)(A) (2000 ed., Supp. IV).

The disagreement at the center of the current dispute concerns the procedures to be followed when parents and their child, dissatisfied with the outcome of the due process hearing, seek further review in a United States District Court. The question is whether parents, either on their own behalf or as representatives of the child, may proceed in court unrepresented by counsel though they are not trained or licensed as attorneys. Resolution of this issue requires us to examine and explain the provisions of IDEA to determine if it accords to parents rights of their own that can be vindicated in court proceedings, or alternatively, whether the Act allows them, in their status as parents, to represent their child in court proceedings.

I

Respondent Parma City School District, a participant in IDEA's educational spending program, accepts federal funds for assistance in the education of children with disabilities. As a condition of receiving funds, it must comply with IDEA's mandates. IDEA requires that the school district provide Jacob with a "free appropriate public education," which must operate in accordance with the IEP that Jacob's parents, along with school officials and other individuals, develop as members of Jacob's "IEP Team." Brief for Petitioners 3 (internal quotation marks omitted).

The school district proposed an IEP for the 2003–2004 school year that would have placed Jacob at a public elementary school. Regarding this IEP as deficient under IDEA, Jacob's nonlawyer parents availed themselves of the administrative review provided by IDEA. They filed a complaint alleging respondent had failed to provide Jacob with a free appropriate public education; they appealed the hearing officer's rejection of the claims in this complaint to a state-level review officer; and after losing that appeal they filed, on their

own behalf and on behalf of Jacob, a complaint in the United States District Court for the Northern District of Ohio. In reliance upon 20 U. S. C. § 1415(i)(2) (2000 ed., Supp. IV) they challenged the administrative decision, alleging, among other matters: that Jacob had not been provided with a free appropriate public education; that his IEP was inadequate; and that the school district had failed to follow procedures mandated by IDEA. Pending the resolution of these challenges, the Winkelmans had enrolled Jacob in a private school at their own expense. They had also obtained counsel to assist them with certain aspects of the proceedings, although they filed their federal complaint, and later their appeal, without the aid of an attorney. The Winkelmans' complaint sought reversal of the administrative decision, reimbursement for private-school expenditures and attorney's fees already incurred, and, it appears, declaratory relief.

The District Court granted respondent's motion for judgment on the pleadings, finding it had provided Jacob with a free appropriate public education. Petitioners, proceeding without counsel, filed an appeal with the Court of Appeals for the Sixth Circuit. Relying on its recent decision in *Cavanaugh* v. *Cardinal Local School Dist.*, 409 F. 3d 753 (2005), the Court of Appeals entered an order dismissing the Winkelmans' appeal unless they obtained counsel to represent Jacob. See Order in No. 05–3886 (Nov. 4, 2005), App. A to Pet. for Cert. 1a. In *Cavanaugh* the Court of Appeals had rejected the proposition that IDEA allows nonlawyer parents raising IDEA claims to proceed *pro se* in federal court. The court ruled that the right to a free appropriate public education "belongs to the child alone," 409 F. 3d, at 757, not to both the parents and the child. It followed, the court held, that "any right on which the [parents] could proceed on their own behalf would be derivative" of the child's right, *ibid.*, so that parents bringing IDEA claims were not appearing on their own behalf, *ibid.* See also 28 U. S. C. § 1654 (allowing parties to prosecute their own claims *pro*

se). As for the parents' alternative argument, the court held, nonlawyer parents cannot litigate IDEA claims on behalf of their child because IDEA does not abrogate the common-law rule prohibiting nonlawyer parents from representing minor children. 409 F. 3d, at 756. As the court in *Cavanaugh* acknowledged, its decision brought the Sixth Circuit in direct conflict with the First Circuit, which had concluded, under a theory of "statutory joint rights," that the Act accords to parents the right to assert IDEA claims on their own behalf. See *Maroni* v. *Pemi-Baker Regional School Dist.*, 346 F. 3d 247, 249, 250 (CA1 2003).

Petitioners sought review in this Court. In light of the disagreement among the Courts of Appeals as to whether a nonlawyer parent of a child with a disability may prosecute IDEA actions *pro se* in federal court, we granted certiorari. 549 U. S. 990 (2006). Compare *Cavanaugh*, *supra,* with *Maroni*, *supra;* see also *Mosely* v. *Board of Ed. of Chicago*, 434 F. 3d 527 (CA7 2006); *Collinsgru* v. *Palmyra Bd. of Ed.*, 161 F. 3d 225 (CA3 1998); *Wenger* v. *Canastota Central School Dist.*, 146 F. 3d 123 (CA2 1998) *(per curiam); Devine* v. *Indian River Cty. School Bd.*, 121 F. 3d 576 (CA11 1997).

II

Our resolution of this case turns upon the significance of IDEA's interlocking statutory provisions. Petitioners' primary theory is that the Act makes parents real parties in interest to IDEA actions, not "mer[e] guardians of their children's rights." Brief for Petitioners 16. If correct, this allows Mr. and Mrs. Winkelman back into court, for there is no question that a party may represent his or her own interests in federal court without the aid of counsel. See 28 U. S. C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . "). Petitioners cannot cite a specific provision in IDEA mandating in direct and explicit terms that parents have the status of real parties in interest. They instead

base their argument on a comprehensive reading of IDEA. Taken as a whole, they contend, the Act leads to the necessary conclusion that parents have independent, enforceable rights. Brief for Petitioners 14 (citing *Koons Buick Pontiac GMC, Inc.* v. *Nigh,* 543 U. S. 50, 60 (2004)). Respondent, accusing petitioners of "knit[ting] together various provisions pulled from the crevices of the statute" to support these claims, Brief for Respondent 19, reads the text of IDEA to mean that any redressable rights under the Act belong only to children, *id.,* at 19–40.

We agree that the text of IDEA resolves the question presented. We recognize, in addition, that a proper interpretation of the Act requires a consideration of the entire statutory scheme. See *Dolan* v. *Postal Service,* 546 U. S. 481, 486 (2006). Turning to the current version of IDEA, which the parties agree governs this case, we begin with an overview of the relevant statutory provisions.

A

The goals of IDEA include "ensur[ing] that all children with disabilities have available to them a free appropriate public education" and "ensur[ing] that the rights of children with disabilities and parents of such children are protected." 20 U. S. C. §§ 1400(d)(1)(A)–(B) (2000 ed., Supp. IV). To this end, the Act includes provisions governing four areas of particular relevance to the Winkelmans' claim: procedures to be followed when developing a child's IEP; criteria governing the sufficiency of an education provided to a child; mechanisms for review that must be made available when there are objections to the IEP or to other aspects of IDEA proceedings; and the requirement in certain circumstances that States reimburse parents for various expenses. See generally §§ 1412(a)(10), 1414, 1415. Although our discussion of these four areas does not identify all the illustrative provisions, we do take particular note of certain terms that mandate or otherwise describe parental involvement.

IDEA requires school districts to develop an IEP for each child with a disability, see §§ 1412(a)(4), 1414(d), with parents playing "a significant role" in this process, *Schaffer* v. *Weast*, 546 U. S. 49, 53 (2005). Parents serve as members of the team that develops the IEP. § 1414(d)(1)(B). The "concerns" parents have "for enhancing the education of their child" must be considered by the team. § 1414(d)(3)(A)(ii). IDEA accords parents additional protections that apply throughout the IEP process. See, *e. g.*, § 1414(d)(4)(A) (requiring the IEP Team to revise the IEP when appropriate to address certain information provided by the parents); § 1414(e) (requiring States to "ensure that the parents of [a child with a disability] are members of any group that makes decisions on the educational placement of their child"). The statute also sets up general procedural safeguards that protect the informed involvement of parents in the development of an education for their child. See, *e. g.*, § 1415(a) (requiring States to "establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education"); § 1415(b)(1) (mandating that States provide an opportunity for parents to examine all relevant records). See generally §§ 1414, 1415. A central purpose of the parental protections is to facilitate the provision of a "'free appropriate public education,'" § 1401(9), which must be made available to the child "in conformity with the [IEP]," § 1401(9)(D).

The Act defines a "free appropriate public education" pursuant to an IEP to be an educational instruction "specially designed . . . to meet the unique needs of a child with a disability," § 1401(29), coupled with any additional "'related services'" that are "required to assist a child with a disability to benefit from [that instruction]," § 1401(26)(A). See also § 1401(9). The education must, among other things, be provided "under public supervision and direction," "meet the standards of the State educational agency," and "include an

appropriate preschool, elementary school, or secondary school education in the State involved." *Ibid.* The instruction must, in addition, be provided at "no cost to parents." § 1401(29). See generally *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176 (1982) (discussing the meaning of "free appropriate public education" as used in the statutory precursor to IDEA).

When a party objects to the adequacy of the education provided, the construction of the IEP, or some related matter, IDEA provides procedural recourse: It requires that a State provide "[a]n opportunity for any party to present a complaint . . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." § 1415(b)(6). By presenting a complaint a party is able to pursue a process of review that, as relevant, begins with a preliminary meeting "where the parents of the child discuss their complaint" and the local educational agency "is provided the opportunity to [reach a resolution]." § 1415(f)(1)(B)(i)(IV). If the agency "has not resolved the complaint to the satisfaction of the parents within 30 days," § 1415(f)(1)(B)(ii), the parents may request an "impartial due process hearing," § 1415(f)(1)(A), which must be conducted either by the local educational agency or by the state educational agency, *ibid.*, and where a hearing officer will resolve issues raised in the complaint, § 1415(f)(3).

IDEA sets standards the States must follow in conducting these hearings. Among other things, it indicates that the hearing officer's decision "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education," § 1415(f)(3)(E)(i), and that, "[i]n matters alleging a procedural violation," the officer may find a child "did not receive a free appropriate public education," § 1415(f)(3)(E)(ii), only if the violation

> "(I) impeded the child's right to a free appropriate public education;

> "(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
>
> "(III) caused a deprivation of educational benefits." *Ibid.*

If the local educational agency, rather than the state educational agency, conducts this hearing, then "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency." § 1415(g)(1). Once the state educational agency has reached its decision, an aggrieved party may commence suit in federal court: "Any party aggrieved by the findings and decision made [by the hearing officer] shall have the right to bring a civil action with respect to the complaint." § 1415(i)(2)(A); see also § 1415(i)(1).

IDEA, finally, provides for at least two means of cost recovery that inform our analysis. First, in certain circumstances it allows a court or hearing officer to require a state agency "to reimburse the parents [of a child with a disability] for the cost of [private-school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child." § 1412(a)(10)(C)(ii). Second, it sets forth rules governing when and to what extent a court may award attorney's fees. See § 1415(i)(3)(B). Included in this section is a provision allowing an award "to a prevailing party who is the parent of a child with a disability." § 1415(i)(3)(B)(i)(I).

B

Petitioners construe these various provisions to accord parents independent, enforceable rights under IDEA. We agree. The parents enjoy enforceable rights at the administrative stage, and it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court.

The statute sets forth procedures for resolving disputes in a manner that, in the Act's express terms, contemplates parents will be the parties bringing the administrative complaints. In addition to the provisions we have cited, we refer also to § 1415(b)(8) (requiring a state educational agency to "develop a model form to assist parents in filing a complaint"); § 1415(c)(2) (addressing the response an agency must provide to a "parent's due process complaint notice"); and § 1415(i)(3)(B)(i) (referring to "the parent's complaint"). A wide range of review is available: Administrative complaints may be brought with respect to "any matter relating to . . . the provision of a free appropriate public education." § 1415(b)(6)(A). Claims raised in these complaints are then resolved at impartial due process hearings, where, again, the statute makes clear that parents will be participating as parties. See generally *supra*, at 525–526. See also § 1415(f)(3)(C) (indicating "[a] parent or agency shall request an impartial due process hearing" within a certain period of time); § 1415(e)(2)(A)(ii) (referring to "a parent's right to a due process hearing"). The statute then grants "[a]ny party aggrieved by the findings and decision made [by the hearing officer] . . . the right to bring a civil action with respect to the complaint." § 1415(i)(2)(A).

Nothing in these interlocking provisions excludes a parent who has exercised his or her own rights from statutory protection the moment the administrative proceedings end. Put another way, the Act does not *sub silentio* or by implication bar parents from seeking to vindicate the rights accorded to them once the time comes to file a civil action. Through its provisions for expansive review and extensive parental involvement, the statute leads to just the opposite result.

Respondent, resisting this line of analysis, asks us to read these provisions as contemplating parental involvement only to the extent parents represent their child's interests. In respondent's view IDEA accords parents nothing more than

"collateral tools related to the child's underlying substantive rights—not freestanding or independently enforceable rights." Brief for Respondent 25.

This interpretation, though, is foreclosed by provisions of the statute. IDEA defines one of its purposes as seeking "to ensure that the rights of children with disabilities and parents of such children are protected." § 1400(d)(1)(B). The word "rights" in the quoted language refers to the rights of parents as well as the rights of the child; otherwise the grammatical structure would make no sense.

Further provisions confirm this view. IDEA mandates that educational agencies establish procedures "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." § 1415(a). It presumes parents have rights of their own when it defines how States might provide for the transfer of the "rights accorded to parents" by IDEA, § 1415(m)(1)(B), and it prohibits the raising of certain challenges "[n]otwithstanding any other individual right of action that a parent or student may maintain under [the relevant provisions of IDEA]," §§ 1401(10)(E), 1412(a)(14)(E). To adopt respondent's reading of the statute would require an interpretation of these statutory provisions (and others) far too strained to be correct.

Defending its countertextual reading of the statute, respondent cites a decision by a Court of Appeals concluding that the Act's "references to parents are best understood as accommodations to the fact of the child's incapacity." *Doe* v. *Board of Ed. of Baltimore Cty.*, 165 F. 3d 260, 263 (CA4 1998); see also Brief for Respondent 30. This, according to respondent, requires us to interpret all references to parents' rights as referring in implicit terms to the child's rights—which, under this view, are the only enforceable rights accorded by IDEA. Even if we were inclined to ignore the plain text of the statute in considering this theory, we disagree that the sole purpose driving IDEA's involvement of

parents is to facilitate vindication of a child's rights. It is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child. See, *e. g.*, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925) (acknowledging "the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401 (1923). There is no necessary bar or obstacle in the law, then, to finding an intention by Congress to grant parents a stake in the entitlements created by IDEA. Without question a parent of a child with a disability has a particular and personal interest in fulfilling "our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." § 1400(c)(1).

We therefore find no reason to read into the plain language of the statute an implicit rejection of the notion that Congress would accord parents independent, enforceable rights concerning the education of their children. We instead interpret the statute's references to parents' rights to mean what they say: that IDEA includes provisions conveying rights to parents as well as to children.

A variation on respondent's argument has persuaded some Courts of Appeals. The argument is that while a parent can be a "party aggrieved" for aspects of the hearing officer's findings and decision, he or she cannot be a "party aggrieved" with respect to all IDEA-based challenges. Under this view the causes of action available to a parent might relate, for example, to various procedural mandates, see, *e. g.*, *Collinsgru*, 161 F. 3d, at 233, and reimbursement demands, see, *e. g.*, § 1412(a)(10)(C)(ii). The argument supporting this conclusion proceeds as follows: Because a "party aggrieved" is, by definition, entitled to a remedy, and parents are, under IDEA, only entitled to certain procedures and reimbursements as remedies, a parent cannot be a "party aggrieved"

with regard to any claim not implicating these limited matters.

This argument is contradicted by the statutory provisions we have recited. True, there are provisions in IDEA stating parents are entitled to certain procedural protections and reimbursements; but the statute prevents us from placing too much weight on the implications to be drawn when other entitlements are accorded in less clear language. We find little support for the inference that parents are excluded by implication whenever a child is mentioned, and vice versa. Compare, *e. g.*, § 1411(e)(3)(E) (barring States from using certain funds for costs associated with actions "brought on behalf of a child" but failing to acknowledge that actions might also be brought on behalf of a parent) with § 1415(i)(3)(B)(i) (allowing recovery of attorney's fees to a "prevailing party who is the parent of a child with a disability" but failing to acknowledge that a child might also be a prevailing party). Without more, then, the language in IDEA confirming that parents enjoy particular procedural and reimbursement-related rights does not resolve whether they are also entitled to enforce IDEA's other mandates, including the one most fundamental to the Act: the provision of a free appropriate public education to a child with a disability.

We consider the statutory structure. The IEP proceedings entitle parents to participate not only in the implementation of IDEA's procedures but also in the substantive formulation of their child's educational program. Among other things, IDEA requires the IEP Team, which includes the parents as members, to take into account any "concerns" parents have "for enhancing the education of their child" when it formulates the IEP. § 1414(d)(3)(A)(ii). The IEP, in turn, sets the boundaries of the central entitlement provided by IDEA: It defines a "'free appropriate public education'" for that parent's child. § 1401(9).

The statute also empowers parents to bring challenges based on a broad range of issues. The parent may seek a

hearing on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." § 1415(b)(6)(A). To resolve these challenges a hearing officer must make a decision based on whether the child "received a free appropriate public education." § 1415(f)(3)(E). When this hearing has been conducted by a local educational agency rather than a state educational agency, "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision" to the state educational agency. § 1415(g)(1). Judicial review follows, authorized by a broadly worded provision phrased in the same terms used to describe the prior stage of review: "Any party aggrieved" may bring "a civil action." § 1415(i)(2)(A).

These provisions confirm that IDEA, through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made. We therefore conclude that IDEA does not differentiate, through isolated references to various procedures and remedies, between the rights accorded to children and the rights accorded to parents. As a consequence, a parent may be a "party aggrieved" for purposes of § 1415(i)(2) with regard to "any matter" implicating these rights. See § 1415(b)(6)(A). The status of parents as parties is not limited to matters that relate to procedure and cost recovery. To find otherwise would be inconsistent with the collaborative framework and expansive system of review established by the Act. Cf. *Cedar Rapids Community School Dist.* v. *Garret F.*, 526 U. S. 66, 73 (1999) (looking to IDEA's "overall statutory scheme" to interpret its provisions).

Our conclusion is confirmed by noting the incongruous results that would follow were we to accept the proposition that parents' IDEA rights are limited to certain nonsubstantive matters. The statute's procedural and reimbursement-related rights are intertwined with the substantive adequacy

of the education provided to a child, see, *e. g.*, § 1415(f)(3)(E), see also § 1412(a)(10)(C)(ii), and it is difficult to disentangle the provisions in order to conclude that some rights adhere to both parent and child while others do not. Were we nevertheless to recognize a distinction of this sort it would impose upon parties a confusing and onerous legal regime, one worsened by the absence of any express guidance in IDEA concerning how a court might in practice differentiate between these matters. It is, in addition, out of accord with the statute's design to interpret the Act to require that parents prove the substantive inadequacy of their child's education as a predicate for obtaining, for example, reimbursement under § 1412(a)(10)(C)(ii), yet to prevent them from obtaining a judgment mandating that the school district provide their child with an educational program demonstrated to be an appropriate one. The adequacy of the educational program is, after all, the central issue in the litigation. The provisions of IDEA do not set forth these distinctions, and we decline to infer them.

The bifurcated regime suggested by the courts that have employed it, moreover, leaves some parents without a remedy. The statute requires, in express terms, that States provide a child with a free appropriate public education "at public expense," § 1401(9)(A), including specially designed instruction "at no cost to parents," § 1401(29). Parents may seek to enforce this mandate through the federal courts, we conclude, because among the rights they enjoy is the right to a free appropriate public education for their child. Under the countervailing view, which would make a parent's ability to enforce IDEA dependant on certain procedural and reimbursement-related rights, a parent whose disabled child has not received a free appropriate public education would have recourse in the federal courts only under two circumstances: when the parent happens to have some claim related to the procedures employed; and when he or she is able to incur, and has in fact incurred, expenses creating a right to

reimbursement. Otherwise the adequacy of the child's education would not be regarded as relevant to any cause of action the parent might bring; and, as a result, only the child could vindicate the right accorded by IDEA to a free appropriate public education.

The potential for injustice in this result is apparent. What is more, we find nothing in the statute to indicate that when Congress required States to provide adequate instruction to a child "at no cost to parents," it intended that only some parents would be able to enforce that mandate. The statute instead takes pains to "ensure that the rights of children with disabilities and parents of such children are protected." § 1400(d)(1)(B). See, *e. g.*, § 1415(e)(2) (requiring that States implement procedures to ensure parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education); § 1415(e)(2)(A)(ii) (requiring that mediation procedures not be "used to deny or delay a parent's right to a due process hearing . . . or to deny any other rights afforded under this subchapter"); cf. § 1400(c)(3) (noting IDEA's success in "ensuring children with disabilities and the families of such children access to a free appropriate public education").

We conclude IDEA grants parents independent, enforceable rights. These rights, which are not limited to certain procedural and reimbursement-related matters, encompass the entitlement to a free appropriate public education for the parents' child.

C

Respondent contends, though, that even under the reasoning we have now explained petitioners cannot prevail without overcoming a further difficulty. Citing our opinion in *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291 (2006), respondent argues that statutes passed pursuant to the Spending Clause, such as IDEA, must provide "'clear notice'" before they can burden a State with some new condition, obligation, or liability. Brief for Respondent

41. Respondent contends that because IDEA is, at best, ambiguous as to whether it accords parents independent rights, it has failed to provide clear notice of this condition to the States. See *id.*, at 40–49.

Respondent's reliance on *Arlington* is misplaced. In *Arlington* we addressed whether IDEA required States to reimburse experts' fees to prevailing parties in IDEA actions. "[W]hen Congress attaches conditions to a State's acceptance of federal funds," we explained, "the conditions must be set out 'unambiguously.'" 548 U. S., at 296 (quoting *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981)). The question to be answered in *Arlington*, therefore, was whether IDEA "furnishes clear notice regarding the liability at issue." 548 U. S., at 296. We found it did not.

The instant case presents a different issue, one that does not invoke the same rule. Our determination that IDEA grants to parents independent, enforceable rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe. The basic measure of monetary recovery, moreover, is not expanded by recognizing that some rights repose in both the parent and the child. Were we considering a statute other than the one before us, the Spending Clause argument might have more force: A determination by the Court that some distinct class of people has independent, enforceable rights might result in a change to the States' statutory obligations. But that is not the case here.

Respondent argues our ruling will, as a practical matter, increase costs borne by the States as they are forced to defend against suits unconstrained by attorneys trained in the law and the rules of ethics. Effects such as these do not suffice to invoke the concerns under the Spending Clause. Furthermore, IDEA does afford relief for the States in certain cases. The Act empowers courts to award attorney's fees to a prevailing educational agency whenever a parent

has presented a "complaint or subsequent cause of action . . . for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." § 1415(i)(3)(B)(i)(III). This provision allows some relief when a party has proceeded in violation of these standards.

III

The Court of Appeals erred when it dismissed the Winkelmans' appeal for lack of counsel. Parents enjoy rights under IDEA; and they are, as a result, entitled to prosecute IDEA claims on their own behalf. The decision by Congress to grant parents these rights was consistent with the purpose of IDEA and fully in accord with our social and legal traditions. It is beyond dispute that the relationship between a parent and child is sufficient to support a legally cognizable interest in the education of one's child; and, what is more, Congress has found that "the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home." § 1400(c)(5).

In light of our holding we need not reach petitioners' alternative argument, which concerns whether IDEA entitles parents to litigate their child's claims *pro se*.

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

It is so ordered.

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

I would hold that parents have the right to proceed *pro se* under the Individuals with Disabilities Education Act (IDEA), 20 U. S. C. § 1400 *et seq.* (2000 ed. and Supp. IV), when they seek reimbursement for private school expenses

or redress for violations of their own procedural rights, but not when they seek a judicial determination that their child's free appropriate public education (or FAPE) is substantively inadequate.

Whether parents may bring suits under the IDEA without a lawyer depends upon the interaction between the IDEA and the general *pro se* provision in the Judiciary Act of 1789. The latter, codified at 28 U. S. C. § 1654, provides that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." (Emphasis added.) The IDEA's right-to-sue provision, 20 U. S. C. § 1415(i)(2)(A) (2000 ed., Supp. IV), provides that "[a]ny *party aggrieved* by the findings and decision [of a hearing officer] shall have the right to bring a civil action with respect to the [administrative] complaint." (Emphasis added.) Thus, when parents are "parties aggrieved" under the IDEA, they are "parties" within the meaning of 28 U. S. C. § 1654, entitled to sue on their own behalf.[1]

As both parties agree, see Tr. of Oral Arg. 7; Brief for Respondent 37, "party aggrieved" means "[a] party entitled to a remedy; esp., a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment," Black's Law Dictionary 1154 (8th ed. 2004); see also *ante*, at 529–530. This case thus turns on the rights that the IDEA accords to parents, and the concomitant remedies made available to them. Only with respect to such rights and remedies are

[1] As the Court notes, *ante*, at 520, 535, petitioners also argue that even if parents do not have their own rights under the statute, they nonetheless may act on behalf of their child without retaining a lawyer. Both sides agree, however, that the common law generally prohibited lay parents from representing their children in court, a manifestation of the more general common-law rule that nonattorneys cannot litigate the interests of another. See Brief for Petitioners 37; Brief for Respondent 9–10; see also, *e. g.*, *Collinsgru* v. *Palmyra Bd. of Ed.*, 161 F. 3d 225, 232 (CA3 1998). Nothing in the IDEA suggests a departure from that rule.

parents properly viewed as "parties aggrieved," capable of filing their own cases in federal court.

A review of the statutory text makes clear that, as relevant here, the IDEA grants parents only two types of rights.[2] First, under certain circumstances "a court or a hearing officer may require the [school district] to reimburse *the parents*" for private school expenditures "if the court or hearing officer finds that the [school district] had not made a free appropriate public education available to the child." 20 U. S. C. § 1412(a)(10)(C)(ii) (2000 ed., Supp. IV) (emphasis added). Second, parents are accorded a variety of procedural protections, both during the development of their child's individualized education program (IEP), see, *e. g.*, § 1414(d)(1)(B)(i) (parents are members of their child's IEP team); § 1415(b)(1) (parents must have an opportunity to examine records and participate in IEP meetings), and in any subsequent administrative challenges, see, *e. g.*, §§ 1415(b)(6), (8) (parents may file administrative due process complaints). It is clear that parents may object to procedural violations at the administrative due process hearing, see § 1415(b)(6)(A), and that a hearing officer may provide relief to parents for certain procedural infractions, see § 1415(f)(3)(E)(ii). Because the rights to reimbursement and to the various procedural protections are accorded to parents themselves, they are "parties aggrieved" when those rights are infringed, and may accordingly proceed *pro se* when seeking to vindicate them.[3]

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[2] Because the grant of those rights is clear, and because I find no statutory basis for any other rights, I need not decide whether the Spending Clause's "clear notice" requirement is applicable here. Cf. *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U. S. 291, 296 (2006).

[3] Of course when parents assert procedural violations, they must also allege that those violations adversely affected the outcome of the proceedings. Under Article III, one does not have standing to challenge a procedural violation without having some concrete interest in the outcome of the proceeding to which the violation pertains, see *Lujan* v. *Defenders of*

The Court goes further, however, concluding that parents may proceed *pro se* not only when they seek reimbursement or assert procedural violations, but also when they challenge the substantive adequacy of their child's FAPE—so that parents may act without a lawyer *in every IDEA case*. See *ante*, at 527–533. In my view, this sweeps far more broadly than the text allows. Out of this sprawling statute the Court cannot identify even *a single* provision stating that parents have the substantive right to a FAPE. The reason for this is readily understandable: The right to a free appropriate public education obviously inheres in the child, for it is he who receives the education. As the IDEA instructs, participating States must provide a "free appropriate public education . . . to all children with disabilities . . . ." § 1412(a)(1)(A) (2000 ed., Supp. IV). The statute is replete with references to the fact that a FAPE belongs to the child. See, *e. g.*, § 1400(d)(1)(A) (IDEA designed "to ensure that all children with disabilities have available to them a free appropriate public education"); § 1408(a)(2)(C)(i) (referring to "the right of a child" to "receive a free appropriate public education"); § 1411(e)(3)(F)(i) (same); § 1414(a)(1)(D)(i)(II) (referring to an agency "that is responsible for making a free appropriate public education available to a child"); § 1415(b)(6)(A) (referring to "the provision of a free appropriate public education to [a] child"). The parents of a disabled child no doubt have an *interest* in seeing their child receive a proper education. But there is a difference between an *interest* and a statutory *right*. The text of the IDEA makes clear that parents have no *right* to the education itself.[4]

Wildlife, 504 U. S. 555, 571–578 (1992), here the parents' interest in having their child receive an appropriate education.

[4] Nor can a parental right to education be justified, as the Court attempts, see *ante*, at 532–533, on the theory that the IDEA gives parents a legal right to *free* schooling for their child. Parents acquire such a right

The Court concedes, as it must, that while the IDEA gives parents the right to reimbursement and procedural protection in explicit terms, it does not do so for the supposed right to the education itself. *Ante,* at 529–530. The obvious inference to be drawn from the statute's clear and explicit conferral of discrete types of rights upon parents and children, respectively, is that it does not by accident confer the parent-designated rights upon children, or the children-designated rights upon parents. The Court believes, however, that "the statute prevents us from placing too much weight on [this] implicatio[n]." *Ante*, at 530. That conclusion is in error. Nothing in "the statute" undermines the obvious "implication" of Congress's scheme. What the Court relies upon for its conclusion that parents have a substantive right to a FAPE is not the "statutory structure," *ibid.*, but rather the myriad *procedural* guarantees accorded to parents in the administrative process, see *ante*, at 530–531. But allowing parents, by means of these guarantees, to help shape the contours of their child's education is simply not the same as giving *them* the right to that education. Nor can the Court sensibly rely on the provisions governing due process hearings and administrative appeals, the various provisions that refer to the "parent's complaint," see, *e. g.*, 20 U. S. C. § 1415(i)(3)(B)(i)(III) (2000 ed., Supp. IV), or the fact that the right-to-sue provision, § 1415(i)(2)(A), refers to the administrative complaint, which in turn allows parents to challenge "any matter" relating to the provision of a FAPE, § 1415(b)(6)(A). These provisions prove nothing except what all parties concede: that parents *may* represent their child *pro se* at the administrative level. See Brief for Petitioners 17–18, 40; Brief for United States as *Amicus Curiae* 12; Brief for Respondent 13, 44; see also *Collinsgru* v. *Palmyra Bd. of Ed.*, 161 F. 3d 225, 232 (CA3 1998). Parents

(in limited circumstances) only when they enroll their child in a private institution. § 1412(a)(10)(C)(ii) (2000 ed., Supp. IV).

thus have the power, at the administrative stage, to litigate *all* of the various rights under the statute since at that stage they are acting not only on their *own* behalf, but on behalf of *their child* as well. This tells us nothing whatever about *whose* rights they are.[5] The Court's spraying statutory sections about like buckshot cannot create a substantive parental right to education where none exists.

Harkening back to its earlier discussion of the IDEA's "text and structure" (by which it means the statute's procedural protections), the Court announces the startling proposition that, in fact, the "IDEA does not differentiate . . . between the rights accorded to children and the rights accorded to parents." *Ante*, at 531. If that were so, the Court could have spared us its painful effort to craft a distinctive parental right out of scattered procedural provisions. But of course it is not so. The IDEA quite clearly

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[5] Contrary to indications in the Court's opinion, *ante*, at 530–531, and to the apparent language of the statute, a hearing officer does not always render a decision "on substantive grounds based on a determination of whether the child received a free appropriate public education." § 1415(f)(3)(E)(i) (2000 ed., Supp. IV). That provision is "[s]ubject to clause (ii)," *ibid.*, which provides that "[i]n matters alleging a procedural violation" a hearing officer can grant relief if "the procedural inadequacies . . . significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child," § 1415(f)(3)(E)(ii)(II). It is true that a hearing officer who accepts such an allegation nominally grants relief by concluding that the child did not receive a FAPE, § 1415(f)(3)(E)(ii), but it is clear from the structure of the statute that this is not a decision on the substantive adequacy of the FAPE, but rather the label attached to a finding of procedural defect. Petitioners agree with me on this point. See Brief for Petitioners 31, n. 23. See also 20 U. S. C. § 1415(f)(3)(E)(iii) (2000 ed., Supp. IV) ("Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section"). In any event, even if a hearing officer was required to render a decision on the substantive adequacy of the FAPE, that feature of the statute still gives no clue as to whether parents' vindication of that substantive right at the administrative stage is on their own behalf or on behalf of the child.

differentiates between the rights accorded to parents and their children. See *Emery* v. *Roanoke City School Bd.*, 432 F. 3d 294, 299 (CA4 2005) ("[P]arents and children are distinct legal entities under the IDEA" (internal quotation marks omitted)). As even petitioners' *amici* agree, "Congress specifically indicated that parents have rights under the Act that are separate from and independent of their children's rights." Brief for Senator Edward M. Kennedy et al. as *Amici Curiae* 18. Does the Court seriously contend that a child has a right to reimbursement, when the statute most definitively provides that if "*the parents* of a child with a disability" enroll that child in private school, "a court . . . may require the [school district] to reimburse *the parents* for the cost of that enrollment"? § 1412(a)(10)(C)(ii) (2000 ed., Supp. IV) (emphasis added); see also Brief for Sen. Kennedy et al., *supra*, at 21 ("The right of reimbursement runs to the parents"). Does the Court believe that a child has a procedural right under §§ 1414(d)(1)(C)(i)–(iii) (2000 ed., Supp. IV), which gives *parents* the power to excuse an IEP team member from attending an IEP meeting? The IDEA does not remotely envision communal "family" rights.

The Court believes that because parents must prove the substantive inadequacy of a FAPE before obtaining reimbursement, § 1412(a)(10)(C)(ii), and because the suitability of a FAPE may also be at issue when procedural violations are alleged, § 1415(f)(3)(E)(ii), it is "out of accord with the statute's design" to "prevent [parents] from obtaining a judgment mandating that the school district provide their child" with a FAPE. *Ante*, at 532. That is a total non sequitur. That Congress has required parents to demonstrate the inadequacy of their child's FAPE in order to vindicate their own rights says nothing about whether parents possess an underlying right to education. The Court insists that the right to a FAPE is the right "most fundamental to the Act." *Ante*, at 530. Undoubtedly so, but that sheds no light upon whom the right belongs to, and hence upon who can sue in their

own right. Congress has used the phrase "party aggrieved," and it is this Court's job to apply that language, not to run from it.

The Court further believes that a distinction between parental and child rights will prove difficult to administer. I fail to see why that is so. Before today, the majority of Federal Courts of Appeals to have considered the issue have allowed parents to sue *pro se* with respect to some claims, but not with respect to the denial of a FAPE. See *Mosely* v. *Board of Ed. of Chicago*, 434 F. 3d 527, 532 (CA7 2006); *Collinsgru*, 161 F. 3d, at 233; *Wenger* v. *Canastota Central School Dist.*, 146 F. 3d 123, 126 (CA2 1998) *(per curiam); Devine* v. *Indian River Cty. School Bd.*, 121 F. 3d 576, 581, n. 17 (CA11 1997). The Court points to no evidence suggesting that this majority rule has caused any confusion in practice. Nor do I see how it could, since the statute makes clear and easily administrable distinctions between parents' and children's legal entitlements.

Finally, the Court charges that the approach taken by the majority of Courts of Appeals would perpetrate an "injustice," *ante*, at 533, since parents who do not seek reimbursement or allege procedural violations would be "without a remedy," *ante*, at 532. That, of course, is not true. They will have the same remedy as all parents who sue to vindicate their children's rights: the power to bring suit, represented by counsel. But even indulging the Court's perception that it is unfair to allow some but not all IDEA parents to proceed *pro se*, that complaint is properly addressed to Congress, which structured the rights as it has, and limited suit to "party aggrieved." And there are good reasons for it to have done so. *Pro se* cases impose unique burdens on lower courts—and on defendants, in this case the schools and school districts that must hire their own lawyers. Since *pro se* complaints are prosecuted essentially for free, without screening by knowledgeable attorneys, they are much more likely to be unmeritorious. And for courts to figure them

out without the assistance of plaintiff's counsel is much more difficult and time consuming. In both categories of *pro se* parental suit permitted under a proper interpretation of the statute, one or the other of these burdens is reduced. Actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate. And actions alleging procedural violations can ordinarily be disposed of without the intensive record review that characterizes suits challenging the suitability of a FAPE.

* * *

Petitioners sought reimbursement, alleged procedural violations, and requested a declaration that their child's FAPE was substantively inadequate. *Ante*, at 521. I agree with the Court that they may proceed *pro se* with respect to the first two claims, but I disagree that they may do so with respect to the third.

Syllabus

BELL ATLANTIC CORP. ET AL. *v.* TWOMBLY ET AL.

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

No. 05–1126. Argued November 27, 2006—Decided May 21, 2007

The 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business left a system of regional service monopolies, sometimes called Incumbent Local Exchange Carriers (ILECs), and a separate long-distance market from which the ILECs were excluded. The Telecommunications Act of 1996 withdrew approval of the ILECs' monopolies, "fundamentally restructur[ing] local telephone markets" and "subject[ing] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 371. It also authorized them to enter the long-distance market. "Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with" competitive local exchange carriers (CLECs). *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 402.

Respondents (hereinafter plaintiffs) represent a class of subscribers of local telephone and/or high-speed Internet services in this action against petitioner ILECs for claimed violations of § 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The complaint alleges that the ILECs conspired to restrain trade (1) by engaging in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs; and (2) by agreeing to refrain from competing against one another, as indicated by their common failure to pursue attractive business opportunities in contiguous markets and by a statement by one ILEC's chief executive officer that competing in another ILEC's territory did not seem right. The District Court dismissed the complaint, concluding that parallel business conduct allegations, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions. Reversing, the Second Circuit held that plaintiffs' parallel conduct allegations were sufficient to withstand a motion to dismiss because the ILECs failed to show that there is no set of facts that would permit plaintiffs to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

Syllabus

Held:

1. Stating a § 1 claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Pp. 553–563.

(a) Because § 1 prohibits "only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 775, "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement," *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 540. While a showing of parallel "business behavior is admissible circumstantial evidence from which" agreement may be inferred, it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id.*, at 540–541. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the behavior's ambiguity: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Thus, this Court has hedged against false inferences from identical behavior at a number of points in the trial sequence, *e. g.*, at the summary judgment stage, see *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574. Pp. 553–554.

(b) This case presents the antecedent question of what a plaintiff must plead in order to state a § 1 claim. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley* v. *Gibson*, 355 U. S. 41, 47. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Applying these general standards to a § 1 claim, stating a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A parallel

conduct allegation gets the § 1 complaint close to stating a claim, but without further factual enhancement it stops short of the line between possibility and plausibility. The requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with "'a largely groundless claim'" from "'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 347. It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. That potential expense is obvious here, where plaintiffs represent a putative class of at least 90 percent of subscribers to local telephone or high-speed Internet service in an action against America's largest telecommunications firms for unspecified instances of antitrust violations that allegedly occurred over a 7-year period. It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest. Plaintiffs' main argument against the plausibility standard at the pleading stage is its ostensible conflict with a literal reading of *Conley*'s statement construing Rule 8: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U. S., at 45–46. The "no set of facts" language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley* described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival. Pp. 554–563.

2. Under the plausibility standard, plaintiffs' claim of conspiracy in restraint of trade comes up short. First, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct, not on any independent allegation of actual agreement among the ILECs. The nub of the complaint is the ILECs' parallel behavior, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience. Nothing in the complaint invests either the action or inaction alleged with a plausible conspiracy suggestion. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, the District Court correctly found that nothing in the complaint intimates that resisting the upstarts was anything more than the natural, unilateral reaction of each

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ILEC intent on preserving its regional dominance. The complaint's general collusion premise fails to answer the point that there was no need for joint encouragement to resist the 1996 Act, since each ILEC had reason to try to avoid dealing with CLECs and would have tried to keep them out, regardless of the other ILECs' actions. Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act to enter into their competitors' territories, leaving the relevant market highly compartmentalized geographically, with minimal competition. This parallel conduct did not suggest conspiracy, not if history teaches anything. Monopoly was the norm in telecommunications, not the exception. Because the ILECs were born in that world, doubtless liked it, and surely knew the adage about him who lives by the sword, a natural explanation for the noncompetition is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same. Antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim. This analysis does not run counter to *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination." Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed. Pp. 564–570.

425 F. 3d 99, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, except as to Part IV, *post*, p. 570.

Michael K. Kellogg argued the cause for petitioners. With him on the briefs were *Mark C. Hansen*, *Aaron M. Panner*, *Richard G. Taranto*, *Stephen M. Shapiro*, *Kenneth S. Geller*, *Richard J. Favretto*, *Timothy Beyer*, *J. Henry Walker*, *Marc W. F. Galonsky*, *John Thorne*, *Paul J. Larkin, Jr.*, *David E. Wheeler*, *Dan K. Webb*, *Cynthia P. Delaney*, *Javier Aguilar*, and *William M. Schur*.

Assistant Attorney General Barnett argued the cause for the United States as *amicus curiae* urging reversal. With

him on the brief were *Solicitor General Clement*, *Deputy Solicitor General Hungar*, *Deanne E. Maynard*, *Catherine G. O'Sullivan*, *James J. O'Connell, Jr.*, and *Hill B. Wellford.*

J. Douglas Richards argued the cause for respondents. With him on the brief was *Michael M. Buchman.**

JUSTICE SOUTER delivered the opinion of the Court.

Liability under § 1 of the Sherman Act, 15 U. S. C. § 1, requires a "contract, combination . . . , or conspiracy, in restraint of trade or commerce." The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to

*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Virginia by *Robert F. McDonnell*, Attorney General of Virginia, *William E. Thro*, State Solicitor General, *Stephen R. McCullough*, Deputy State Solicitor General, *William C. Mims*, Chief Deputy Attorney General, and *Sarah Oxenham Allen*, Assistant Attorney General, by *Orville B. Fitch II*, Deputy Attorney General of New Hampshire, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *John Suthers* of Colorado, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Michael A. Cox* of Michigan, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Larry Long* of South Dakota, *Paul G. Summers* of Tennessee, and *Mark L. Shurtleff* of Utah; for the American Petroleum Institute by *Robert A. Long*, *Theodore P. Metzler*, *Harry M. Ng*, and *Douglas W. Morris;* for the Chamber of Commerce of the United States of America et al. by *Roy T. Englert, Jr.*, *Donald J. Russell*, *Matthew R. Segal*, *John T. Whatley*, *Robin S. Conrad*, *Amar D. Sarwal*, *Michael Field Altschul*, *Jan S. Amundson*, *Quentin Riegel*, *Peter B. Kenney, Jr.*, *Mark S. Popofsky*, *Guy Stephenson*, *Kathryn Fewell*, and *Saul P. Morgenstern;* for Legal Scholars by *Max Huffman;* and for MasterCard International Inc. et al. by *Timothy J. Muris*, *Jonathan D. Hacker*, and *Rebecca H. Farrington.*

Parker C. Folse III filed a brief for the American Antitrust Institute as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Bar Association by *Karen J. Mathis*, *Joseph Angland*, and *Roxann E. Henry;* for Economists by *R. Hewitt Pate;* and for Debra Lyn Bassett et al. by *Eric Alan Isaacson* and *Christopher M. Burke.*

competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

I

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business was a system of regional service monopolies (variously called "Regional Bell Operating Companies," "Baby Bells," or "Incumbent Local Exchange Carriers" (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), 110 Stat. 56, which "fundamentally restructure[d] local telephone markets" and "subject[ed] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 371 (1999). In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market. See 47 U. S. C. § 271.

"Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with competitors," *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 402 (2004), which came to be known as "competitive local exchange carriers" (CLECs), Pet. for Cert. 6, n. 1. A CLEC could make use of an ILEC's network in any of three ways: by (1) "purchas[ing] local telephone services at wholesale rates for resale to end users," (2) "leas[ing] elements of the [ILEC's] network 'on an unbundled basis,'" or (3) "interconnect[ing] its own facilities with the [ILEC's] network." *Iowa Utilities Bd.*, *supra*, at 371 (quoting 47 U. S. C. § 251(c)). Owing to the "considerable expense and effort" required to make unbundled network elements available to rivals at wholesale prices, *Trinko*, *supra*, at 410, the ILECs vigorously litigated the scope of the sharing obligation imposed by the 1996 Act, with the result that the Federal Communications Commission (FCC) three times

revised its regulations to narrow the range of network elements to be shared with the CLECs. See *Covad Communications Co.* v. *FCC*, 450 F. 3d 528, 533–534 (CADC 2006) (summarizing the 10-year-long regulatory struggle between the ILECs and CLECs).

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all "subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) ¶ 53, App. 28 (hereinafter Complaint). In this action against petitioners, a group of ILECs,[1] plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth of upstart CLECs. Complaint ¶ 47, App. 23–26. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. *Ibid.* According to the complaint, the ILECs'

[1] The 1984 divestiture of AT&T's local telephone service created seven Regional Bell Operating Companies. Through a series of mergers and acquisitions, those seven companies were consolidated into the four ILECs named in this suit: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (successor-in-interest to Bell Atlantic Corporation). Complaint ¶ 21, App. 16. Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States. *Id.*, ¶ 48, App. 26.

"compelling common motivatio[n]" to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; "[h]ad any one [ILEC] not sought to prevent CLECs . . . from competing effectively . . . , the resulting greater competitive inroads into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct." *Id.*, ¶ 50, App. 26–27.

Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure "meaningfully [to] pursu[e]" "attractive business opportunit[ies]" in contiguous markets where they possessed "substantial competitive advantages," *id.*, ¶¶ 40–41, App. 21–22, and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC "'might be a good way to turn a quick dollar but that doesn't make it right,'" *id.*, ¶ 42, App. 22.

The complaint couches its ultimate allegations this way:

> "In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id.*, ¶ 51, App. 27.[2]

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[2] In setting forth the grounds for § 1 relief, the complaint repeats these allegations in substantially similar language:

"Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to pre-

The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The District Court acknowledged that "plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement," but emphasized that "while '[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, . . .] "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.' " 313 F. Supp. 2d 174, 179 (2003) (quoting *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 (1954); alterations in original). Thus, the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that "ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." 313 F. Supp. 2d, at 179. The District Court found plaintiffs' allegations of parallel ILEC actions to discourage competition inadequate because "the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id.*, at 183. As to the ILECs' supposed agreement against competing with each other, the District Court found that the complaint does not "alleg[e] facts . . . suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests, and consequently [does] not rais[e] an inference that [the ILECs'] actions were the result of a conspiracy." *Id.*, at 188.

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vent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Act." *Id.*, ¶ 64, App. 30–31.

The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal." 425 F. 3d 99, 114 (2005) (emphasis in original). Although the Court of Appeals took the view that plaintiffs must plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," it then said that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Ibid.*

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, 548 U. S. 903 (2006), and now reverse.

II

A

Because § 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 775 (1984), "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express," *Theatre Enterprises*, 346 U. S., at 540. While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id.*, at 540–541. Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output deci-

sions" is "not in itself unlawful." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U. S. 209, 227 (1993); see 6 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1433a, p. 236 (2d ed. 2003) (hereinafter Areeda & Hovenkamp) ("The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act § 1"); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 672 (1962) ("[M]ere interdependence of basic price decisions is not conspiracy").

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. See, *e. g.*, AEI-Brookings Joint Center for Regulatory Studies, Epstein, Motions to Dismiss Antitrust Cases: Separating Fact from Fantasy, Related Publication 06–08, pp. 3–4 (2006) (discussing problem of "false positives" in § 1 suits). Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, see *Theatre Enterprises*, *supra;* proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, see *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984); and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, see *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986).

B

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the

Sherman Act. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; *Sanjuan* v. *American Bd. of Psychiatry and Neurology, Inc.*, 40 F. 3d 247, 251 (CA7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan* v. *Allain*, 478 U. S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"),[3] on the assumption that all the allegations in the complaint are true (even if doubtful in fact), see, *e. g.*, *Swierkiewicz* v.

[3] The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. See *post*, at 580 (opinion of STEVENS, J.) (pleading standard of Federal Rules "does not require, or even invite, the pleading of facts"). While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957) (emphasis added), Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

Sorema N. A., 534 U. S. 506, 508, n. 1 (2002); *Neitzke* v. *Williams*, 490 U. S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.[4] And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and "that a recovery is very remote and unlikely." *Ibid.* In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without

[4] Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard. See, *e. g.*, 6 Areeda & Hovenkamp ¶ 1425, at 167–185 (discussing "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties"); Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N. Y. L. S. L. Rev. 881, 899 (1979) (describing "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement"). The parties in this case agree that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason," would support a plausible inference of conspiracy. Brief for Respondents 37; see also Reply Brief for Petitioners 12.

more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief." Cf. *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F. 3d 53, 56 (CA1 1999) ("[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court is not required to accept such terms as a sufficient basis for a complaint").[5]

We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336 (2005), when we explained that something beyond the mere possibility of loss causation must be

[5] The border in *DM Research* was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability.

alleged, lest a plaintiff with "'a largely groundless claim'" be allowed to "'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id.*, at 347 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 741 (1975)). So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" 5 Wright & Miller § 1216, at 233–234 (quoting *Daves* v. *Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (Haw. 1953)); see also *Dura*, *supra*, at 346; *Asahi Glass Co.* v. *Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (ND Ill. 2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 528, n. 17 (1983), "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." See also *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F. 2d 1101, 1106 (CA7 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 N. Y. U. L. Rev. 1887, 1898–1899 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Lit-

igation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F. R. D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed). That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," *post*, at 573, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, *e. g.*, Easterbrook, Discovery as Abuse, 69 B. U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves"). And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," *post*, at 573; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a § 1 claim. *Dura*,

544 U. S., at 347 (quoting *Blue Chip Stamps*, *supra*, at 741; alteration in *Dura*).[6]

Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises*, *Monsanto*, and *Matsushita*, and their main argument against the plausibility standard at the pleading stage is its ostensible

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[6] The dissent takes heart in the reassurances of plaintiffs' counsel that discovery would be "'"phased"'" and "limited to the existence of the alleged conspiracy and class certification." *Post*, at 593. But determining whether some illegal agreement may have taken place between unspecified persons at different ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to the kind of line drawing and case management that the dissent envisions. Perhaps the best answer to the dissent's optimism that antitrust discovery is open to effective judicial control is a more extensive quotation of the authority just cited, a judge with a background in antitrust law. Given the system that we have, the hope of effective judicial supervision is slim:

"The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive' discovery except in theory, because in practice we lack essential information." Easterbrook, Discovery as Abuse, 69 B. U. L. Rev. 635, 638–639 (1989) (footnote omitted).

conflict with an early statement of ours construing Rule 8. Justice Black's opinion for the Court in *Conley* v. *Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U. S., at 45–46. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard, see 425 F. 3d, at 106, 114 (invoking *Conley*'s "no set of facts" language in describing the standard for dismissal).[7]

On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single

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[7] The Court of Appeals also relied on Chief Judge Clark's suggestion in *Nagler* v. *Admiral Corp.*, 248 F. 2d 319 (CA2 1957), that facts indicating parallel conduct alone suffice to state a claim under § 1. 425 F. 3d, at 114 (citing *Nagler*, *supra*, at 325). But *Nagler* gave no explanation for citing *Theatre Enterprises* (which upheld a denial of a directed verdict for plaintiff on the ground that proof of parallelism was not proof of conspiracy) as authority that pleading parallel conduct sufficed to plead a Sherman Act conspiracy. Now that *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), and *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986), have made it clear that neither parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy, it is time for a fresh look at adequacy of pleading when a claim rests on parallel action.

fact in a context that suggests an agreement. 425 F. 3d, at 106, 114. It seems fair to say that this approach to pleading would dispense with any showing of a "'reasonably founded hope'" that a plaintiff would be able to make a case, see *Dura*, 544 U. S., at 347 (quoting *Blue Chip Stamps*, 421 U. S., at 741); Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. See, *e. g.*, *Car Carriers*, 745 F. 2d, at 1106 ("*Conley* has never been interpreted literally" and, "[i]n practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory" (internal quotation marks omitted; emphasis and omission in original)); *Ascon Properties, Inc.* v. *Mobil Oil Co.*, 866 F. 2d 1149, 1155 (CA9 1989) (tension between *Conley*'s "no set of facts" language and its acknowledgment that a plaintiff must provide the "grounds" on which his claim rests); *O'Brien* v. *DiGrazia*, 544 F. 2d 543, 546, n. 3 (CA1 1976) ("[W]hen a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional . . . action into a substantial one"); *McGregor* v. *Industrial Excess Landfill, Inc.*, 856 F. 2d 39, 42–43 (CA6 1988) (quoting *O'Brien*'s analysis); Hazard, From Whom No Secrets Are Hid, 76 Texas L. Rev. 1665, 1685 (1998) (describing *Conley* as having "turned Rule 8 on its head"); Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 463–465 (1986) (noting tension between *Conley* and subsequent understandings of Rule 8).

We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the com-

plaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. See *Sanjuan*, 40 F. 3d, at 251 (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint"); accord, *Swierkiewicz*, 534 U. S., at 514; *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 256 (1994); *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 249–250 (1989); *Hishon* v. *King & Spalding*, 467 U. S. 69, 73 (1984). *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.[8]

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[8] Because *Conley*'s "'no set of facts'" language was one of our earliest statements about pleading under the Federal Rules, it is no surprise that it has since been "cited as authority" by this Court and others. *Post*, at 577. Although we have not previously explained the circumstances and rejected the literal reading of the passage embraced by the Court of Appeals, our analysis comports with this Court's statements in the years since *Conley*. See *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 347 (2005) (requiring "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support the claim (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 741 (1975); alteration in *Dura*)); *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 526 (1983) ("It is not . . . proper to assume that [the plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged"); *Wilson* v. *Schnettler*, 365 U. S. 381, 383 (1961) ("In the absence of . . . an allegation [that the arrest was made without probable cause] the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause to believe that he had committed . . . a narcotics offense"). Nor are

III

When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. *Supra*, at 550–551. Although in form a few stray statements speak directly of agreement,[9] on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the com-

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we reaching out to decide this issue in a case where the matter was not raised by the parties, see *post*, at 579, since both the ILECs and the Government highlight the problems stemming from a literal interpretation of *Conley*'s "no set of facts" language and seek clarification of the standard. Brief for Petitioners 27–28; Brief for United States as *Amicus Curiae* 22–25; see also Brief for Respondents 17 (describing "[p]etitioners and their amici" as mounting an "attack on *Conley*'s 'no set of facts' standard").

The dissent finds relevance in Court of Appeals precedents from the 1940s, which allegedly gave rise to *Conley*'s "no set of facts" language. See *post*, at 580–583. Even indulging this line of analysis, these cases do not challenge the understanding that, before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct. See, *e. g.*, *Leimer* v. *State Mut. Life Assurance Co. of Worcester, Mass.*, 108 F. 2d 302, 305 (CA8 1940) ("'[I]f, in view of what is alleged, it can reasonably be conceived that the plaintiffs . . . could, upon a trial, establish a case which would entitle them to . . . relief, the motion to dismiss should not have been granted'"); *Continental Collieries, Inc.* v. *Shober*, 130 F. 2d 631, 635 (CA3 1942) ("No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it"). Rather, these cases stand for the unobjectionable proposition that, when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. Cf. *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974) (a district court weighing a motion to dismiss asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

[9] See Complaint ¶¶ 51, 64, App. 27, 30–31 (alleging that ILECs engaged in a "contract, combination or conspiracy" and agreed not to compete with one another).

plaint first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another." Complaint ¶ 51, App. 27.[10] The nub of the complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.[11]

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[10] If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by Rule 8. Apart from identifying a 7-year span in which the § 1 violations were supposed to have occurred (*i. e.*, "[b]eginning at least as early as February 6, 1996, and continuing to the present," *id.*, ¶ 64, App. 30), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. *Post*, at 576. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.

[11] The dissent's quotations from the complaint leave the impression that plaintiffs directly allege illegal agreement; in fact, they proceed exclusively via allegations of parallel conduct, as both the District Court and Court of Appeals recognized. See 313 F. Supp. 2d 174, 182 (SDNY 2003); 425 F. 3d 99, 102–104 (CA2 2005).

We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, see *id.*, ¶ 47, App. 23–24, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

The complaint makes its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one CLEC in an ILEC's territory "would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories." *Id.*, ¶ 50, App. 26–27. But, its logic aside, this general premise still fails to answer the point that there was just no need for joint encouragement to resist the 1996 Act; as the District Court said, "each ILEC has reason to want to avoid dealing with CLECs" and "each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." 313 F. Supp. 2d, at 184; cf. *Kramer* v. *Pollock-Krasner Foundation*, 890 F. Supp. 250, 256 (SDNY 1995) (while the plaintiff "may believe the defendants conspired . . . , the defendants' allegedly conspiratorial ac-

tions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy").[12]

Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was supposedly passed in the "'hop[e] that the large incumbent local monopoly companies . . . might attack their neighbors' service areas, as they are the best situated to do so.'" Complaint ¶ 38, App. 20 (quoting Consumer Federation of America, Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster, p. 12 (Feb. 2000)). Contrary to hope, the ILECs declined "'to enter each other's service territories in any significant way,'" Complaint ¶ 38, App. 20, and the local telephone and high-speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with "especially attractive business opportunities" in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was "strongly suggestive of conspiracy." *Id.*, ¶ 40, App. 21.

But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade

[12] From the allegation that the ILECs belong to various trade associations, see Complaint ¶ 46, App. 23, the dissent playfully suggests that they conspired to restrain trade, an inference said to be "buttressed by the common sense of Adam Smith." *Post*, at 591, 594. If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag.

preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. See *Verizon Communications Inc.* v. *FCC*, 535 U. S. 467, 477–478 (2002) (describing telephone service providers as traditional public monopolies). The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

In fact, the complaint itself gives reasons to believe that the ILECs would see their best interests in keeping to their old turf. Although the complaint says generally that the ILECs passed up "especially attractive business opportunit[ies]" by declining to compete as CLECs against other ILECs, Complaint ¶ 40, App. 21, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period,[13] and the complaint is replete with indications that any CLEC faced nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act, *id.*, ¶ 47, App.

[13] The complaint quoted a reported statement of Qwest's CEO, Richard Notebaert, to suggest that the ILECs declined to compete against each other despite recognizing that it "'might be a good way to turn a quick dollar.'" ¶ 42, App. 22 (quoting Chicago Tribune, Oct. 31, 2002, Business Section, p. 1). This was only part of what he reportedly said, however, and the District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. See Fed. Rule Evid. 201.

Notebaert was also quoted as saying that entering new markets as a CLEC would not be "a sustainable economic model" because the CLEC pricing model is "just . . . nuts." Chicago Tribune, Oct. 31, 2002, Business Section, p. 1 (cited at Complaint ¶ 42, App. 22). Another source cited in the complaint quotes Notebaert as saying he thought it "unwise" to "base a business plan" on the privileges accorded to CLECs under the 1996 Act because the regulatory environment was too unstable. Chicago Tribune, Dec. 19, 2002, Business Section, p. 2 (cited at Complaint ¶ 45, App. 23).

23–26. Not only that, but even without a monopolistic tradition and the peculiar difficulty of mandating shared networks, "[f]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." Areeda & Hovenkamp ¶ 307d, at 155 (Supp. 2006) (commenting on the case at bar). The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim.[14]

Plaintiffs say that our analysis runs counter to *Swierkiewicz*, 534 U. S., at 508, which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973)." They argue that just as the prima facie case is a "flexible evidentiary standard" that "should not be transposed into a rigid pleading standard for discrimination cases," *Swierkiewicz*, *supra*, at 512, "transpos[ing] 'plus factor' summary judgment analysis woodenly into a rigid Rule 12(b)(6) pleading standard . . . would be unwise," Brief for Respondents 39. As the District Court

[14] In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished "'by the process of amending the Federal Rules, and not by judicial interpretation.'" *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 515 (2002) (quoting *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168 (1993)). On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Fed. Rules Civ. Proc. 9(b)–(c). Here, our concern is not that the allegations in the complaint were insufficiently "particular[ized]," *ibid.;* rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.

correctly understood, however, "*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." 313 F. Supp. 2d, at 181 (citation and footnote omitted). Even though Swierkiewicz's pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court of Appeals dismissed his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. *Swierkiewicz*, 534 U. S., at 514. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief. *Id.*, at 508.

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

* * *

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

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins except as to Part IV, dissenting.

In the first paragraph of its 23-page opinion the Court states that the question to be decided is whether allegations that "major telecommunications providers engaged in certain

parallel conduct unfavorable to competition" suffice to state a violation of § 1 of the Sherman Act. *Ante*, at 548–549. The answer to that question has been settled for more than 50 years. If that were indeed the issue, a summary reversal citing *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537 (1954), would adequately resolve this case. As *Theatre Enterprises* held, parallel conduct is circumstantial evidence admissible on the issue of conspiracy, but it is not itself illegal. *Id.*, at 540–542.

Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. The plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not "plausible" provide a legally acceptable reason for dismissing the complaint? I think not.

Respondents' amended complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners

> "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) ¶ 51, App. 27 (hereinafter Complaint).

The complaint explains that, contrary to Congress' expectation when it enacted the 1996 Telecommunications Act, and consistent with their own economic self-interests, petitioner Incumbent Local Exchange Carriers (ILECs) have assiduously avoided infringing upon each other's markets and have

refused to permit nonincumbent competitors to access their networks. The complaint quotes Richard Notebaert, the former chief executive officer of one such ILEC, as saying that competing in a neighboring ILEC's territory " 'might be a good way to turn a quick dollar but that doesn't make it right.' " *Id.*, ¶ 42, App. 22. Moreover, respondents allege that petitioners "communicate amongst themselves" through numerous industry associations. *Id.*, ¶ 46, App. 23. In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* violation of the Sherman Act. See Report of the Attorney General's National Committee to Study the Antitrust Laws 26 (1955).

Under rules of procedure that have been well settled since well before our decision in *Theatre Enterprises,* a judge ruling on a defendant's motion to dismiss a complaint "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 508, n. 1 (2002); see *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 127 (1943). But instead of requiring knowledgeable executives such as Notebaert to respond to these allegations by way of sworn depositions or other limited discovery—and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement—the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway," *ante,* at 566; that "there was just no need for joint encouragement to resist the 1996 Act," *ibid.;* and that the "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing," *ante,* at 568.

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the ab-

sence of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners "agreed not to compete with one another" is not just one of "a few stray statements," *ante*, at 564; it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

I

Rule 8(a)(2) of the Federal Rules requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The Rule did not come about by happenstance, and its language is not inadvertent. The English experience with Byzantine special pleading rules—illustrated by the hypertechnical Hilary rules of

1834[1]—made obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N. Y. Laws pp. 497, 521. Substantially similar language appeared in the Federal Equity Rules adopted in 1912. See Fed. Equity Rule 25 (requiring "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence").

A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead "facts" rather than "conclusions," a distinction that proved far easier to say than to apply. As commentators have noted,

> "it is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence,' and 'conclusions.' Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described." Weinstein & Distler, Comments on Procedural Reform: Drafting Pleading Rules, 57 Colum. L. Rev. 518, 520–521 (1957).

See also Cook, Statements of Fact in Pleading Under the Codes, 21 Colum. L. Rev. 416, 417 (1921) (hereinafter Cook) ("[T]here is no logical distinction between statements which are grouped by the courts under the phrases 'statements of

[1] See 9 W. Holdsworth, History of English Law 324–327 (1926).

fact' and 'conclusions of law' "). Rule 8 was directly responsive to this difficulty. Its drafters intentionally avoided any reference to "facts" or "evidence" or "conclusions." See 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, p. 207 (3d ed. 2004) (hereinafter Wright & Miller) ("The substitution of 'claim showing that the pleader is entitled to relief' for the code formulation of the 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions' . . . ").

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz*, 534 U. S., at 514 ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim"). Charles E. Clark, the "principal draftsman" of the Federal Rules,[2] put it thus:

> "Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A. B. A. J. 976, 977 (1937) (hereinafter Clark, New Federal Rules).

The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9,

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[2] *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 283 (1988).

a complaint for negligence. As relevant, the Form 9 complaint states only: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Form 9, Complaint for Negligence, Forms App., Fed. Rules Civ. Proc., 28 U. S. C. App., p. 829 (hereinafter Form 9). The complaint then describes the plaintiff's injuries and demands judgment. The asserted ground for relief—namely, the defendant's negligent driving—would have been called a "'conclusion of law'" under the code pleading of old. See, *e. g.*, Cook 419. But that bare allegation suffices under a system that "restrict[s] the pleadings to the task of general notice-giving and invest[s] the deposition-discovery process with a vital role in the preparation for trial."[3] *Hickman* v. *Taylor*, 329 U. S. 495, 501 (1947); see also *Swierkiewicz*, 534 U. S., at 513, n. 4 (citing Form 9 as an example of "'the simplicity and brevity of statement which the rules contemplate'"); *Thomson* v. *Washington*, 362 F. 3d 969, 970 (CA7 2004) (Posner, J.) ("The federal rules replaced fact pleading with notice pleading").

II

It is in the context of this history that *Conley* v. *Gibson*, 355 U. S. 41 (1957), must be understood. The *Conley* plaintiffs were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing

[3] The Federal Rules do impose a "particularity" requirement on "all averments of fraud or mistake," Fed. Rule Civ. Proc. 9(b), neither of which has been alleged in this case. We have recognized that the canon of *expresio unius est exclusio alterius* applies to Rule 9(b). See *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168 (1993).

for a unanimous Court, Justice Black rejected the union's claim as foreclosed by the language of Rule 8. *Id.*, at 47–48. In the course of doing so, he articulated the formulation the Court rejects today: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*, at 45–46.

Consistent with the design of the Federal Rules, *Conley*'s "no set of facts" formulation permits outright dismissal only when proceeding to discovery or beyond would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process. Today, however, in its explanation of a decision to dismiss a complaint that it regards as a fishing expedition, the Court scraps *Conley*'s "no set of facts" language. Concluding that the phrase has been "questioned, criticized, and explained away long enough," *ante*, at 562, the Court dismisses it as careless composition.

If *Conley*'s "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzl[ed] the profession for 50 years," *ante*, at 563, has been cited as authority in a dozen opinions of this Court and four separate writings.[4] In not one of

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[4] *SEC* v. *Zandford*, 535 U. S. 813, 818 (2002); *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 654 (1999); *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764, 811 (1993); *Brower* v. *County of Inyo*, 489 U. S. 593, 598 (1989); *Hughes* v. *Rowe*, 449 U. S. 5, 10 (1980) *(per curiam); McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U. S. 232, 246 (1980); *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U. S. 738, 746 (1976); *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974); *Cruz* v. *Beto*, 405 U. S. 319, 322 (1972) *(per curiam); Haines* v. *Kerner*, 404 U. S. 519, 521 (1972) *(per curiam); Jenkins* v. *McKeithen*, 395 U. S. 411, 422 (1969) (plurality opinion); see also *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 554 (1985) (Brennan, J., concurring in part and

those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears "beyond doubt" that "no set of facts" in support of the claim would entitle the plaintiff to relief.[5]

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dissenting in part); *Hoover* v. *Ronwin*, 466 U. S. 558, 587 (1984) (STEVENS, J., dissenting); *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 561, n. 1 (1977) (Marshall, J., dissenting); *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 55, n. 6 (1976) (Brennan, J., concurring in judgment).

[5] See, *e. g.*, *EB Invs., LLC* v. *Atlantis Development, Inc.*, 930 So. 2d 502, 507 (Ala. 2005); *Department of Health & Social Servs.* v. *Native Village of Curyung*, 151 P. 3d 388, 396 (Alaska 2006); *Newman* v. *Maricopa Cty.*, 167 Ariz. 501, 503, 808 P. 2d 1253, 1255 (App. 1991*); Public Serv. Co. of Colo.* v. *Van Wyk*, 27 P. 3d 377, 385–386 (Colo. 2001) (en banc); *Clawson* v. *St. Louis Post-Dispatch, LLC*, 906 A. 2d 308, 312 (D. C. 2006); *Hillman Constr. Corp.* v. *Wainer*, 636 So. 2d 576, 578 (Fla. App. 1994); *Kaplan* v. *Kaplan*, 266 Ga. 612, 613, 469 S. E. 2d 198, 199 (1996); *Wright* v. *Home Depot U. S. A., Inc.*, 111 Haw. 401, 406, 142 P. 3d 265, 270 (2006); *Taylor* v. *Maile*, 142 Idaho 253, 257, 127 P. 3d 156, 160 (2005); *Fink* v. *Bryant*, 2001–CC–0987, p. 4 (La. 11/28/01), 801 So. 2d 346, 349; *Gagne* v. *Cianbro Corp.*, 431 A. 2d 1313, 1318–1319 (Me. 1981); *Gasior* v. *Massachusetts Gen. Hospital*, 446 Mass. 645, 647, 846 N. E. 2d 1133, 1135 (2006); *Ralph Walker, Inc.* v. *Gallagher*, 926 So. 2d 890, 893 (Miss. 2006); *Jones* v. *Montana Univ. System*, 337 Mont. 1, 7, 155 P. 3d 1247, 1252 (2007); *Johnston* v. *Nebraska Dept. of Correctional Servs.*, 270 Neb. 987, 989, 709 N. W. 2d 321, 324 (2006); *Blackjack Bonding* v. *Las Vegas Munic. Ct.*, 116 Nev. 1213, 1217, 14 P. 3d 1275, 1278 (2000); *Shepard* v. *Ocwen Fed. Bank*, 361 N. C. 137, 139, 638 S. E. 2d 197, 199 (2006); *Rose* v. *United Equitable Ins. Co.*, 2001 ND 154, ¶ 10, 632 N. W. 2d 429, 434; *State ex rel. Turner* v. *Houk*, 112 Ohio St. 3d 561, 562, 2007–Ohio–814, ¶ 5, 862 N. E. 2d 104, 105 *(per curiam); Moneypenney* v. *Dawson*, 2006 OK 53, ¶ 2, 141 P. 3d 549, 551; *Gagnon* v. *State*, 570 A. 2d 656, 659 (R. I. 1990); *Osloond* v. *Farrier*, 2003 SD 28, ¶ 4, 659 N. W. 2d 20, 22 *(per curiam); Smith* v. *Lincoln Brass Works, Inc.*, 712 S. W. 2d 470, 471 (Tenn. 1986); *Association of Haystack Property Owners, Inc.* v. *Sprague*, 145 Vt. 443, 446, 494 A. 2d 122, 124 (1985); *In re Coday*,

Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of petitioners. I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process—a rulemaking process—for revisions of that order. See 28 U. S. C. §§2072–2074 (2000 ed. and Supp. IV).

Today's majority calls *Conley*'s "'no set of facts'" language "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be

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156 Wash. 2d 485, 497, 130 P. 3d 809, 815 (2006) (en banc); *Haines* v. *Hampshire Cty. Comm'n*, 216 W. Va. 499, 502, 607 S. E. 2d 828, 831 (2004); *Warren* v. *Hart*, 747 P. 2d 511, 512 (Wyo. 1987); see also *Malpiede* v. *Townson*, 780 A. 2d 1075, 1082–1083 (Del. 2001) (permitting dismissal only "where the court determines with reasonable certainty that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint" (internal quotation marks omitted)); *Canel* v. *Topinka*, 212 Ill. 2d 311, 318, 818 N. E. 2d 311, 317 (2004) (replacing "appears beyond doubt" in the *Conley* formulation with "is clearly apparent"); *In re Young*, 522 N. E. 2d 386, 388 (Ind. 1988) *(per curiam)* (replacing "appears beyond doubt" with "appears to a certainty"); *Barkema* v. *Williams Pipeline Co.*, 666 N. W. 2d 612, 614 (Iowa 2003) (holding that a motion to dismiss should be sustained "only when there exists no conceivable set of facts entitling the non-moving party to relief"); *Pioneer Village* v. *Bullitt Cty.*, 104 S. W. 3d 757, 759 (Ky. 2003) (holding that judgment on the pleadings should be granted "if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief"); *Corley* v. *Detroit Bd. of Ed.*, 470 Mich. 274, 277, 681 N. W. 2d 342, 345 (2004) *(per curiam)* (holding that a motion for judgment on the pleadings should be granted only "'if no factual development could possibly justify recovery'"); *Oberkramer* v. *Ellisville*, 706 S. W. 2d 440, 441 (Mo. 1986) (en banc) (omitting the words "beyond doubt" from the *Conley* formulation); *Colman* v. *Utah State Land Bd.*, 795 P. 2d 622, 624 (Utah 1990) (holding that a motion to dismiss is appropriate "only if it clearly appears that [the plaintiff] can prove no set of facts in support of his claim"); *NRC Management Servs. Corp.* v. *First Va. Bank-Southwest*, 63 Va. Cir. 68, 70 (2003) ("The Virginia standard is identical [to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it").

supported by showing any set of facts consistent with the allegations in the complaint." *Ante*, at 563. This is not and cannot be what the *Conley* Court meant. First, as I have explained, and as the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.[6] The "pleading standard" label the majority gives to what it reads into the *Conley* opinion—a statement of the permissible factual support for an adequately pleaded complaint—would not, therefore, have impressed the *Conley* Court itself. Rather, that Court would have understood the majority's remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate. Second, it is pellucidly clear that the *Conley* Court was interested in what a complaint *must* contain, not what it *may* contain. In fact, the Court said without qualification that it was "appraising the *sufficiency* of the complaint." 355 U. S., at 45 (emphasis added). It was, to paraphrase today's majority, describing "the minimum standard of adequate pleading to govern a complaint's survival," *ante*, at 563.

We can be triply sure as to *Conley*'s meaning by examining the three Court of Appeals cases the *Conley* Court cited as support for the "accepted rule" that "a complaint should not

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[6] The majority is correct to say that what the Federal Rules require is a "'showing'" of entitlement to relief. *Ante*, at 555, n. 3. Whether and to what extent that "showing" requires allegations of fact will depend on the particulars of the claim. For example, had the amended complaint in this case alleged *only* parallel conduct, it would not have made the required "showing." See *supra*, at 570–571. Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of "bareness" with which the Federal Rules are concerned. A plaintiff's inability to persuade a district court that the allegations actually included in her complaint are "plausible" is an altogether different kind of failing, and one that should not be fatal at the pleading stage.

be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U. S., at 45–46. In the first case, *Leimer* v. *State Mut. Life Assurance Co. of Worcester, Mass.*, 108 F. 2d 302 (CA8 1940), the plaintiff alleged that she was the beneficiary of a life insurance plan and that the insurance company was wrongfully withholding proceeds from her. In reversing the District Court's grant of the defendant's motion to dismiss, the Eighth Circuit noted that court's own longstanding rule that, to warrant dismissal, "'it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.'" *Id.*, at 305 (quoting *Winget* v. *Rockwood*, 69 F. 2d 326, 329 (CA8 1934)).

The *Leimer* court viewed the Federal Rules—specifically Rules 8(a)(2), 12(b)(6), 12(e) (motion for a more definite statement), and 56 (motion for summary judgment)—as reinforcing the notion that "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." 108 F. 2d, at 306. The court refuted in the strongest terms any suggestion that the unlikelihood of recovery should determine the fate of a complaint: "No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint." *Ibid.*

The Third Circuit relied on *Leimer*'s admonition in *Continental Collieries, Inc.* v. *Shober*, 130 F. 2d 631 (1942), which the *Conley* Court also cited in support of its "no set of facts" formulation. In a diversity action the plaintiff alleged breach of contract, but the District Court dismissed the complaint on the ground that the contract appeared to be unenforceable under state law. The Court of Appeals reversed,

concluding that there were facts in dispute that went to the enforceability of the contract, and that the rule at the pleading stage was as in *Leimer:* "No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." 130 F. 3d, at 635.

The third case the *Conley* Court cited approvingly was written by Judge Clark himself. In *Dioguardi* v. *Durning*, 139 F. 2d 774 (CA2 1944), the *pro se* plaintiff, an importer of "tonics," charged the customs inspector with auctioning off the plaintiff's former merchandise for less than was bid for it—and indeed for an amount equal to the plaintiff's own bid—and complained that two cases of tonics went missing three weeks before the sale. The inference, hinted at by the averments but never stated in so many words, was that the defendant fraudulently denied the plaintiff his rightful claim to the tonics, which, if true, would have violated federal law. Writing six years after the adoption of the Federal Rules he held the lead rein in drafting, Judge Clark said that the defendant

> "could have disclosed the facts from his point of view, in advance of a trial if he chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting." *Id.*, at 775.

As any civil procedure student knows, Judge Clark's opinion disquieted the defense bar and gave rise to a movement to revise Rule 8 to require a plaintiff to plead a "'cause of action.'" See 5 Wright & Miller § 1201, at 86–87. The movement failed, see *ibid.; Dioguardi* was explicitly approved in *Conley;* and "[i]n retrospect the case itself seems to be a

routine application of principles that are universally accepted," 5 Wright & Miller § 1220, at 284–285.

In light of *Leimer*, *Continental Collieries*, and *Dioguardi*, *Conley*'s statement that a complaint is not to be dismissed unless "no set of facts" in support thereof would entitle the plaintiff to relief is hardly "puzzling," *ante*, at 562–563. It reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process. *Conley*'s language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts.

We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley*. For example, in *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), we reversed the Court of Appeals' dismissal on the pleadings when the respondents, the Governor and other officials of the State of Ohio, argued that the petitioners' claims were barred by sovereign immunity. In a unanimous opinion by then-Justice Rehnquist, we emphasized:

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*" *Id.*, at 236 (emphasis added).

The *Rhodes* plaintiffs had "alleged generally and in conclusory terms" that the defendants, by calling out the National Guard to suppress the Kent State University student protests, "were guilty of wanton, wilful and negligent conduct." *Krause* v. *Rhodes*, 471 F. 2d 430, 433 (CA6 1972). We reversed the Court of Appeals on the ground that "[w]hatever

the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure," were not barred by the Eleventh Amendment because they were styled as suits against the defendants in their individual capacities. 416 U. S., at 238.

We again spoke with one voice against efforts to expand pleading requirements beyond their appointed limits in *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U. S. 163 (1993). Writing for the unanimous Court, Chief Justice Rehnquist rebuffed the Fifth Circuit's effort to craft a standard for pleading municipal liability that accounted for "the enormous expense involved today in litigation," *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit,* 954 F. 2d 1054, 1057 (1992) (internal quotation marks omitted), by requiring a plaintiff to "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity," 507 U. S., at 167 (internal quotation marks omitted). We found this language inconsistent with Rules 8(a)(2) and 9(b) and emphasized that motions to dismiss were not the place to combat discovery abuse: "In the absence of [an amendment to Rule 9(b)], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.,* at 168–169.

Most recently, in *Swierkiewicz,* 534 U. S. 506, we were faced with a case more similar to the present one than the majority will allow. In discrimination cases, our precedents require a plaintiff at the summary judgment stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting evidentiary burdens imposed under the framework articulated in *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973). See, *e. g., Trans World Airlines, Inc.* v. *Thur-*

ston, 469 U. S. 111, 121 (1985). Swierkiewicz alleged that he had been terminated on account of national origin in violation of Title VII of the Civil Rights Act of 1964. The Second Circuit dismissed the suit on the pleadings because he had not pleaded a prima facie case of discrimination under the *McDonnell Douglas* standard.

We reversed in another unanimous opinion, holding that "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Swierkiewicz*, 534 U. S., at 511. We also observed that Rule 8(a)(2) does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.*, at 512; see Brief for United States et al. as *Amici Curiae* in *Swierkiewicz* v. *Sorema N. A.*, O. T. 2001, No. 00–1853, p. 10 (stating that a Rule 12(b)(6) motion is not "an appropriate device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint" (internal quotation marks omitted)).[7]

As in the discrimination context, we have developed an evidentiary framework for evaluating claims under § 1 of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy. See *Matsushita Elec. Indus-*

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[7] See also 5 Wright & Miller § 1202, at 89–90 ("[P]leadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel, and to indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this; indeed, history shows that no more can be performed successfully by the pleadings" (footnotes omitted)).

trial Co. v. *Zenith Radio Corp.*, 475 U. S. 574 (1986). Under *Matsushita*, a plaintiff's allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants. In order to survive a Rule 56 motion, a § 1 plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently.'" *Id.*, at 588 (quoting *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 764 (1984)). That is, the plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action." 475 U. S., at 588.

Everything today's majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage. The majority rejects the complaint in this case because—in light of the fact that the parallel conduct alleged is consistent with ordinary market behavior—the claimed conspiracy is "conceivable" but not "plausible," *ante*, at 570. I have my doubts about the majority's assessment of the plausibility of this alleged conspiracy. See Part III, *infra*. But even if the majority's speculation is correct, its "plausibility" standard is irreconcilable with Rule 8 and with our governing precedents. As we made clear in *Swierkiewicz* and *Leatherman*, fear of the burdens of litigation does not justify factual conclusions supported only by lawyers' arguments rather than sworn denials or admissible evidence.

This case is a poor vehicle for the Court's new pleading rule, for we have observed that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample

opportunity for discovery should be granted very sparingly." *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U. S. 738, 746 (1976) (quoting *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962)); see also *Knuth* v. *Erie-Crawford Dairy Cooperative Assn.*, 395 F. 2d 420, 423 (CA3 1968) ("The 'liberal' approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all the details and specific facts relied upon cannot properly be set forth as part of the pleadings"). Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that Congress intended to encourage, rather than discourage, private enforcement of the law. See *Radovich* v. *National Football League*, 352 U. S. 445, 454 (1957) ("Congress itself has placed the private antitrust litigant in a most favorable position . . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws"). It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.

The same year we decided *Conley*, Judge Clark wrote, presciently,

> "I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i. e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally *and antitrust cases in particular.*" Special Pleading in the "Big Case"? in Procedure—The Handmaid of Justice 147, 148 (C. Wright & H. Reasoner eds. 1965) (hereinafter Clark, Special Pleading in the Big Case) (emphasis added).

In this "Big Case," the Court succumbs to the temptation that previous Courts have steadfastly resisted.[8] While the majority assures us that it is not applying any "'heightened'" pleading standard, see *ante,* at 569, n. 14, I shall now explain why I have a difficult time understanding its opinion any other way.

III

The Court does not suggest that an agreement to do what the plaintiffs allege would be permissible under the antitrust laws, see, *e. g., Associated Gen. Contractors of Cal., Inc.* v. *Carpenters,* 459 U. S. 519, 526–527 (1983). Nor does the Court hold that these plaintiffs have failed to allege an injury entitling them to sue for damages under those laws, see *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U. S. 477, 489–490 (1977). Rather, the theory on which the Court per-

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[8] Our decision in *Dura Pharmaceuticals, Inc.* v. *Broudo,* 544 U. S. 336 (2005), is not to the contrary. There, the plaintiffs failed adequately to allege loss causation, a required element in a private securities fraud action. Because it alleged nothing more than that the prices of the securities the plaintiffs purchased were artificially inflated, the *Dura* complaint failed to "provid[e] the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [alleged] misrepresentation." *Id.,* at 347. Here, the failure the majority identifies is not a failure of notice—which "notice pleading" rightly condemns—but rather a failure to satisfy the Court that the agreement alleged might plausibly have occurred. That being a question not of *notice* but of *proof,* it should not be answered without first hearing from the defendants (as apart from their lawyers).

Similarly, in *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters,* 459 U. S. 519 (1983), in which we also found an antitrust complaint wanting, the problem was not that the injuries the plaintiffs alleged failed to satisfy some threshold of plausibility, but rather that the injuries *as alleged* were not "the type that the antitrust statute was intended to forestall." *Id.,* at 540; see *id.,* at 526 ("As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged").

mits dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.

As the Court explains, prior to the enactment of the Telecommunications Act of 1996 the law prohibited the defendants from competing with each other. The new statute was enacted to replace a monopolistic market with a competitive one. The Act did not merely require the regional monopolists to take affirmative steps to facilitate entry to new competitors, see *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 402 (2004); it also permitted the existing firms to compete with each other and to expand their operations into previously forbidden territory. See 47 U. S. C. §271. Each of the defendants decided not to take the latter step. That was obviously an extremely important business decision, and I am willing to presume that each company acted entirely independently in reaching that decision. I am even willing to entertain the majority's belief that any agreement among the companies was unlikely. But the plaintiffs allege in three places in their complaint, ¶¶ 4, 51, 64, App. 11, 27, 30, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)." *Ante*, at 555.

The majority circumvents this obvious obstacle to dismissal by pretending that it does not exist. The Court admits that "in form a few stray statements in the complaint speak directly of agreement," but disregards those allegations by saying that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel conduct. *Ante*, at 564. The Court's dichotomy between factual allegations and "legal conclusions" is the stuff of a bygone era, *supra*, at 574–576. That distinction was a defining feature of code pleading, see generally Clark, The Complaint in

Code Pleading, 35 Yale L. J. 259 (1925–1926), but was conspicuously abolished when the Federal Rules were enacted in 1938. See *United States* v. *Employing Plasterers Assn. of Chicago*, 347 U. S. 186, 188 (1954) (holding, in an antitrust case, that the Government's allegations of effects on interstate commerce must be taken into account in deciding whether to dismiss the complaint "[w]hether these charges be called 'allegations of fact' or 'mere conclusions of the pleader' "); *Brownlee* v. *Conine*, 957 F. 2d 353, 354 (CA7 1992) ("The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, . . . so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliché means, does not automatically condemn it"); *Walker Distributing Co.* v. *Lucky Lager Brewing Co.*, 323 F. 2d 1, 3–4 (CA9 1963) ("[O]ne purpose of Rule 8 was to get away from the highly technical distinction between statements of fact and conclusions of law . . . "); *Oil, Chemical & Atomic Workers Int'l Union* v. *Delta*, 277 F. 2d 694, 697 (CA6 1960) ("Under the notice system of pleading established by the Rules of Civil Procedure, . . . the ancient distinction between pleading 'facts' and 'conclusions' is no longer significant"); 5 Wright & Miller § 1218, at 267 ("[T]he federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties"). "Defendants entered into a contract" is no more a legal conclusion than "defendant negligently drove," see Form 9; *supra*, at 575–576. Indeed it is less of one.[9]

[9] The Court suggests that the allegation of an agreement, even if credited, might not give the notice required by Rule 8 because it lacks specificity. *Ante*, at 565, n. 10. The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a Rule 12(e) motion for a more definite statement. See *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 514 (2002). Petitioners made no such motion and indeed have conceded that "[o]ur problem with the current complaint is not a lack of specificity, it's quite specific." Tr. of Oral Arg. 14. Thus, the fact that "the pleadings mentioned no specific time, place, or persons involved in the alleged conspiracies," *ante*, at 565, n. 10, is, for our purposes, academic.

Even if I were inclined to accept the Court's anachronistic dichotomy and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." Many years ago a truly great economist perceptively observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, in 39 Great Books of the Western World 55 (R. Hutchins & M. Adler eds. 1952). I am not so cynical as to accept that sentiment at face value, but I need not do so here. Respondents' complaint points not only to petitioners' numerous opportunities to meet with each other, Complaint ¶ 46, App. 23,[10] but also to Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right," *id.*, ¶ 42, App. 22. What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would be in his company's economic self-interest to compete with its brethren, he had agreed with his competitors not to do so. According to the complaint, that is how the Illinois Coalition for Competitive Telecom construed Notebaert's statement, *id.*, ¶ 44, App. 22 (calling the statement "evidence of potential collusion among regional Bell phone monopolies to not com-

[10] The Court describes my reference to the allegation that the defendants belong to various trade associations as "playfully" suggesting that the defendants conspired to restrain trade. *Ante*, at 567, n. 12. Quite the contrary: An allegation that competitors meet on a regular basis, like the allegations of parallel conduct, is consistent with—though not sufficient to prove—the plaintiffs' entirely serious and unequivocal allegation that the defendants entered into an unlawful agreement. Indeed, if it were true that the plaintiffs "rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs," *ante*, at 564, there would have been no purpose in including a reference to the trade association meetings in the amended complaint.

pete against one another and kill off potential competitors in local phone service"), and that is how Members of Congress construed his company's behavior, *id.*, ¶ 45, App. 23 (describing a letter to the Justice Department requesting an investigation into the possibility that the ILECs' "'very apparent non-competition policy'" was coordinated).

Perhaps Notebaert meant instead that competition would be sensible in the short term but not in the long run. That's what his lawyers tell us anyway. See Brief for Petitioners 36. But I would think that no one would know better what Notebaert meant than Notebaert himself. Instead of permitting respondents to ask Notebaert, however, the Court looks to other quotes from that and other articles and decides that what he meant was that entering new markets as a competitive local exchange carrier would not be a "'sustainable economic model.'" *Ante*, at 568, n. 13. Never mind that—as anyone ever interviewed knows—a newspaper article is hardly a verbatim transcript; the writer selects quotes to package his story, not to record a subject's views for posterity. But more importantly the District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor.[11] See *Allen* v. *Wright*, 468 U. S. 737, 767–768, n. 1 (1984) (Brennan, J., dissenting). The inference the statement supports—that simultaneous decisions by ILECs not even to attempt to poach customers from one another once the law authorized them to

[11] It is ironic that the Court seeks to justify its decision to draw factual inferences in the defendants' favor at the pleading stage by citing to a rule of evidence, *ante*, at 568, n. 13. Under Federal Rule of Evidence 201(b), a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Whether Notebaert's statements constitute evidence of a conspiracy is hardly beyond reasonable dispute.

do so were the product of an agreement—sits comfortably within the realm of possibility. That is all the Rules require.

To be clear, if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint without requiring the defendants to answer the charge that they "have agreed not to compete with one another and otherwise allocated customers and markets to one another."[12] Complaint, ¶ 51, App. 27. Even a sworn denial of that charge would not justify a summary dismissal without giving the plaintiffs the opportunity to take depositions from Notebaert and at least one responsible executive representing each of the other defendants.

Respondents in this case proposed a plan of "'phased discovery'" limited to the existence of the alleged conspiracy and class certification. Brief for Respondents 25–26. Two petitioners rejected the plan. *Ibid.* Whether or not respondents' proposed plan was sensible, it was an appropriate subject for negotiation.[13] Given the charge in the com-

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[12] The Court worries that a defendant seeking to respond to this "conclusory" allegation "would have little idea where to begin." *Ante,* at 565, n. 10. A defendant could, of course, begin by either denying or admitting the charge.

[13] The potential for "sprawling, costly, and hugely time-consuming" discovery, *ante,* at 560, n. 6, is no reason to throw the baby out with the bathwater. The Court vastly underestimates a district court's case-management arsenal. Before discovery even begins, the court may grant a defendant's Rule 12(e) motion; Rule 7(a) permits a trial court to order a plaintiff to reply to a defendant's answer, see *Crawford-El* v. *Britton,* 523 U. S. 574, 598 (1998); and Rule 23 requires "rigorous analysis" to ensure that class certification is appropriate, *General Telephone Co. of Southwest* v. *Falcon,* 457 U. S. 147, 161 (1982); see *In re Initial Public Offering Securities Litigation,* 471 F. 3d 24 (CA2 2006) (holding that a district court may not certify a class without ruling that each Rule 23 requirement is met, even if a requirement overlaps with a merits issue). Rule 16 invests a trial judge with the power, backed by sanctions, to regulate pretrial

plaint—buttressed by the common sense of Adam Smith—I cannot say that the possibility that joint discussions and perhaps some agreements played a role in petitioners' decisionmaking process is so implausible that dismissing the complaint before any defendant has denied the charge is preferable to granting respondents even a minimal opportu-

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proceedings via conferences and scheduling orders, at which the parties may discuss, *inter alia*, "the elimination of frivolous claims or defenses," Rule 16(c)(1); "the necessity or desirability of amendments to the pleadings," Rule 16(c)(2); "the control and scheduling of discovery," Rule 16(c)(6); and "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," Rule 16(c)(12). Subsequently, Rule 26 confers broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them. See 523 U. S., at 598–599. Indeed, Rule 26(c) specifically permits a court to take actions "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope.

In short, the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations for their plausibility *vel non* without requiring an answer from the defendant. See *Societe Internationale pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U. S. 197, 206 (1958) ("Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation"). And should it become apparent over the course of litigation that a plaintiff's filings bespeak an *in terrorem* suit, the district court has at its call its own *in terrorem* device, in the form of a wide array of Rule 11 sanctions. See Rules 11(b), (c) (authorizing sanctions if a suit is presented "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); see *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 498 U. S. 533 (1991) (holding that Rule 11 applies to a represented party who signs a pleading, motion, or other papers, as well as to attorneys); *Atkins* v. *Fischer*, 232 F. R. D. 116, 126 (DC 2005) ("As possible sanctions pursuant to Rule 11, the court has an arsenal of options at its disposal").

nity to prove their claims. See Clark, New Federal Rules 977 ("[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function").

I fear that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar—among whom "lament" as to inadequate judicial supervision of discovery is most "common," see *ante*, at 559—should lobby for this state of affairs. But "we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public." Clark, Special Pleading in the Big Case 152. As we did in our prior decisions, we should have instructed them that their remedy was to seek to amend the Federal Rules—not our interpretation of them.[14] See *Swierkiewicz*, 534 U. S., at 515; *Crawford-El* v. *Britton*, 523 U. S. 574, 595 (1998); *Leatherman*, 507 U. S., at 168.

IV

Just a few weeks ago some of my colleagues explained that a strict interpretation of the literal text of statutory lan-

[14] Given his "background in antitrust law," *ante*, at 560, n. 6, Judge Easterbrook has recognized that the most effective solution to discovery abuse lies in the legislative and rulemaking arenas. He has suggested that the remedy for the ills he complains of requires a revolution in the rules of civil procedure:

"Perhaps a system in which judges pare away issues and focus [on] investigation is too radical to contemplate in this country—although it prevailed here before 1938, when the Federal Rules of Civil Procedure were adopted. The change could not be accomplished without abandoning notice pleading, increasing the number of judicial officers, and giving them more authority . . . . If we are to rule out judge-directed discovery, however, we must be prepared to pay the piper. Part of the price is the high cost of unnecessary discovery—impositional and otherwise." Discovery as Abuse, 69 B. U. L. Rev. 635, 645 (1989).

guage is essential to avoid judicial decisions that are not faithful to the intent of Congress. *Zuni Public School Dist. No. 89* v. *Department of Education*, *ante*, p. 108 (SCALIA, J., dissenting). I happen to believe that there are cases in which other tools of construction are more reliable than text, but I agree of course that congressional intent should guide us in matters of statutory interpretation. *Ante*, at 106 (STEVENS, J., concurring). This is a case in which the intentions of the drafters of three important sources of law—the Sherman Act, the Telecommunications Act of 1996, and the Federal Rules of Civil Procedure—all point unmistakably in the same direction, yet the Court marches resolutely the other way. Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery. *Ante*, at 558–560. Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their Rule 12(b) motion have far exceeded the cost of limited discovery, or that those discovery costs would burden respondents as well as petitioners,[15] that concern would not provide an adequate justification for this law-changing decision. For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of pro-

[15] It would be quite wrong, of course, to assume that dismissal of an antitrust case after discovery is costless to plaintiffs. See Fed. Rule Civ. Proc. 54(d)(1) ("[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs").

foundly serious factual allegations, that could account for this stark break from precedent.

If the allegation of conspiracy happens to be true, today's decision obstructs the congressional policy favoring competition that undergirds both the Telecommunications Act of 1996 and the Sherman Act itself. More importantly, even if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental—and unjustified—change in the character of pretrial practice.

Accordingly, I respectfully dissent.

Syllabus

ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* WEAVER

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

No. 06–313. Argued March 21, 2007—Decided May 21, 2007

The District Court dismissed respondent's first federal habeas petition without prejudice on the ground that his state postconviction proceedings were not exhausted while he had a certiorari petition pending. After this Court denied certiorari, respondent refiled his habeas petition, raising a claim essentially identical to that made in two other cases in which the Eighth Circuit had granted habeas relief. Those cases, like respondent's first habeas petition, had been filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The District Court granted relief. The Eighth Circuit affirmed, but concluded that, because respondent's petition was refiled after AEDPA's effective date, his claims must be evaluated under that statute's strict standard of review.

Held: The petition for writ of certiorari is dismissed as improvidently granted. The District Court erred in dismissing respondent's first habeas petition, which was fully exhausted and did not become unexhausted upon his decision to seek certiorari, see *Lawrence* v. *Florida*, 549 U. S. 327. Regardless of whether, as respondent contends, AEDPA is inapplicable to his case, it is appropriate for this Court to exercise its discretion to prevent three virtually identically situated litigants from being treated in a needlessly disparate manner, simply because the District Court erroneously dismissed respondent's pre-AEDPA petition.

Certiorari dismissed. Reported below: 438 F. 3d 832.

Andrea K. Spillars argued the cause for petitioner. With her on the briefs were *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *James R. Layton*, State Solicitor, and *Stephen D. Hawke*, *Alana M. Barragán-Scott*, *Heidi C. Doerhoff*, and *Ronald S. Ribaudo*, Assistant Attorneys General.

John H. Blume argued the cause for respondent. With him on the brief were *Sheri L. Johnson*, *Trevor W. Morrison*, *Keir M. Weyble*, *Charles A. Weiss*, *Elizabeth C.*

Carver, John W. Rogers, K. Lee Marshall, and *James R. Wyrsch.**

PER CURIAM.

We granted certiorari in this case, 549 U. S. 1092 (2006), to decide whether the Court of Appeals had exceeded its authority under 28 U. S. C. § 2254(d)(1) by setting aside a capital sentence on the ground that the prosecutor's closing statement was "unfairly inflammatory." *Weaver* v. *Bowersox*, 438 F. 3d 832, 841 (CA8 2006). Our primary concern was whether the Court of Appeals' application of the more stringent standard of review mandated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, was consistent with our interpretation of that statute. Cf. *Carey* v. *Musladin*, 549 U. S. 70 (2006). We are now aware of circumstances that persuade us that dismissal of the writ is the appropriate manner in which to dispose of this case.

The argument made by the prosecutor in this case was essentially the same as the argument that he made in two other cases—one of which involved respondent's codefendant. See *Shurn* v. *Delo*, 177 F. 3d 662, 666 (CA8 1999); *Newlon* v. *Armontrout*, 693 F. Supp. 799 (WD Mo. 1988), aff'd, 885 F. 2d 1328 (CA8 1989). In each of those cases, the defendant received a death sentence. Also in each case, the defendant filed a petition seeking federal habeas relief before AEDPA's effective date. Federal habeas relief was granted in all three cases. The State does not question the propriety of

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**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Carter G. Phillips and *Jeffrey T. Green* filed a brief for Interested Former Oklahoma City Bombing Prosecutors as *amici curiae* urging affirmance.

Michael C. Small and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

relief in the other two cases because it was clear at the time, as it is now, that AEDPA did not apply to either of them.

Respondent argues, for the following reasons, that AEDPA should not govern his case either. Like the defendants in *Newlon* and *Shurn*, respondent filed his federal habeas petition before the effective date of AEDPA. Instead of considering respondent's claims, however, the District Court *sua sponte* stayed the habeas proceedings, noting that respondent had indicated his intention to file a petition for writ of certiorari seeking this Court's review of the state courts' denial of postconviction relief. Though the District Court recognized that respondent was not required to seek certiorari from this Court, it concluded that, if "a state prisoner chooses to pursue writ of certiorari, he must first exhaust that remedy before filing a federal habeas corpus petition." App. to Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 15. Thus, the District Court put respondent to a choice: He could forgo filing a petition for certiorari, or his habeas petition would be dismissed.

Respondent moved for reconsideration and for the appointment of counsel. The District Court denied both motions, reiterating its view that if respondent sought certiorari, his federal habeas petition would be premature. When respondent notified the District Court that a petition for certiorari had been filed, the court made good on its promise: It dismissed respondent's habeas petition "without prejudice" to his refiling "following exhaustion of his state proceedings." *Id.*, at 13. Though respondent had filed his habeas petition before AEDPA took effect, the District Court dismissed his petition after the statute was in force.

Still without an attorney, respondent requested a certificate of appealability from the District Court. The court denied the request, opining that reasonable jurists could not disagree with the dismissal of respondent's petition. *Id.*, at 5–6. Respondent also filed a notice of appeal, which the

Court of Appeals construed as a request for a certificate of appealability and rejected.*

Respondent refiled his habeas petition after this Court denied review of his state postconviction proceedings. The Eighth Circuit eventually concluded that, because respondent's petition was filed after AEDPA's effective date, his claims must be evaluated under that statute's strict standard of review. See *Weaver* v. *Bowersox*, 241 F. 3d 1024, 1029 (2001).

Our recent decision in *Lawrence* v. *Florida*, 549 U. S. 327 (2007), conclusively establishes that the District Court was wrong to conclude that, if respondent chose to seek certiorari, he had to exhaust that remedy before filing a federal habeas petition. *Lawrence* clarified that "[s]tate review ends when the state courts have finally resolved an application for state postconviction relief"—even if a prisoner files a certiorari petition. *Id.*, at 332; see also *id.*, at 332–333 ("[W]e have said that state prisoners need not petition for certiorari to exhaust state remedies" (citing *Fay* v. *Noia*, 372 U. S. 391, 435–438 (1963))). Thus, respondent's habeas petition, which was fully exhausted when filed, did not become unexhausted upon his decision to seek certiorari. Because the petition was not premature, the District Court had no cause to dismiss it.

Whether this unusual procedural history leads to the conclusion, as respondent colorably contends, that the AEDPA standard is simply inapplicable to this case, is a question we find unnecessary to resolve. Regardless of the answer to that question, we find it appropriate to exercise our discretion to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner,

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*Respondent did not seek rehearing or rehearing en banc in the Court of Appeals, nor did he file a petition for writ of certiorari from the denial of the certificate of appealability. Pursuit of either would almost certainly have been futile.

simply because the District Court erroneously dismissed respondent's pre-AEDPA petition.

Accordingly, the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring in the result.

While I do not agree with all the reasons given in the *per curiam* for the discretionary decision to dismiss the writ as improvidently granted in this case, I do agree with that disposition.

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

The Eighth Circuit held in this case that the Missouri Supreme Court had unreasonably applied clearly established precedent of this Court in concluding that certain statements made by the prosecutor during the penalty phase of respondent's capital trial did not rise to the level of a due process violation. *Weaver* v. *Bowersox*, 438 F. 3d 832, 839–842 (2006). As the Court says, *ante*, at 599, we granted certiorari to decide whether this holding comported with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(d)(1). We received briefing, and heard an hour's argument, on that question. Yet now the Court declines to answer it, dismissing the writ as improvidently granted.

The reason is that the Court has become "aware," *ante*, at 599, that respondent's post-AEDPA habeas petition was filed only because the District Court had erroneously dismissed an earlier petition filed prior to AEDPA's effective date, *ante*, at 600, 601. Believing that respondent is "virtually identically situated" to two other litigants whose federal habeas petitions were not governed by AEDPA, and seeking to avoid "treat[ing the three] in a needlessly disparate manner . . . simply because the District Court erroneously dis-

missed respondent's pre-AEDPA petition," the Court has decided to let stand the Eighth Circuit's flagrant misapplication of AEDPA, whether or not (and without deciding whether) AEDPA governs this case. *Ante*, at 601–602.

I fully agree with the Court that the District Court erred in dismissing respondent's pre-AEDPA petition, but that seems to me no justification for aborting this argued case. The District Court's previous error does not affect the *legal* conclusion that AEDPA applies to this new petition. And once it is admitted that AEDPA governs, the District Court's error should in no way alter our prior determination that the Eighth Circuit's application of AEDPA deserves our scrutiny. I discuss these two points in succession.

I

The Court provides no legal argument to support its assertion that respondent has a "colorabl[e]" claim, *ante*, at 601, that the prior erroneous dismissal renders AEDPA inapplicable to this case. Nor does respondent. See Brief for Respondent 39, n. 44. I am aware of no authority supporting the proposition that respondent is legally or equitably entitled to evade the collateral consequences of the District Court's error.

To begin with, any resort to equity would founder on respondent's failure to exhaust his appeals of the District Court's erroneous decision. See *ante*, at 601, n. The Court is untroubled by respondent's lack of diligence because, it says, further appellate review "would almost certainly have been futile." *Ibid.* The Court does not explain the basis for this pessimistic assessment, but the reason seems to be its belief that the District Court's error was not clear until our recent decision in *Lawrence* v. *Florida*, 549 U. S. 327 (2007). See *ante*, at 601 (describing *Lawrence* as "clarif[ying]" the exhaustion rule).

This seems to me quite wrong. The District Court's error was as apparent in 1996 as it was in *1966*. In *Fay* v. *Noia*,

372 U. S. 391, 435–438 (1963), we announced in no uncertain terms that a federal habeas petitioner need not seek certiorari in order to exhaust state-court remedies. "[N]o less an authority than Hart & Wechsler's The Federal Courts and the Federal System," *Massachusetts* v. *EPA*, 549 U. S. 497, 520, n. 17 (2007), has long understood *Noia* to stand for that proposition. See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 1555 (3d ed. 1988); *id.*, at 1446 (4th ed. 1996); *id.*, at 1391 (5th ed. 2003). Indeed, *Lawrence*'s "clarifi[cation]" consisted of nothing more than citing the same old pages in *Noia*. See *Lawrence*, *supra*, at 333. It logically follows from *Noia* no less inescapably than from *Lawrence* that final disposition of a pending certiorari petition is also unnecessary to exhaust state-court remedies.

That the District Court had erred was no mystery to respondent in 1996. He correctly asked the District Court to reconsider its decision to dismiss his habeas action, and instead to stay it pending disposition of his petition for certiorari (which is the proper procedural way to handle such duplicative filings). See App. to Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 8–11 (hereinafter NACDL Brief). And he then filed a notice of appeal and unsuccessfully sought a certificate of appealability. See *id.*, at 1–7. Respondent (who theretofore had shown himself to be a highly capable *pro se* litigant, undoubtedly aware of the availability of en banc and certiorari review) simply gave up too early. There is no more reason in this case than in any other to excuse the failure to make use of all available means of review. Far from thinking that a petition for certiorari "would almost certainly have been futile," *ante*, at 601, n., I think it would almost certainly have been successful. We give special attention to capital cases (as today's delicate disposition shows), and since the District Court's denial of a certificate of appealability occurred on August 1, 1996, see App. to NACDL Brief 1, more than three months

after AEDPA's effective date, see *Woodford* v. *Garceau*, 538 U. S. 202, 204 (2003), it would have been obvious that our refusal to correct the District Court's clear error would subject this defendant's renewed request for federal habeas relief to AEDPA's restrictions.

More fundamentally, however, even were the Court's conjecture correct that diligence on respondent's part would not have been rewarded, neither AEDPA nor any principle of law would entitle him to relief from the collateral consequences of an uncorrected judicial error. We held in *Daniels* v. *United States*, 532 U. S. 374, 382 (2001), that "[i]f . . . a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available *(or because the defendant did so unsuccessfully)*, then that defendant is without recourse." (Emphasis added.) If a defendant is subject to *additional jail time* because a prior erroneous conviction went unreversed, surely respondent cannot complain about the fact that the District Court's prior uncorrected error has caused this habeas petition to be subject to AEDPA's entirely reasonable restrictions.*

II

There having been eliminated the possibility that AEDPA is inapplicable to this case (and hence that the question on which we granted certiorari and heard argument is not presented), what possible justification remains for canceling our grant of certiorari after full briefing and argument? There disappears, along with the claim of AEDPA inapplicability, any substance to the Court's contention that respondent is "virtually identically situated" to the two other litigants with similar claims, and that he is being treated differently "sim-

*Of course, even if some novel argument for the inapplicability of AEDPA exists, respondent and the Court have not explained why the claim has not been waived, given that this issue was raised *for the first time* in respondent's merits brief in this Court. See *infra*, at 606–607.

ply because the District Court erroneously dismissed [his] pre-AEDPA petition." *Ante,* at 601–602. No. He is being treated differently because he, unlike them, seeks federal habeas relief by means of a petition filed after AEDPA's effective date. Is what happened here any less rational, any less fair, a basis for differential treatment than the random fact that one petitioner's habeas action was filed a day before AEDPA's effective date, and another petitioner's could not be filed until one day after? Would the Court entertain the thought that if those two petitions involved the same sort of closing argument by the same prosecutor, the second of them would have to be exempted from AEDPA? If anything, the differential treatment is more justified here, since the later filing was not randomly determined, but was likely the consequence of respondent's failure to exhaust his appeals.

The Court seems to be affected by a vague and discomforting feeling that things are different now from what they were when we granted certiorari. They are so only in the respect that we now know, as we did not then, that respondent's earlier petition was wrongfully dismissed. That fact has relevance neither to the law governing this case (as discussed in Part I, *supra*) nor to any equities that might justify our bringing to naught the parties' briefing and arguments, and the Justices' deliberations, on the question for which this petition was granted. But what makes today's wasteful action particularly perverse is that it is *the fault of respondent* that we did not know of the wrongful dismissal earlier. Before we granted plenary review, respondent had *never* argued that AEDPA should not apply because of the District Court's error. He made no such claim either time he was before the Eighth Circuit. See Brief for Appellee in *Bowersox* v. *Weaver,* No. 99–3462, pp. xvii–xix; Brief for Appellee/Cross-Appellant in *Bowersox* v. *Weaver,* No. 03–2880 etc., p. 7. And, more significantly, he remained completely silent in his brief in opposition, despite his obligation to raise the issue under this Court's Rule 15.2. Indeed, even in respond-

ent's merits brief, his argument (if it can be called that) consists of three sentences explaining the procedural history followed by a conclusory assertion, all buried in footnote 44 on page 39.

Respondent's delayed invocation of this issue has not only not been sanctioned; it has been rewarded. Had respondent raised his specious claim of AEDPA inapplicability in a timely manner, petitioner would have had the opportunity to blow it out of the water. Whether by way of calculus or through dumb luck, respondent's tardiness has succeeded in confounding the Court. We promulgated Rule 15.2 precisely to prohibit such sandbagging—and to avoid the ill effects that minimal briefing has on the quality of our decisionmaking, as perfectly demonstrated by this case. Respondent and his counsel should not profit from their flouting of this Court's Rules.

* * *

I would thus answer the question on which we granted certiorari and received full briefing and argument. Because plenary review has convinced me beyond doubt that the Missouri Supreme Court did not unreasonably apply clearly established precedent of this Court, I would reverse the judgment of the Eighth Circuit.

A postscript is warranted in light of the unusual circumstances in which we dispose of this case. The greatest harm done by today's cancellation is not to the State of Missouri, which will have to retry this murder case almost two decades after the original trial—though that is harm enough. The greatest harm is that done to AEDPA, since dismissing the writ of certiorari leaves the Eighth Circuit's grossly erroneous precedent on the books. (That precedent, by the way, cannot be explained away—as perhaps the Court's own opinion can—as the product of law-distorting compassion for a defendant wronged by a District Court's erroneous action. As noted earlier, the Eighth Circuit was not informed of that erroneous action. It presumably really believes that this is

the way AEDPA should be applied.) Other courts should be warned that this Court's failure to reverse the Eighth Circuit's decision is a rare manifestation of judicial clemency unrestrained by law. They would be well advised to do unto the Eighth Circuit's decision just what it did unto AEDPA: ignore it.

For the foregoing reasons, I respectfully dissent.

LOS ANGELES COUNTY, CALIFORNIA, ET AL. *v.* RETTELE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06–605. Decided May 21, 2007

Respondents filed a 42 U. S. C. § 1983 suit, alleging that their Fourth Amendment right to be free from unreasonable searches and seizures was violated when Los Angeles County Sheriff's Department deputies, who were executing a valid warrant to search a house but were unaware that the potentially armed suspects being sought had sold the house to respondents and moved out, ordered the unclothed respondents out of bed and required them to stand for a few minutes before allowing them to dress. The District Court granted the defendants summary judgment. In reversing, the Ninth Circuit found that the deputies violated the Fourth Amendment and were not entitled to qualified immunity because a reasonable deputy would have stopped the search upon discovering that respondents were of a different race than the suspects and would not have ordered respondents from their bed.

Held: The deputies did not violate the Fourth Amendment. Officers executing a search warrant may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search. Upon encountering respondents, the deputies acted reasonably to secure the premises. The presence of one race did not eliminate the possibility that suspects of a different race were in the residence as well. In ordering respondents out of bed, the deputies acted reasonably to ensure their own safety, since blankets and bedding can conceal a weapon and since one of the suspects was known to own a firearm. There is no allegation that the detention was prolonged or that respondents were prevented from dressing any longer than necessary to protect the deputies' safety.

Certiorari granted; 186 Fed. Appx. 765, reversed and remanded.

PER CURIAM.

Deputies of the Los Angeles County Sheriff's Department obtained a valid warrant to search a house, but they were unaware that the suspects being sought had moved out three months earlier. When the deputies searched the house,

they found in a bedroom two residents who were of a different race than the suspects. The deputies ordered these innocent residents, who had been sleeping unclothed, out of bed. The deputies required them to stand for a few minutes before allowing them to dress.

The residents brought suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, naming the deputies and other parties and accusing them of violating the Fourth Amendment right to be free from unreasonable searches and seizures. The District Court granted summary judgment to all named defendants. The Court of Appeals for the Ninth Circuit reversed, concluding both that the deputies violated the Fourth Amendment and that they were not entitled to qualified immunity because a reasonable deputy would have stopped the search upon discovering that respondents were of a different race than the suspects and because a reasonable deputy would not have ordered respondents from their bed. We grant the petition for certiorari and reverse the judgment of the Court of Appeals by this summary disposition.

I

From September to December 2001, Los Angeles County Sheriff's Department Deputy Dennis Watters investigated a fraud and identity-theft crime ring. There were four suspects of the investigation. One had registered a 9-millimeter Glock handgun. The four suspects were known to be African-Americans.

On December 11, Watters obtained a search warrant for two houses in Lancaster, California, where he believed he could find the suspects. The warrant authorized him to search the homes and three of the suspects for documents and computer files. In support of the search warrant an affidavit cited various sources showing the suspects resided at respondents' home. The sources included Department of Motor Vehicles reports, mailing address listings, an outstanding warrant, and an Internet telephone directory. In

this Court respondents do not dispute the validity of the warrant or the means by which it was obtained.

What Watters did not know was that one of the houses (the first to be searched) had been sold in September to a Max Rettele. He had purchased the home and moved into it three months earlier with his girlfriend Judy Sadler and Sadler's 17-year-old son Chase Hall. All three, respondents here, are Caucasians.

On the morning of December 19, Watters briefed six other deputies in preparation for the search of the houses. Watters informed them they would be searching for three African-American suspects, one of whom owned a registered handgun. The possibility a suspect would be armed caused the deputies concern for their own safety. Watters had not obtained special permission for a night search, so he could not execute the warrant until 7 a.m. See Cal. Penal Code Ann. § 1533 (West 2000). Around 7:15 Watters and six other deputies knocked on the door and announced their presence. Chase Hall answered. The deputies entered the house after ordering Hall to lie face down on the ground.

The deputies' announcement awoke Rettele and Sadler. The deputies entered their bedroom with guns drawn and ordered them to get out of their bed and to show their hands. They protested that they were not wearing clothes. Rettele stood up and attempted to put on a pair of sweatpants, but deputies told him not to move. Sadler also stood up and attempted, without success, to cover herself with a sheet. Rettele and Sadler were held at gunpoint for one to two minutes before Rettele was allowed to retrieve a robe for Sadler. He was then permitted to dress. Rettele and Sadler left the bedroom within three to four minutes to sit on the couch in the living room.

By that time the deputies realized they had made a mistake. They apologized to Rettele and Sadler, thanked them for not becoming upset, and left within five minutes. They proceeded to the other house the warrant authorized them

to search, where they found three suspects. Those suspects were arrested and convicted.

Rettele and Sadler, individually and as guardians ad litem for Hall, filed this § 1983 suit against Los Angeles County, the Los Angeles County Sheriff's Department, Deputy Watters, and other members of the sheriff's department. Respondents alleged petitioners violated their Fourth Amendment rights by obtaining a warrant in reckless fashion and conducting an unreasonable search and detention. The District Court held that the warrant was obtained by proper procedures and the search was reasonable. It concluded in the alternative that any Fourth Amendment rights the deputies violated were not clearly established and that, as a result, the deputies were entitled to qualified immunity.

On appeal respondents did not challenge the validity of the warrant; they did argue that the deputies had conducted the search in an unreasonable manner. A divided panel of the Court of Appeals for the Ninth Circuit reversed in an unpublished opinion. 186 Fed. Appx. 765 (2006). The majority held that

> "because (1) no African-Americans lived in [respondents'] home; (2) [respondents], a Caucasian couple, purchased the residence several months before the search and the deputies did not conduct an ownership inquiry; (3) the African-American suspects were not accused of a crime that required an emergency search; and (4) [respondents] were ordered out of bed naked and held at gunpoint while the deputies searched their bedroom for the suspects and a gun, we find that a reasonable jury could conclude that the search and detention were 'unnecessarily painful, degrading, or prolonged,' and involved 'an undue invasion of privacy,' *Franklin v. Foxworth,* 31 F. 3d 873, 876 (9th Cir. 1994)." *Id.,* at 766.

Turning to whether respondents' Fourth Amendment rights were clearly established, the majority held that a reasonable

deputy should have known the search and detention were unlawful.

Judge Cowen dissented. In his view the deputies had authority to detain respondents for the duration of the search and were justified in ordering respondents from their bed because weapons could have been concealed under the bedcovers. He also concluded that, assuming a constitutional violation, the law was not clearly established.

The Court of Appeals denied rehearing and rehearing en banc.

II

Because respondents were of a different race than the suspects the deputies were seeking, the Court of Appeals held that "[a]fter taking one look at [respondents], the deputies should have realized that [respondents] were not the subjects of the search warrant and did not pose a threat to the deputies' safety." *Ibid.* We need not pause long in rejecting this unsound proposition. When the deputies ordered respondents from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house. The presence of some Caucasians in the residence did not eliminate the possibility that the suspects lived there as well. As the deputies stated in their affidavits, it is not uncommon in our society for people of different races to live together. Just as people of different races live and work together, so too might they engage in joint criminal activity. The deputies, who were searching a house where they believed a suspect might be armed, possessed authority to secure the premises before deciding whether to continue with the search.

In *Michigan* v. *Summers*, 452 U. S. 692 (1981), this Court held that officers executing a search warrant for contraband may "detain the occupants of the premises while a proper search is conducted." *Id.*, at 705. In weighing whether the search in *Summers* was reasonable the Court first found that "detention represents only an incremental intrusion on per-

sonal liberty when the search of a home has been authorized by a valid warrant." *Id.*, at 703. Against that interest, it balanced "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and facilitating "the orderly completion of the search." *Id.*, at 702–703; see *Muehler* v. *Mena*, 544 U. S. 93 (2005).

In executing a search warrant officers may take reasonable action to secure the premises and to ensure their own safety and the efficacy of the search. *Id.*, at 98–100; see also *id.*, at 103 (KENNEDY, J., concurring); *Summers*, *supra*, at 704–705. The test of reasonableness under the Fourth Amendment is an objective one. *Graham* v. *Connor*, 490 U. S. 386, 397 (1989) (addressing the reasonableness of a seizure of the person). Unreasonable actions include the use of excessive force or restraints that cause unnecessary pain or are imposed for a prolonged and unnecessary period of time. *Mena*, *supra*, at 100; *Graham*, *supra*, at 396–399.

The orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies. Blankets and bedding can conceal a weapon, and one of the suspects was known to own a firearm, factors which underscore this point. The Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach. The reports are replete with accounts of suspects sleeping close to weapons. See *United States* v. *Enslin*, 327 F. 3d 788, 791 (CA9 2003) ("When [the suspect] put his hands in the air and began to sit up, his movement shifted the covers and the marshals could see a gun in the bed next to him"); see also *United States* v. *Jones*, 336 F. 3d 245, 248 (CA3 2003) (suspect kept a 9-millimeter Luger under his pillow while he slept); *United States* v. *Hightower*, 96 F. 3d 211 (CA7 1996) (suspect kept a loaded five-shot handgun under his pillow); *State* v. *Willis*, 36,759–KA, p. 3 (La. App. 4/9/03), 843 So. 2d 592, 595 (officers "pulled back the bed covers and found a .38 caliber Model 10 Smith and Wesson

revolver located near where defendant's left hand had been"); *State* v. *Kypreos*, 115 Wash. App. 207, 61 P. 3d 352 (2002) (suspect kept a handgun in the bed).

The deputies needed a moment to secure the room and ensure that other persons were not close by or did not present a danger. Deputies were not required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with the sheets. Rather, "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Summers*, 452 U. S., at 702–703.

This is not to say, of course, that the deputies were free to force Rettele and Sadler to remain motionless and standing for any longer than necessary. We have recognized that "special circumstances, or possibly a prolonged detention," might render a search unreasonable. See *id.*, at 705, n. 21. There is no accusation that the detention here was prolonged. The deputies left the home less than 15 minutes after arriving. The detention was shorter and less restrictive than the 2- to 3-hour handcuff detention upheld in *Mena*. See 544 U. S., at 100. And there is no allegation that the deputies prevented Sadler and Rettele from dressing longer than necessary to protect their safety. Sadler was unclothed for no more than two minutes, and Rettele for only slightly more time than that. Sadler testified that once the police were satisfied that no immediate threat was presented, "they wanted us to get dressed and they were pressing us really fast to hurry up and get some clothes on." Deposition of Judy Lorraine Sadler in No. CV–0206262–RSWL (RNBX) (CD Cal., June 10, 2003), Doc. 26, Exh. 4, p. 55.

The Fourth Amendment allows warrants to issue on probable cause, a standard well short of absolute certainty. Valid warrants will issue to search the innocent, and people like Rettele and Sadler unfortunately bear the cost. Officers executing search warrants on occasion enter a house when residents are engaged in private activity; and the re-

sulting frustration, embarrassment, and humiliation may be real, as was true here. When officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, however, the Fourth Amendment is not violated.

As respondents' constitutional rights were not violated, "there is no necessity for further inquiries concerning qualified immunity." *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER would deny the petition for a writ of certiorari.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring in the judgment.

This case presents two separate questions: (1) whether the four circumstances identified in the Court of Appeals' unpublished opinion established a genuine issue of material fact as to whether the seizure violated respondents' Fourth Amendment rights, see *ante*, at 612; (2) whether the officers were nevertheless entitled to qualified immunity because the right was not clearly established. The fact that the judges on the Court of Appeals disagreed on both questions convinces me that they should not have announced their decision in an unpublished opinion.

In answering the first question, the Ninth Circuit majority relied primarily on *Franklin* v. *Foxworth*, 31 F. 3d 873 (CA9 1994). As Judge Cowen's discussion of *Franklin* demonstrates, that case surely does not clearly establish the unconstitutionality of the officers' conduct.* Consequently, re-

*See 186 Fed. Appx. 765, 767 (2006) (dissenting opinion) ("In *Franklin v. Foxworth*, 31 F. 3d 873 (9th Cir. 1994), we found unconstitutional the officers' failure to provide clothing to a gravely ill man before exposing

gardless of the proper answer to the constitutional question, the defendants were entitled to qualified immunity. I would reverse on that ground and disavow the unwise practice of deciding constitutional questions in advance of the necessity for doing so. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 859 (1998) (STEVENS, J., concurring in judgment). Accordingly, I concur in the Court's judgment.

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his genitals to twenty-three strangers for over two hours, under circumstances where there was no reason why the man was not given clothing. *Id.* at 876–78. We concluded that the detention was conducted in 'a manner that wantonly and callously subjected an obviously ill and incapacitated person to entirely unnecessary and unjustifiable degradation and suffering.' *Id.* at 878. Here, in contrast, Plaintiffs were not gravely ill, and their brief exposure, which lasted, at most, three or four minutes, was outweighed by the safety risks associated with allowing two occupants to remain in bed under covers during execution of a search warrant").

Syllabus

LEDBETTER *v.* GOODYEAR TIRE & RUBBER CO., INC.

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

No. 05–1074. Argued November 27, 2006—Decided May 29, 2007

During most of the time that petitioner Ledbetter was employed by respondent Goodyear, salaried employees at the plant where she worked were given or denied raises based on performance evaluations. Ledbetter submitted a questionnaire to the Equal Employment Opportunity Commission (EEOC) in March 1998 and a formal EEOC charge in July 1998. After her November 1998 retirement, she filed suit, asserting, among other things, a sex discrimination claim under Title VII of the Civil Rights Act of 1964. The District Court allowed her Title VII pay discrimination claim to proceed to trial. There, Ledbetter alleged that several supervisors had in the past given her poor evaluations because of her sex; that as a result, her pay had not increased as much as it would have if she had been evaluated fairly; that those past pay decisions affected the amount of her pay throughout her employment; and that by the end of her employment, she was earning significantly less than her male colleagues. Goodyear maintained that the evaluations had been nondiscriminatory, but the jury found for Ledbetter, awarding backpay and damages. On appeal, Goodyear contended that the pay discrimination claim was time barred with regard to all pay decisions made before September 26, 1997—180 days before Ledbetter filed her EEOC questionnaire—and that no discriminatory act relating to her pay occurred after that date. The Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred before the last pay decision that affected the employee's pay during the EEOC charging period, and concluding that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions during that period, denials of raises in 1997 and 1998.

Held: Because the later effects of past discrimination do not restart the clock for filing an EEOC charge, Ledbetter's claim is untimely. Pp. 623–643.

(a) An individual wishing to bring a Title VII lawsuit must first file an EEOC charge within, as relevant here, 180 days "after the alleged unlawful employment practice occurred." 42 U. S. C. § 2000e–5(e)(1). In addressing the issue of an EEOC charge's timeliness, this Court has stressed the need to identify with care the specific employment practice

at issue. Ledbetter's arguments—that the paychecks that she received during the charging period and the 1998 raise denial each violated Title VII and triggered a new EEOC charging period—fail because they would require the Court in effect to jettison the defining element of the disparate-treatment claim on which her Title VII recovery was based, discriminatory intent. *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, *Delaware State College* v. *Ricks*, 449 U. S. 250, *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900, and *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, clearly instruct that the EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But if an employer engages in a series of separately actionable intentionally discriminatory acts, then a fresh violation takes place when each act is committed. Ledbetter makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions occurring before that period were not communicated to her. She argues simply that Goodyear's nondiscriminatory conduct during the charging period gave present effect to discriminatory conduct outside of that period. But current effects alone cannot breathe life into prior, uncharged discrimination. Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory employment decision was made and communicated to her. Her attempt to shift forward the intent associated with prior discriminatory acts to the 1998 pay decision is unsound, for it would shift intent away from the act that consummated the discriminatory employment practice to a later act not performed with bias or discriminatory motive, imposing liability in the absence of the requisite intent. Her argument would also distort Title VII's "integrated, multistep enforcement procedure." *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U. S. 355, 359. The short EEOC filing deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation. *Id.*, at 367–368. Nothing in Title VII supports treating the intent element of Ledbetter's disparate-treatment claim any differently from the employment practice element of the claim. Pp. 623–632.

(b) *Bazemore* v. *Friday*, 478 U. S. 385 *(per curiam)*, which concerned a disparate-treatment pay claim, is entirely consistent with *Evans*, *Ricks*, *Lorance*, and *Morgan*. *Bazemore*'s rule is that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. It is not, as Ledbetter contends, a "paycheck accrual rule" under which each paycheck, even if not accompanied by discriminatory intent, triggers a

Syllabus

new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted that paycheck's amount, no matter how long ago the discrimination occurred. Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate based on sex or that it later applied this system to her within the charging period with discriminatory animus, *Bazemore* is of no help to her. Pp. 633–640.

(c) Ledbetter's "paycheck accrual rule" is also not supported by either analogies to the statutory regimes of the Equal Pay Act of 1963, the Fair Labor Standards Act of 1938, or the National Labor Relations Act, or policy arguments for giving special treatment to pay claims. Pp. 640–643.

421 F. 3d 1169, affirmed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 643.

Kevin K. Russell argued the cause for petitioner. With him on the briefs were *Amy Howe*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Robert L. Wiggins, Jr.*, and *Jon C. Goldfarb*.

Glen D. Nager argued the cause for respondent. With him on the brief were *Michael A. Carvin*, *Shay Dvoretzky*, and *Jay St. Clair*.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Kim*, *Deputy Solicitor General Garre*, and *Dennis J. Dimsey*.*

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*Briefs of *amici curiae* urging reversal were filed for the National Employment Lawyers Association et al. by *Joseph M. Sellers*, *Christine E. Webber*, *James M. Finberg*, *Eve H. Cervantez*, *Michael Foreman*, *Sarah Crawford*, *Terisa E. Chaw*, *Dennis Courtland Hayes*, *Thomas W. Osborne*, *Daniel B. Kohrman*, *Laurie A. McCann*, *Melvin Radowitz*, *Patricia A. Shiu*, and *Shelley A. Gregory;* and for the National Partnership for Women & Families et al. by *Deborah L. Brake*, *Judith L. Lichtman*, *Jocelyn C. Frye*, *Marcia D. Greenberger*, *Jocelyn Samuels*, *Dina R. Lassow*, and *Joanna L. Grossman*.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America et al. by *Neal D. Mollen*, *Car-*

JUSTICE ALITO delivered the opinion of the Court.

This case calls upon us to apply established precedent in a slightly different context. We have previously held that the time for filing a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) begins when the discriminatory act occurs. We have explained that this rule applies to any "[d]iscrete ac[t]" of discrimination, including discrimination in "termination, failure to promote, denial of transfer, [and] refusal to hire." *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 114 (2002). Because a pay-setting decision is a "discrete act," it follows that the period for filing an EEOC charge begins when the act occurs. Petitioner, having abandoned her claim under the Equal Pay Act, asks us to deviate from our prior decisions in order to permit her to assert her claim under Title VII. Petitioner also contends that discrimination in pay is different from other types of employment discrimination and thus should be governed by a different rule. But because a pay-setting decision is a discrete act that occurs at a particular point in time, these arguments must be rejected. We therefore affirm the judgment of the Court of Appeals.

I

Petitioner Lilly Ledbetter (Ledbetter) worked for respondent Goodyear Tire & Rubber Company (Goodyear) at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors' evaluation of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge. After taking early retirement in November 1998,

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son H. Sullivan, Robin S. Conrad, Shane Brennan, and *Karen R. Harned;* and for the Equal Employment Advisory Council et al. by *Ann Elizabeth Reesman* and *Laura A. Giantris.*

Ledbetter commenced this action, in which she asserted, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963 (EPA), 77 Stat. 56, 29 U. S. C. § 206(d).

The District Court granted summary judgment in favor of Goodyear on several of Ledbetter's claims, including her EPA claim, but allowed others, including her Title VII pay discrimination claim, to proceed to trial. In support of this latter claim, Ledbetter introduced evidence that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment. Toward the end of her time with Goodyear, she was being paid significantly less than any of her male colleagues. Goodyear maintained that the evaluations had been nondiscriminatory, but the jury found for Ledbetter and awarded her backpay and damages.

On appeal, Goodyear contended that Ledbetter's pay discrimination claim was time barred with respect to all pay decisions made prior to September 26, 1997—that is, 180 days before the filing of her EEOC questionnaire.[1] And Goodyear argued that no discriminatory act relating to Ledbetter's pay occurred after that date.

The Court of Appeals for the Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee's pay during the EEOC

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[1] The parties assume that the EEOC charging period runs backwards from the date of the questionnaire, even though Ledbetter's discriminatory pay claim was not added until the July 1998 formal charge. 421 F. 3d 1169, 1178 (CA11 2005). We likewise assume for the sake of argument that the filing of the questionnaire, rather than the formal charge, is the appropriate date.

charging period. 421 F. 3d 1169, 1182–1183 (2005). The Court of Appeals then concluded that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions that occurred within that time span, namely, a decision made in 1997 to deny Ledbetter a raise and a similar decision made in 1998. *Id.*, at 1186–1187.

Ledbetter filed a petition for a writ of certiorari but did not seek review of the Court of Appeals' holdings regarding the sufficiency of the evidence in relation to the 1997 and 1998 pay decisions. Rather, she sought review of the following question:

> "Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period." Pet. for Cert. i.

In light of disagreement among the Courts of Appeals as to the proper application of the limitations period in Title VII disparate-treatment pay cases, compare 421 F. 3d 1169 with *Forsyth* v. *Federation Employment & Guidance Serv.*, 409 F. 3d 565 (CA2 2005); *Shea* v. *Rice*, 409 F. 3d 448 (CADC 2005), we granted certiorari, 548 U. S. 903 (2006).

II

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice" to discriminate "against any individual with respect to his compensation . . . because of such individual's . . . sex." 42 U. S. C. § 2000e–2(a)(1). An individual wishing to challenge an employment practice under this provision must first file a charge with the EEOC. § 2000e–5(e)(1). Such a charge must be filed within a specified period (either 180 or 300 days, depending on the State)

"after the alleged unlawful employment practice occurred," *ibid.*, and if the employee does not submit a timely EEOC charge, the employee may not challenge that practice in court, § 2000e–5(f)(1).

In addressing the issue whether an EEOC charge was filed on time, we have stressed the need to identify with care the specific employment practice that is at issue. *Morgan*, 536 U. S., at 110–111. Ledbetter points to two different employment practices as possible candidates. Primarily, she urges us to focus on the paychecks that were issued to her during the EEOC charging period (the 180-day period preceding the filing of her EEOC questionnaire), each of which, she contends, was a separate act of discrimination. Alternatively, Ledbetter directs us to the 1998 decision denying her a raise, and she argues that this decision was "unlawful because it carried forward intentionally discriminatory disparities from prior years." Reply Brief for Petitioner 20. Both of these arguments fail because they would require us in effect to jettison the defining element of the legal claim on which her Title VII recovery was based.

Ledbetter asserted disparate treatment, the central element of which is discriminatory intent. See *Chardon* v. *Fernandez*, 454 U. S. 6, 8 (1981) *(per curiam); Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977); *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 1002 (1988) (Blackmun, J., joined by Brennan, and Marshall, JJ., concurring in part and concurring in judgment) ("[A] disparate-treatment challenge focuses exclusively on the intent of the employer"). However, Ledbetter does not assert that the relevant Goodyear decisionmakers acted with actual discriminatory intent either when they issued her checks during the EEOC charging period or when they denied her a raise in 1998. Rather, she argues that the paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner *prior to* the EEOC charging period. Brief for Petitioner 22. Similarly, she maintains that the

1998 decision was unlawful because it "carried forward" the effects of prior, uncharged discrimination decisions. Reply Brief for Petitioner 20. In essence, she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period. Brief for Petitioner 13 ("[E]ach paycheck that offers a woman less pay than a similarly situated man because of her sex is a separate violation of Title VII with its own limitations period, regardless of whether the paycheck simply implements a prior discriminatory decision made outside the limitations period"); see also Reply Brief for Petitioner 20. This argument is squarely foreclosed by our precedents.

In *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553 (1977), we rejected an argument that is basically the same as Ledbetter's. Evans was forced to resign because the airline refused to employ married flight attendants, but she did not file an EEOC charge regarding her termination. Some years later, the airline rehired her but treated her as a new employee for seniority purposes. *Id.*, at 554–555. Evans then sued, arguing that, while any suit based on the original discrimination was time barred, the airline's refusal to give her credit for her prior service gave "present effect to [its] past illegal act and therefore perpetuate[d] the consequences of forbidden discrimination." *Id.*, at 557.

We agreed with Evans that the airline's "seniority system [did] indeed have a continuing impact on her pay and fringe benefits," *id.*, at 558, but we noted that "the critical question [was] whether any present *violation* exist[ed]," *ibid.* (emphasis in original). We concluded that the continuing effects of the precharging period discrimination did not make out a present violation. As JUSTICE STEVENS wrote for the Court:

> "United was entitled to treat [Evans' termination] as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a

> timely charge . . . is merely an unfortunate event in history which has no present legal consequences." *Ibid.*

It would be difficult to speak to the point more directly.

Equally instructive is *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980), which concerned a college professor, Ricks, who alleged that he had been discharged because of national origin. In March 1974, Ricks was denied tenure, but he was given a final, nonrenewable 1-year contract that expired on June 30, 1975. *Id.*, at 252–253. Ricks delayed filing a charge with the EEOC until April 1975, *id.*, at 254, but he argued that the EEOC charging period ran from the date of his actual termination rather than from the date when tenure was denied. In rejecting this argument, we recognized that "one of the *effects* of the denial of tenure," namely, his ultimate termination, "did not occur until later." *Id.*, at 258 (emphasis in original). But because Ricks failed to identify any specific discriminatory act "that continued until, or occurred at the time of, the actual termination of his employment," *id.*, at 257, we held that the EEOC charging period ran from "the time the tenure decision was made and communicated to Ricks," *id.*, at 258.

This same approach dictated the outcome in *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900 (1989), which grew out of a change in the way in which seniority was calculated under a collective-bargaining agreement. Before 1979, all employees at the plant in question accrued seniority based simply on years of employment at the plant. In 1979, a new agreement made seniority for workers in the more highly paid (and traditionally male) position of "tester" depend on time spent in that position alone and not in other positions in the plant. Several years later, when female testers were laid off due to low seniority as calculated under the new provision, they filed an EEOC charge alleging that the 1979 scheme had been adopted with discriminatory intent, namely, to protect incumbent male testers when women with sub-

stantial plant seniority began to move into the traditionally male tester positions. *Id.*, at 902–903.

We held that the plaintiffs' EEOC charge was not timely because it was not filed within the specified period after the adoption in 1979 of the new seniority rule. We noted that the plaintiffs had not alleged that the new seniority rule treated men and women differently or that the rule had been applied in a discriminatory manner. Rather, their complaint was that the rule was adopted originally with discriminatory intent. *Id.*, at 905. And as in *Evans* and *Ricks*, we held that the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt. 490 U. S., at 907–908. We stated:

> "Because the claimed invalidity of the facially nondiscriminatory and neutrally applied tester seniority system is wholly dependent on the alleged illegality of signing the underlying agreement, it is the date of that signing which governs the limitations period." *Id.*, at 911.[2]

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[2] After *Lorance*, Congress amended Title VII to cover the specific situation involved in that case. See 42 U. S. C. §2000e–5(e)(2) (allowing for Title VII liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application). The dissent attaches great significance to this amendment, suggesting that it shows that *Lorance* was wrongly reasoned as an initial matter. *Post*, at 652–654 (opinion of GINSBURG, J.). However, the very legislative history cited by the dissent explains that this amendment and the other 1991 Title VII amendments "'*expand[ed]* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.'" *Post*, at 653 (emphasis added). For present purposes, what is most important about the amendment in question is that it applied only to the adoption of a discriminatory seniority system, not to other types of employment discrimination. *Evans* and *Ricks*, upon which *Lorance* relied, 490 U. S., at 906–908, and which employed identical reasoning, were left in place, and these decisions are more than sufficient to support our holding today.

Our most recent decision in this area confirms this understanding. In *Morgan*, we explained that the statutory term "employment practice" generally refers to "a discrete act or single 'occurrence' " that takes place at a particular point in time. 536 U. S., at 110–111. We pointed to "termination, failure to promote, denial of transfer, [and] refusal to hire" as examples of such "discrete" acts, and we held that a Title VII plaintiff "can only file a charge to cover discrete acts that 'occurred' within the appropriate time period." *Id.*, at 114.

The instruction provided by *Evans*, *Ricks*, *Lorance*, and *Morgan* is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed. See *Morgan*, *supra*, at 113.

Ledbetter's arguments here—that the paychecks that she received during the charging period and the 1998 raise denial each violated Title VII and triggered a new EEOC charging period—cannot be reconciled with *Evans*, *Ricks*, *Lorance*, and *Morgan*. Ledbetter, as noted, makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not communicated to her. Instead, she argues simply that Goodyear's conduct during the charging period gave present effect to discriminatory conduct outside of that period. Brief for Petitioner 13. But current effects alone cannot breathe life into prior, uncharged discrimination; as we held in *Evans*, such effects in themselves have "no present legal consequences." 431 U. S., at 558. Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so,

and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure.

In an effort to circumvent the need to prove discriminatory intent during the charging period, Ledbetter relies on the intent associated with other decisions made by other persons at other times. Reply Brief for Petitioner 6 ("Intentional discrimination . . . occurs when . . . differential treatment takes place, even if the intent to engage in that conduct for a discriminatory purpose was made previously").

Ledbetter's attempt to take the intent associated with the prior pay decisions and shift it to the 1998 pay decision is unsound. It would shift intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of the requisite intent.

Our cases recognize this point. In *Evans*, for example, we did not take the airline's discriminatory intent in 1968, when it discharged the plaintiff because of her sex, and attach that intent to its later act of neutrally applying its seniority rules. Similarly, in *Ricks*, we did not take the discriminatory intent that the college allegedly possessed when it denied Ricks tenure and attach that intent to its subsequent act of terminating his employment when his nonrenewable contract ran out. On the contrary, we held that "the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks." 449 U. S., at 258.

Not only would Ledbetter's argument effectively eliminate the defining element of her disparate-treatment claim, but it would distort Title VII's "integrated, multistep enforcement procedure." *Occidental Life Ins. Co. of Cal.* v. *EEOC*, 432 U. S. 355, 359 (1977). We have previously noted the legislative compromises that preceded the enactment of Title VII,

Mohasco Corp. v. *Silver*, 447 U. S. 807, 819–821 (1980); *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 126 (1988) (STEVENS, J., joined by Rehnquist, C. J., and SCALIA, J., dissenting). Respectful of the legislative process that crafted this scheme, we must "give effect to the statute as enacted," *Mohasco*, *supra*, at 819, and we have repeatedly rejected suggestions that we extend or truncate Congress' deadlines. See, *e. g.*, *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 236–240 (1976) (union grievance procedures do not toll EEOC filing deadline); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47–49 (1974) (arbitral decisions do not foreclose access to court following a timely filed EEOC complaint).

Statutes of limitations serve a policy of repose. *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 554–555 (1974). They

> "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States* v. *Kubrick*, 444 U. S. 111, 117 (1979) (quoting *Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 349 (1944)).

The EEOC filing deadline "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, *supra*, at 256–257. Certainly, the 180-day EEOC charging deadline, 42 U. S. C. § 2000e–5(e)(1), is short by any measure, but "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco*, *supra*, at 825. This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allega-

tions through voluntary conciliation and cooperation. *Occidental Life Ins.*, *supra*, at 367–368; *Alexander*, *supra*, at 44.

A disparate-treatment claim comprises two elements: an employment practice, and discriminatory intent. Nothing in Title VII supports treating the intent element of Ledbetter's claim any differently from the employment practice element.[3] If anything, concerns regarding stale claims weigh more heavily with respect to proof of the intent associated with employment practices than with the practices themselves. For example, in a case such as this in which the plaintiff's claim concerns the denial of raises, the employer's challenged acts (the decisions not to increase the employee's pay at the times in question) will almost always be documented and will typically not even be in dispute. By contrast, the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time. In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial. Thus, the critical issue in a case involving a long-past performance evaluation will often be whether the evaluation was so far off the mark that a sufficient inference of discriminatory intent can be drawn. See *Watson*, 487 U. S., at 1004 (Blackmun, J., joined by Brennan and Marshall, JJ., concurring in part and concurring in judgment) (noting that in a disparate-treatment claim, the *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), factors establish discrimination by inference). See also, *e. g.*, *Zhuang* v. *Datacard*

[3] Of course, there may be instances where the elements forming a cause of action span more than 180 days. Say, for instance, an employer forms an illegal discriminatory intent toward an employee but does not act on it until 181 days later. The charging period would not begin to run until the employment practice was executed on day 181 because until that point the employee had no cause of action. The act and intent had not yet been joined. Here, by contrast, Ledbetter's cause of action was fully formed and present at the time that the discriminatory employment actions were taken against her, at which point she could have, and should have, sued.

Corp., 414 F. 3d 849 (CA8 2005) (rejecting inference of discrimination from performance evaluations); *Cooper* v. *Southern Co.*, 390 F. 3d 695, 732–733 (CA11 2004) (same). This can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.[4]

Ledbetter contends that employers would be protected by the equitable doctrine of laches, but Congress plainly did not think that laches was sufficient in this context. Indeed, Congress took a diametrically different approach, including in Title VII a provision allowing only a few months in most cases to file a charge with the EEOC. 42 U. S. C. § 2000e–5(e)(1).

Ultimately, "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco*, *supra*, at 826. By operation of §§ 2000e–5(e)(1) and 2000e–5(f)(1), a Title VII "claim is time barred if it is not filed within these time limits." *Morgan*, 536 U. S., at 109; *Electrical Workers*, 429 U. S., at 236. We therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period. Ledbetter's claim is, for this reason, untimely.

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[4] The dissent dismisses this concern, *post*, at 657–658, but this case illustrates the problems created by tardy lawsuits. Ledbetter's claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor, who, Ledbetter testified, retaliated against her when she rejected his sexual advances during the early 1980's, and did so again in the mid-1990's when he falsified deficiency reports about her work. His misconduct, Ledbetter argues, was "a principal basis for [her] performance evaluation in 1997." Brief for Petitioner 6; see also *id.*, at 5–6, 8, 11 (stressing the same supervisor's misconduct). Yet, by the time of trial, this supervisor had died and therefore could not testify. A timely charge might have permitted his evidence to be weighed contemporaneously.

III

A

In advancing her two theories Ledbetter does not seriously contest the logic of *Evans*, *Ricks*, *Lorance*, and *Morgan* as set out above, but rather argues that our decision in *Bazemore* v. *Friday*, 478 U. S. 385 (1986) *(per curiam)*, requires different treatment of her claim because it relates to pay. Ledbetter focuses specifically on our statement that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.*, at 395. She argues that in *Bazemore* we adopted a "paycheck accrual rule" under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct that impacted the amount of that paycheck, no matter how long ago the discrimination occurred. On this reading, *Bazemore* dispensed with the need to prove actual discriminatory intent in pay cases and, without giving any hint that it was doing so, repudiated the very different approach taken previously in *Evans* and *Ricks*. Ledbetter's interpretation is unsound.

Bazemore concerned a disparate-treatment pay claim brought against the North Carolina Agricultural Extension Service (Service). 478 U. S., at 389–390. Service employees were originally segregated into "a white branch" and "a 'Negro branch,'" with the latter receiving less pay, but in 1965 the two branches were merged. *Id.*, at 390–391. After Title VII was extended to public employees in 1972, black employees brought suit claiming that pay disparities attributable to the old dual pay scale persisted. *Id.*, at 391. The Court of Appeals rejected this claim, which it interpreted to be that the "'discriminatory difference in salaries should have been affirmatively eliminated.'" *Id.*, at 395.

This Court reversed in a *per curiam* opinion, *id.*, at 386–388, but all of the Members of the Court joined Justice Bren-

nan's separate opinion, see *id.*, at 388 (opinion concurring in part). Justice Brennan wrote:

> "The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discrimination *after* the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed." *Id.*, at 395 (emphasis in original).

Far from adopting the approach that Ledbetter advances here, this passage made a point that was "too obvious to warrant extended discussion," *ibid.;* namely, that when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used.

Bazemore thus is entirely consistent with our prior precedents, as Justice Brennan's opinion took care to point out. Noting that *Evans* turned on whether "'any *present violation* exist[ed],'" Justice Brennan stated that the *Bazemore*

plaintiffs were alleging that the defendants "ha[d] *not* from the date of the Act forward made all their employment decisions in a wholly nondiscriminatory way," 478 U. S., at 396–397, n. 6 (emphasis in original; internal quotation marks and brackets omitted)—which is to say that they had engaged in fresh discrimination. Justice Brennan added that the Court's "holding in no sense g[ave] legal effect to the pre-1972 actions, but, consistent with *Evans* . . . focuse[d] on the present salary structure, which is illegal if it *is a mere continuation of the pre-1965 discriminatory pay structure.*" *Id.*, at 397, n. 6 (emphasis added).

The sentence in Justice Brennan's opinion on which Ledbetter chiefly relies comes directly after the passage quoted above, and makes a similarly obvious point:

> "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.*, at 395–396.[5]

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[5] That the focus in *Bazemore* was on a current violation, not the carrying forward of a past act of discrimination, was made clearly by the side opinion in the Court of Appeals:

"[T]he majority holds, in effect, that because the pattern of discriminatory salaries here challenged originated before applicable provisions of the Civil Rights Act made their payment illegal, any 'lingering effects' of that earlier pattern cannot (presumably on an indefinitely maintained basis) be considered in assessing a challenge to post-act continuation of that pattern.

"*Hazelwood* [*School Dist.* v. *United States*, 433 U. S. 299 (1977),] and *Evans* indeed made it clear that an employer cannot be found liable, or sanctioned with remedy, for employment decisions made before they were declared illegal or as to which the claimant has lost any right of action by lapse of time. For this reason it is generally true that, as the catch-phrase has it, Title VII imposed 'no obligation to catch-up,' i. e., affirmatively to remedy present effects of pre-Act discrimination, whether in composing a work force or otherwise. But those cases cannot be thought to insulate employment decisions that presently are illegal on the basis that at one time *comparable* decisions were legal when made by the particular em-

In other words, a freestanding violation may always be charged within its own charging period regardless of its connection to other violations. We repeated this same point more recently in *Morgan:* "The existence of past acts and the employee's prior knowledge of their occurrence . . . does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed." 536 U. S., at 113.[6] Neither of these opinions stands for the proposition that an action not comprising an employment practice and alleged discriminatory intent is separately chargeable, just because it is related to some past act of discrimination.

Ledbetter attempts to eliminate the obvious inconsistencies between her interpretation of *Bazemore* and the *Evans/Ricks/Lorance/Morgan* line of cases on the ground that none of the latter cases involved pay raises, but the logic of our prior cases is fully applicable to pay cases. To take *Evans*

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ployer. It is therefore one thing to say that an employer who upon the effective date of Title VII finds itself with a racially unbalanced work-force need not act affirmatively to redress the balance; and quite another to say that it may also continue to make discriminatory hiring decisions because it was by that means that its present work force was composed. It may not, in short, under the *Hazelwood/Evans* principle continue practices now violative simply because at one time they were not." *Bazemore* v. *Friday*, 751 F. 2d 662, 695–696 (CA4 1984) (Phillips, J., concurring in part and dissenting in part) (emphasis in original; footnotes omitted).

[6] The briefs filed with this Court in *Bazemore* v. *Friday*, 478 U. S. 385 (1986) *(per curiam)*, further elucidate the point. The petitioners described the Service's conduct as "[t]he continued use of a racially explicit base wage." Brief for Petitioner Bazemore et al. in *Bazemore* v. *Friday*, O. T. 1985, No. 85–93, p. 33. The United States' brief also properly distinguished the commission of a discrete discriminatory act with continuing adverse results from the intentional carrying forward of a discriminatory pay system. Brief for Federal Petitioners in *Bazemore* v. *Friday*, O. T. 1984, Nos. 85–93 and 85–428, p. 17. This case involves the former, not the latter.

as an example, the employee there was unlawfully terminated; this caused her to lose seniority; and the loss of seniority affected her wages, among other things. 431 U. S., at 555, n. 5 ("[S]eniority determine[s] a flight attendant's wages; the duration and timing of vacations; rights to retention in the event of layoffs and rights to re-employment thereafter; and rights to preferential selection of flight assignments"). The relationship between past discrimination and adverse present effects was the same in *Evans* as it is here. Thus, the argument that Ledbetter urges us to accept here would necessarily have commanded a different outcome in *Evans*.

Bazemore stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is "facially nondiscriminatory and neutrally applied." *Lorance*, 490 U. S., at 911. The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period.

Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus, *Bazemore* is of no help to her. Rather, all Ledbetter has alleged is that Goodyear's agents discriminated against her individually in the past and that this discrimination reduced the amount of later paychecks. Because Ledbetter did not file timely EEOC charges relating to her employer's discriminatory pay decisions in the past, she cannot maintain a suit based on that past discrimination at this time.

B

The dissent also argues that pay claims are different. Its principal argument is that a pay discrimination claim is like a hostile work environment claim because both types of claims are "'based on the cumulative effect of individual acts,'" *post*, at 648, but this analogy overlooks the critical conceptual distinction between these two types of claims. And although the dissent relies heavily on *Morgan*, the dissent's argument is fundamentally inconsistent with *Morgan*'s reasoning.

Morgan distinguished between "discrete" acts of discrimination and a hostile work environment. A discrete act of discrimination is an act that in itself "constitutes a separate actionable 'unlawful employment practice'" and that is temporally distinct. 536 U. S., at 114, 117. As examples we identified "termination, failure to promote, denial of transfer, or refusal to hire." *Id.*, at 114. A hostile work environment, on the other hand, typically comprises a succession of harassing acts, each of which "may not be actionable on its own." In addition, a hostile work environment claim "cannot be said to occur on any particular day." *Id.*, at 115–116. In other words, the actionable wrong is the environment, not the individual acts that, taken together, create the environment.[7]

Contrary to the dissent's assertion, *post*, at 648–649, what Ledbetter alleged was not a single wrong consisting of a succession of acts. Instead, she alleged a series of discrete dis-

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[7] Moreover, the proposed hostile salary environment claim would go far beyond *Morgan*'s limits. *Morgan* still required at least some of the discriminatorily motivated acts predicate to a hostile work environment claim to occur within the charging period. 536 U. S., at 117 ("Provided that *an act contributing to the claim occurs within the filing period*, the entire time period of the hostile environment may be considered by a court" (emphasis added)). But the dissent would permit claims where no one acted in any way with an improper motive during the charging period. *Post*, at 649, 657–658.

criminatory acts, see Brief for Petitioner 13, 15 (arguing that payment of each paycheck constituted a separate violation of Title VII), each of which *was* independently identifiable and actionable, and *Morgan* is perfectly clear that when an employee alleges "serial violations," *i. e.*, a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation. 536 U. S., at 113.

While this fundamental misinterpretation of *Morgan* is alone sufficient to show that the dissent's approach must be rejected, it should also be noted that the dissent is coy as to whether it would apply the same rule to all pay discrimination claims or whether it would limit the rule to cases like Ledbetter's, in which multiple discriminatory pay decisions are alleged. The dissent relies on the fact that Ledbetter was allegedly subjected to a series of discriminatory pay decisions over a period of time, and the dissent suggests that she did not realize for some time that she had been victimized. But not all pay cases share these characteristics.

If, as seems likely, the dissent would apply the same rule in all pay cases, then, if a single discriminatory pay decision made 20 years ago continued to affect an employee's pay today, the dissent would presumably hold that the employee could file a timely EEOC charge today. And the dissent would presumably allow this even if the employee had full knowledge of all the circumstances relating to the 20-year-old decision at the time it was made.[8] The dissent, it appears, proposes that we adopt a special rule for pay cases based on the particular characteristics of one case that is

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[8] The dissent admits as much, responding only that an employer could resort to equitable doctrines such as laches. *Post*, at 657–658. But first, as we have noted, Congress has already determined that defense to be insufficient. *Supra*, at 632. Second, it is far from clear that a suit filed under the dissent's theory, alleging that a paycheck paid recently within the charging period was itself a freestanding violation of Title VII because it reflected the effects of 20-year-old discrimination, would even be barred by laches.

certainly not representative of all pay cases and may not even be typical. We refuse to take that approach.

IV

In addition to the arguments previously discussed, Ledbetter relies largely on analogies to other statutory regimes and on extrastatutory policy arguments to support her "paycheck accrual rule."

A

Ledbetter places significant weight on the EPA, which was enacted contemporaneously with Title VII and prohibits paying unequal wages for equal work because of sex. 29 U. S. C. § 206(d). Stating that "the lower courts routinely hear [EPA] claims challenging pay disparities that first arose outside the limitations period," Ledbetter suggests that we should hold that Title VII is violated each time an employee receives a paycheck that reflects past discrimination. Brief for Petitioner 34–35.

The simple answer to this argument is that the EPA and Title VII are not the same. In particular, the EPA does not require the filing of a charge with the EEOC or proof of intentional discrimination. See § 206(d)(1) (asking only whether the alleged inequality resulted from "any other factor other than sex"). Ledbetter originally asserted an EPA claim, but that claim was dismissed by the District Court and is not before us. If Ledbetter had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts.[9]

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[9] The Magistrate Judge recommended dismissal of Ledbetter's EPA claim on the ground that Goodyear had demonstrated that the pay disparity resulted from Ledbetter's consistently weak performance, not her sex. App. to Pet. for Cert. 71a–77a. The Magistrate Judge also recommended dismissing the Title VII disparate-pay claim on the same basis. *Id.*, at 65a–69a. Ledbetter objected to the Magistrate Judge's disposition of the Title VII and EPA claims, arguing that the Magistrate Judge had improperly resolved a disputed factual issue. See Plaintiff's Objections to Mag-

Ledbetter's appeal to the Fair Labor Standards Act of 1938 (FLSA) is equally unavailing. Stating that it is "well established that the statute of limitations for violations of the minimum wage and overtime provisions of the [FLSA] runs anew with each paycheck," Brief for Petitioner 35, Ledbetter urges that the same should be true in a Title VII pay case. Again, however, Ledbetter's argument overlooks the fact that an FLSA minimum wage or overtime claim does not require proof of a specific intent to discriminate. See 29 U. S. C. § 207 (establishing overtime rules); cf. § 255(a) (establishing 2-year statute of limitations for FLSA claims, except for claims of a "willful violation," which may be commenced within 3 years).

Ledbetter is on firmer ground in suggesting that we look to cases arising under the National Labor Relations Act (NLRA) since the NLRA provided a model for Title VII's remedial provisions and, like Title VII, requires the filing of a timely administrative charge (with the National Labor Relations Board) before suit may be maintained. *Lorance*, 490 U. S., at 909; *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 226, n. 8 (1982). Cf. 29 U. S. C. § 160(b) ("[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board").

Ledbetter argues that the NLRA's 6-month statute of limitations begins anew for each paycheck reflecting a prior violation of the statute, but our precedents suggest otherwise. In *Machinists* v. *NLRB*, 362 U. S. 411, 416–417 (1960), we

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istrate Judge's Report and Recommendation, 1 Record in No. 03–15264–G (CA11), Doc. 32. The District Court sustained this objection as to the "disparate pay" claim, but without specifically mentioning the EPA claim, which had been dismissed by the Magistrate Judge on the same basis. See App. to Pet. for Cert. 43a–44a. While the record is not entirely clear, it appears that at this point Ledbetter elected to abandon her EPA claim, proceeding to trial with only the Title VII disparate-pay claim, thus giving rise to the dispute the Court must now resolve.

held that "where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice[,] the use of the earlier unfair labor practice [merely] serves to cloak with illegality that which was otherwise lawful." This interpretation corresponds closely to our analysis in *Evans* and *Ricks* and supports our holding in the present case.

B

Ledbetter, finally, makes a variety of policy arguments in favor of giving the alleged victims of pay discrimination more time before they are required to file a charge with the EEOC. Among other things, she claims that pay discrimination is harder to detect than other forms of employment discrimination.[10]

We are not in a position to evaluate Ledbetter's policy arguments, and it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees against the interest in encouraging the "prompt processing of all charges of employment discrimination," *Mohasco*, 447 U. S., at 825, and the interest in repose.

Ledbetter's policy arguments for giving special treatment to pay claims find no support in the statute and are inconsistent with our precedents.[11] We apply the statute as written,

[10] We have previously declined to address whether Title VII suits are amenable to a discovery rule. *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 114, n. 7 (2002). Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.

[11] Ledbetter argues that the EEOC's endorsement of her approach in its Compliance Manual and in administrative adjudications merits deference. But we have previously declined to extend *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), deference to the Compliance Manual, *Morgan*, *supra*, at 111, n. 6, and similarly decline to defer to the EEOC's adjudicatory positions. The EEOC's views in question are based on its misreading of *Bazemore*. See, *e. g.*, *Amft* v. *Mineta*, No. 07A40116, 2006 WL 985183, *5 (EEOC Office of Fed. Operations, Apr. 6, 2006); *Albritton* v. *Potter*, No. 01A44063, 2004 WL

and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute.

* * *

For these reasons, the judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.

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

Lilly Ledbetter was a supervisor at Goodyear Tire & Rubber's plant in Gadsden, Alabama, from 1979 until her retirement in 1998. For most of those years, she worked as an area manager, a position largely occupied by men. Initially, Ledbetter's salary was in line with the salaries of men performing substantially similar work. Over time, however, her pay slipped in comparison to the pay of male area managers with equal or less seniority. By the end of 1997, Ledbetter was the only woman working as an area manager and the pay discrepancy between Ledbetter and her 15 male counterparts was stark: Ledbetter was paid $3,727 per month; the lowest paid male area manager received $4,286 per month, the highest paid, $5,236. See 421 F. 3d 1169, 1174 (CA11 2005); Brief for Petitioner 4.

Ledbetter launched charges of discrimination before the Equal Employment Opportunity Commission (EEOC) in March 1998. Her formal administrative complaint specified that, in violation of Title VII, Goodyear paid her a discrimi-

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2983682, *2 (EEOC Office of Fed. Operations, Dec. 17, 2004). Agencies have no special claim to deference in their interpretation of our decisions. *Reno* v. *Bossier Parish School Bd.*, 528 U. S. 320, 336, n. 5 (2000). Nor do we see reasonable ambiguity in the statute itself, which makes no distinction between compensation and other sorts of claims and which clearly requires that discrete employment actions alleged to be unlawful be motivated "because of such individual's . . . sex." 42 U. S. C. § 2000e–2(a)(1).

natorily low salary because of her sex. See 42 U. S. C. § 2000e–2(a)(1) (rendering it unlawful for an employer "to discriminate against any individual with respect to [her] compensation . . . because of such individual's . . . sex"). That charge was eventually tried to a jury, which found it "more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex." App. 102. In accord with the jury's liability determination, the District Court entered judgment for Ledbetter for backpay and damages, plus counsel fees and costs.

The Court of Appeals for the Eleventh Circuit reversed. Relying on Goodyear's system of annual merit-based raises, the court held that Ledbetter's claim, in relevant part, was time barred. 421 F. 3d, at 1171, 1182–1183. Title VII provides that a charge of discrimination "shall be filed within [180] days after the alleged unlawful employment practice occurred." 42 U. S. C. § 2000e–5(e)(1).[1] Ledbetter charged, and proved at trial, that within the 180-day period, her pay was substantially less than the pay of men doing the same work. Further, she introduced evidence sufficient to establish that discrimination against female managers at the Gadsden plant, not performance inadequacies on her part, accounted for the pay differential. See, *e. g.*, App. 36–47, 51–68, 82–87, 90–98, 112–113. That evidence was unavailing, the Eleventh Circuit held, and the Court today agrees, because it was incumbent on Ledbetter to file charges year by year, each time Goodyear failed to increase her salary commensurate with the salaries of male peers. Any annual pay decision not contested immediately (within 180 days), the Court affirms, becomes grandfathered, a *fait accompli* beyond the province of Title VII ever to repair.

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[1] If the complainant has first instituted proceedings with a state or local agency, the filing period is extended to 300 days or 30 days after the denial of relief by the agency. 42 U. S. C. § 2000e–5(e)(1). Because the 180-day period applies to Ledbetter's case, that figure will be used throughout. See *ante*, at 622, 624.

The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.

Pay disparities are thus significantly different from adverse actions "such as termination, failure to promote, . . . or refusal to hire," all involving fully communicated discrete acts, "easy to identify" as discriminatory. See *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 114 (2002). It is only when the disparity becomes apparent and sizable, *e. g.*, through future raises calculated as a percentage of current salaries, that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.

On questions of time under Title VII, we have identified as the critical inquiries: "What constitutes an 'unlawful employment practice' and when has that practice 'occurred'?" *Id.*, at 110. Our precedent suggests, and lower courts have overwhelmingly held, that the unlawful practice is the *current payment* of salaries infected by gender-based (or race-based) discrimination—a practice that occurs whenever a paycheck delivers less to a woman than to a similarly situated man. See *Bazemore* v. *Friday*, 478 U. S. 385, 395 (1986) (Brennan, J., joined by all other Members of the Court, concurring in part).

I

Title VII proscribes as an "unlawful employment practice" discrimination "against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1). An individual seeking to challenge an employment practice under this proscription must file a charge with the EEOC within 180 days "after the alleged unlawful employment practice occurred." § 2000e–5(e)(1). See *ante*, at 624; *supra*, at 644, n. 1.

Ledbetter's petition presents a question important to the sound application of Title VII: What activity qualifies as an unlawful employment practice in cases of discrimination with respect to compensation. One answer identifies the pay-setting decision, and that decision alone, as the unlawful practice. Under this view, each particular salary-setting decision is discrete from prior and subsequent decisions, and must be challenged within 180 days on pain of forfeiture. Another response counts both the pay-setting decision and the actual payment of a discriminatory wage as unlawful practices. Under this approach, each payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice; prior decisions, outside the 180-day charge-filing period, are not themselves actionable, but they are relevant in determining the lawfulness of conduct within the period. The Court adopts the first view, see *ante*, at 621, 624, 628–629, but the second is more faithful to precedent, more in tune with the realities of the workplace, and more respectful of Title VII's remedial purpose.

A

In *Bazemore*, we unanimously held that an employer, the North Carolina Agricultural Extension Service, committed an unlawful employment practice each time it paid black employees less than similarly situated white employees. 478 U. S., at 395 (opinion of Brennan, J.). Before 1965, the Ex-

tension Service was divided into two branches: a white branch and a "Negro branch." *Id.*, at 390. Employees in the "Negro branch" were paid less than their white counterparts. In response to the Civil Rights Act of 1964, which included Title VII, the State merged the two branches into a single organization, made adjustments to reduce the salary disparity, and began giving annual raises based on nondiscriminatory factors. *Id.*, at 390–391, 394–395. Nonetheless, "some pre-existing salary disparities continued to linger on." *Id.*, at 394 (internal quotation marks omitted). We rejected the Court of Appeals' conclusion that the plaintiffs could not prevail because the lingering disparities were simply a continuing effect of a decision lawfully made prior to the effective date of Title VII. See *id.*, at 395–396. Rather, we reasoned, "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." *Id.*, at 395. Paychecks perpetuating past discrimination, we thus recognized, are actionable not simply because they are "related" to a decision made outside the charge-filing period, cf. *ante*, at 636, but because they discriminate anew each time they issue, see *Bazemore*, 478 U. S., at 395–396, and n. 6; *Morgan*, 536 U. S., at 111–112.

Subsequently, in *Morgan*, we set apart, for purposes of Title VII's timely filing requirement, unlawful employment actions of two kinds: "discrete acts" that are "easy to identify" as discriminatory, and acts that recur and are cumulative in impact. See *id.*, at 110, 113–115. "[A] [d]iscrete ac[t] such as termination, failure to promote, denial of transfer, or refusal to hire," *id.*, at 114, we explained, "'occur[s]' on the day that it 'happen[s].' A party, therefore, must file a charge within . . . 180 . . . days of the date of the act or lose the ability to recover for it." *Id.*, at 110; see *id.*, at 113 ("[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act.").

"[D]ifferent in kind from discrete acts," we made clear, are "claims . . . based on the cumulative effect of individual acts." *Id.*, at 115. The *Morgan* decision placed hostile work environment claims in that category. "Their very nature involves repeated conduct." *Ibid.* "The unlawful employment practice" in hostile work environment claims "cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Ibid.* (internal quotation marks omitted). The persistence of the discriminatory conduct both indicates that management should have known of its existence and produces a cognizable harm. *Ibid.* Because the very nature of the hostile work environment claim involves repeated conduct,

> "[i]t does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Id.*, at 117.

Consequently, although the unlawful conduct began in the past, "a charge may be filed at a later date and still encompass the whole." *Ibid.*

Pay disparities, of the kind Ledbetter experienced, have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination. Ledbetter's claim, resembling Morgan's, rested not on one particular paycheck, but on "the cumulative effect of individual acts." See *id.*, at 115. See also Brief for Petitioner 13, 15–17, and n. 9 (analogizing Ledbetter's claim to the recurring and cumulative harm at issue in *Morgan*); Reply Brief for Petitioner 13 (distinguishing pay discrimination from "easy to identify" discrete acts (internal quotation marks omitted)).

She charged insidious discrimination building up slowly but steadily. See Brief for Petitioner 5–8. Initially in line with the salaries of men performing substantially the same work, Ledbetter's salary fell 15 to 40 percent behind her male counterparts only after successive evaluations and percentage-based pay adjustments. See *supra*, at 643–644. Over time, she alleged and proved, the repetition of pay decisions undervaluing her work gave rise to the current discrimination of which she complained. Though component acts fell outside the charge-filing period, with each new paycheck, Goodyear contributed incrementally to the accumulating harm. See *Morgan*, 536 U. S., at 117; *Bazemore*, 478 U. S., at 395–396; cf. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 502, n. 15 (1968).[2]

B

The realities of the workplace reveal why the discrimination with respect to compensation that Ledbetter suffered does not fit within the category of singular discrete acts "easy to identify." A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. And promotions, transfers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden from sight. It is not unusual, decisions in point illustrate, for management to decline to pub-

[2] *National Railroad Passenger Corporation* v. *Morgan*, 536 U. S. 101, 117 (2002), the Court emphasizes, required that "an act contributing to the claim occu[r] within the [charge-]filing period." *Ante*, at 638, and n. 7 (emphasis deleted; internal quotation marks omitted). Here, each paycheck within the filing period compounded the discrimination Ledbetter encountered, and thus contributed to the "actionable wrong," *i. e.*, the succession of acts composing the pattern of discriminatory pay, of which she complained.

lish employee pay levels, or for employees to keep private their own salaries. See, *e. g.*, *Goodwin* v. *General Motors Corp.*, 275 F. 3d 1005, 1008–1009 (CA10 2002) (plaintiff did not know what her colleagues earned until a printout listing of salaries appeared on her desk, seven years after her starting salary was set lower than her co-workers' salaries); *McMillan* v. *Massachusetts Soc. for Prevention of Cruelty to Animals*, 140 F. 3d 288, 296 (CA1 1998) (plaintiff worked for employer for years before learning of salary disparity published in a newspaper).[3] Tellingly, as the record in this case bears out, Goodyear kept salaries confidential; employees had only limited access to information regarding their colleagues' earnings. App. 56–57, 89.

The problem of concealed pay discrimination is particularly acute where the disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision. She may have little reason even to suspect discrimination until a pattern develops incrementally and she ultimately becomes aware of the disparity. Even if an employee suspects that the reason for a comparatively low raise is not performance but sex (or another protected ground), the amount involved may seem too small, or the employer's intent too ambiguous, to make the issue immediately actionable—or winnable.

Further separating pay claims from the discrete employment actions identified in *Morgan*, an employer gains from sex-based pay disparities in a way it does not from a discriminatory denial of promotion, hiring, or transfer. When a

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[3] See also Bierman & Gely, "Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law, 25 Berkeley J. Emp. & Lab. L. 167, 168, 171 (2004) (one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers; only one in ten employers has adopted a pay openness policy).

male employee is selected over a female for a higher level position, someone still gets the promotion and is paid a higher salary; the employer is not enriched. But when a woman is paid less than a similarly situated man, the employer reduces its costs each time the pay differential is implemented. Furthermore, decisions on promotions, like decisions installing seniority systems, often implicate the interests of third-party employees in a way that pay differentials do not. Cf. *Teamsters* v. *United States*, 431 U. S. 324, 352–353 (1977) (recognizing that seniority systems involve "vested . . . rights of employees" and concluding that Title VII was not intended to "destroy or water down" those rights). Disparate pay, by contrast, can be remedied at any time solely at the expense of the employer who acts in a discriminatory fashion.

C

In light of the significant differences between pay disparities and discrete employment decisions of the type identified in *Morgan*, the cases on which the Court relies hold no sway. See *ante*, at 625–629 (discussing *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553 (1977), *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980), and *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900 (1989)). *Evans* and *Ricks* both involved a single, immediately identifiable act of discrimination: in *Evans*, a constructive discharge, 431 U. S., at 554; in *Ricks*, a denial of tenure, 449 U. S., at 252. In each case, the employee filed charges well after the discrete discriminatory act occurred: When United Airlines forced Evans to resign because of its policy barring married female flight attendants, she filed no charge; only four years later, when Evans was rehired, did she allege that the airline's former no-marriage rule was unlawful and therefore should not operate to deny her seniority credit for her prior service. See *Evans*, 431 U. S., at 554–557. Similarly, when Delaware State College denied Ricks tenure, he did not object until his terminal contract came to an end, one year later. *Ricks*, 449 U. S., at 253–254, 257–258.

No repetitive, cumulative discriminatory employment practice was at issue in either case. See *Evans*, 431 U. S., at 557–558; *Ricks*, 449 U. S., at 258.[4]

Lorance is also inapposite, for, in this Court's view, it too involved a one-time discrete act: the adoption of a new seniority system that "had its genesis in sex discrimination." See 490 U. S., at 902, 905 (internal quotation marks omitted). The Court's extensive reliance on *Lorance*, *ante*, at 626–629, 633, 636–637, moreover, is perplexing for that decision is no longer effective: In the 1991 Civil Rights Act, Congress superseded *Lorance*'s holding. § 112, 105 Stat. 1079 (codified as amended at 42 U. S. C. § 2000e–5(e)(2)). Repudiating our judgment that a facially neutral seniority system adopted with discriminatory intent must be challenged immediately, Congress provided:

> "For purposes of this section, an unlawful employment practice occurs . . . when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system." *Ibid.*

Congress thus agreed with the dissenters in *Lorance* that "the harsh reality of [that] decision" was "glaringly at odds with the purposes of Title VII." 490 U. S., at 914 (opinion

[4] The Court also relies on *Machinists* v. *NLRB*, 362 U. S. 411 (1960), which like *Evans* and *Ricks*, concerned a discrete act: the execution of a collective-bargaining agreement containing a union security clause. 362 U. S., at 412, 417. In *Machinists*, it was undisputed that under the National Labor Relations Act (NLRA), a union and an employer may not agree to a union security clause "if at the time of original execution the union does not represent a majority of the employees in the [bargaining] unit." *Id.*, at 412–414, 417. The complainants, however, failed to file a charge within the NLRA's six-month charge-filing period; instead, they filed charges 10 and 12 months after the execution of the agreement, objecting to its subsequent enforcement. See *id.*, at 412, 414. Thus, as in *Evans* and *Ricks*, but in contrast to Ledbetter's case, the employment decision at issue was easily identifiable and occurred on a single day.

of Marshall, J.). See also § 3, 105 Stat. 1071 (1991 Civil Rights Act was designed "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

True, § 112 of the 1991 Civil Rights Act directly addressed only seniority systems. See *ante*, at 627, and n. 2. But Congress made clear (1) its view that this Court had unduly *contracted* the scope of protection afforded by Title VII and other civil rights statutes, and (2) its aim to generalize the ruling in *Bazemore*. As the Senate Report accompanying the proposed Civil Rights Act of 1990, the precursor to the 1991 Act, explained:

> "Where, as was alleged in *Lorance*, an employer adopts a rule or decision with an unlawful discriminatory motive, each application of that rule or decision is a new violation of the law. In *Bazemore* . . . , for example, . . . the Supreme Court properly held that each application of th[e] racially motivated salary structure, *i. e.*, each new paycheck, constituted a distinct violation of Title VII. Section 7(a)(2) generalizes the result correctly reached in *Bazemore*." Civil Rights Act of 1990, S. Rep. No. 101–315, p. 54 (1990).[5]

See also 137 Cong. Rec. 29046, 29047 (1991) (Sponsors' Interpretative Memorandum) ("This legislation should be interpreted as disapproving the extension of *[Lorance]* to contexts outside of seniority systems."). But cf. *ante*, at 637 (relying on *Lorance* to conclude that "when an employer issues paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied" a new Title VII violation does not occur (internal quotation marks omitted)).

Until today, in the more than 15 years since Congress amended Title VII, the Court had not once relied upon

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[5] No Senate Report was submitted with the Civil Rights Act of 1991, which was in all material respects identical to the proposed 1990 Act.

Lorance. It is mistaken to do so now. Just as Congress' "goals in enacting Title VII . . . never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first [180] days," 490 U. S., at 914 (Marshall, J., dissenting), Congress never intended to immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption. This assessment gains weight when one comprehends that even a relatively minor pay disparity will expand exponentially over an employee's working life if raises are set as a percentage of prior pay.

A clue to congressional intent can be found in Title VII's backpay provision. The statute expressly provides that backpay may be awarded for a period of up to two years before the discrimination charge is filed. 42 U. S. C. §2000e–5(g)(1) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."). This prescription indicates that Congress contemplated challenges to pay discrimination commencing before, but continuing into, the 180-day filing period. See *Morgan*, 536 U. S., at 119 ("If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay."). As we recognized in *Morgan*, "the fact that Congress expressly limited the amount of recoverable damages elsewhere to a particular time period [*i. e.*, two years] indicates that the [180-day] timely filing provision was not meant to serve as a specific limitation . . . [on] the conduct that may be considered." *Ibid.*

D

In tune with the realities of wage discrimination, the Courts of Appeals have overwhelmingly judged as a present violation the payment of wages infected by discrimination: Each paycheck less than the amount payable had the employer adhered to a nondiscriminatory compensation regime, courts have held, constitutes a cognizable harm. See, *e. g.*,

Forsyth v. *Federation Employment and Guidance Serv.*, 409 F. 3d 565, 573 (CA2 2005) ("Any paycheck given within the [charge-filing] period . . . would be actionable, even if based on a discriminatory pay scale set up outside of the statutory period."); *Shea* v. *Rice*, 409 F. 3d 448, 452–453 (CADC 2005) ("[An] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason" (citing *Bazemore*, 478 U. S., at 396)); *Goodwin*, 275 F. 3d, at 1009–1010 ("*[Bazemore]* has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation. . . . [E]ach race-based discriminatory salary payment constitutes a fresh violation of Title VII." (footnote omitted)); *Anderson* v. *Zubieta*, 180 F. 3d 329, 335 (CADC 1999) ("The Courts of Appeals have repeatedly reached the . . . conclusion" that pay discrimination is "actionable upon receipt of each paycheck."); accord *Hildebrandt* v. *Illinois Dept. of Natural Resources*, 347 F. 3d 1014, 1025–1029 (CA7 2003); *Cardenas* v. *Massey*, 269 F. 3d 251, 257 (CA3 2001); *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F. 3d 164, 167–168 (CA8 1995) (en banc); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F. 3d 336, 347–349 (CA4 1994); *Gibbs* v. *Pierce Cty. Law Enforcement Support Agcy.*, 785 F. 2d 1396, 1399–1400 (CA9 1986).

Similarly in line with the real-world characteristics of pay discrimination, the EEOC—the federal agency responsible for enforcing Title VII, see, *e. g.*, 42 U. S. C. §§2000e–5(f), 2000e–12(a)—has interpreted the Act to permit employees to challenge disparate pay each time it is received. The EEOC's Compliance Manual provides that "[r]epeated occurrences of the same discriminatory employment action, such as discriminatory paychecks, can be challenged as long as one discriminatory act occurred within the charge filing period." 2 EEOC Compliance Manual §2–IV–C(1)(a), p. 605:0024, and n. 183 (2006); cf. *id.*, §10–III, p. 633:0002

(Title VII requires an employer to eliminate pay disparities attributable to a discriminatory system, even if that system has been discontinued).

The EEOC has given effect to its interpretation in a series of administrative decisions. See *Albritton* v. *Potter*, No. 01A44063, 2004 WL 2983682, *2 (EEOC Office of Fed. Operations, Dec. 17, 2004) (although disparity arose and employee became aware of the disparity outside the charge-filing period, claim was not time barred because "[e]ach paycheck that complainant receives which is less than that of similarly situated employees outside of her protected classes could support a claim under Title VII if discrimination is found to be the reason for the pay discrepancy." (citing *Bazemore*, 478 U. S., at 396)). See also *Bynum-Doles* v. *Winter*, No. 01A53973, 2006 WL 2096290 (EEOC Office of Fed. Operations, July 18, 2006); *Ward* v. *Potter*, No. 01A60047, 2006 WL 721992 (EEOC Office of Fed. Operations, Mar. 10, 2006). And in this very case, the EEOC urged the Eleventh Circuit to recognize that Ledbetter's failure to challenge any particular pay-setting decision when that decision was made "does not deprive her of the right to seek relief for discriminatory paychecks she received in 1997 and 1998." Brief of EEOC in Support of Petition for Rehearing and Suggestion for Rehearing En Banc, in No. 03–15264–GG (CA11), p. 14 (hereinafter EEOC Brief) (citing *Morgan*, 536 U. S., at 113).[6]

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[6] The Court dismisses the EEOC's considerable "experience and informed judgment," *Firefighters* v. *Cleveland*, 478 U. S. 501, 518 (1986) (internal quotation marks omitted), as unworthy of any deference in this case, see *ante*, at 642–643, n. 11. But the EEOC's interpretations mirror workplace realities and merit at least respectful attention. In any event, the level of deference due the EEOC here is an academic question, for the agency's conclusion that Ledbetter's claim is not time barred is the best reading of the statute even if the Court "were interpreting [Title VII] from scratch." See *Edelman* v. *Lynchburg College*, 535 U. S. 106, 114 (2002); see *supra*, at 646–655 and this page.

II

The Court asserts that treating pay discrimination as a discrete act, limited to each particular pay-setting decision, is necessary to "protec[t] employers from the burden of defending claims arising from employment decisions that are long past." *Ante*, at 630 (quoting *Ricks*, 449 U. S., at 256–257). But the discrimination of which Ledbetter complained is *not* long past. As she alleged, and as the jury found, Goodyear continued to treat Ledbetter differently because of sex each pay period, with mounting harm. Allowing employees to challenge discrimination "that extend[s] over long periods of time," into the charge-filing period, we have previously explained, "does not leave employers defenseless" against unreasonable or prejudicial delay. *Morgan*, 536 U. S., at 121. Employers disadvantaged by such delay may raise various defenses. *Id.*, at 122. Doctrines such as "waiver, estoppel, and equitable tolling" "allow us to honor Title VII's remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Id.*, at 121 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 398 (1982)); see 536 U. S., at 121 (defense of laches may be invoked to block an employee's suit "if he unreasonably delays in filing [charges] and as a result harms the defendant"); EEOC Brief 15 ("[I]f Ledbetter unreasonably delayed challenging an earlier decision, and that delay significantly impaired Goodyear's ability to defend itself . . . Goodyear can raise a defense of laches. . . . ").[7]

In a last-ditch argument, the Court asserts that this dissent would allow a plaintiff to sue on a single decision made

[7] Further, as the EEOC appropriately recognized in its brief to the Eleventh Circuit, Ledbetter's failure to challenge particular pay raises within the charge-filing period "significantly limit[s] the relief she can seek. By waiting to file a charge, Ledbetter lost her opportunity to seek relief for any discriminatory paychecks she received between 1979 and late 1997." EEOC Brief 14. See also *supra*, at 654–656.

20 years ago "even if the employee had full knowledge of all the circumstances relating to the . . . decision at the time it was made." *Ante*, at 639. It suffices to point out that the defenses just noted would make such a suit foolhardy. No sensible judge would tolerate such inexcusable neglect. See *Morgan*, 536 U. S., at 121 ("In such cases, the federal courts have the discretionary power . . . to locate a just result in light of the circumstances peculiar to the case." (internal quotation marks omitted)).

Ledbetter, the Court observes, *ante*, at 640–641, n. 9, dropped an alternative remedy she could have pursued: Had she persisted in pressing her claim under the Equal Pay Act of 1963 (EPA), 29 U. S. C. § 206(d), she would not have encountered a time bar.[8] See *ante*, at 640 ("If Ledbetter had pursued her EPA claim, she would not face the Title VII obstacles that she now confronts."); cf. *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 208–210 (1974). Notably, the EPA provides no relief when the pay discrimination charged is based on race, religion, national origin, age, or disability. Thus, in truncating the Title VII rule this Court announced in *Bazemore*, the Court does not disarm female workers from achieving redress for unequal pay, but it does impede racial and other minorities from gaining similar relief.[9]

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[8] Under the EPA, 29 U. S. C. § 206(d), which is subject to the Fair Labor Standards Act's time prescriptions, a claim charging denial of equal pay accrues anew with each paycheck. 1 B. Lindemann & P. Grossman, Employment Discrimination Law 529 (3d ed. 1996); cf. 29 U. S. C. § 255(a) (prescribing a two-year statute of limitations for violations generally, but a three-year limitation period for willful violations).

[9] For example, under today's decision, if a black supervisor initially received the same salary as his white colleagues, but annually received smaller raises, there would be no right to sue under Title VII outside the 180-day window following each annual salary change, however strong the cumulative evidence of discrimination might be. The Court would thus force plaintiffs, in many cases, to sue too soon to prevail, while cutting them off as time barred once the pay differential is large enough to enable them to mount a winnable case.

Furthermore, the difference between the EPA's prohibition against paying unequal wages and Title VII's ban on discrimination with regard to compensation is not as large as the Court's opinion might suggest. See *ante*, at 640. The key distinction is that Title VII requires a showing of intent. In practical effect, "if the trier of fact is in equipoise about whether the wage differential is motivated by gender discrimination," Title VII compels a verdict for the employer, while the EPA compels a verdict for the plaintiff. 2 C. Sullivan, M. Zimmer, & R. White, Employment Discrimination: Law and Practice § 7.08[F][3], p. 532 (3d ed. 2002). In this case, Ledbetter carried the burden of persuading the jury that the pay disparity she suffered was attributable to intentional sex discrimination. See *supra*, at 643–644; *infra* this page and 660.

III

To show how far the Court has strayed from interpretation of Title VII with fidelity to the Act's core purpose, I return to the evidence Ledbetter presented at trial. Ledbetter proved to the jury the following: She was a member of a protected class; she performed work substantially equal to work of the dominant class (men); she was compensated less for that work; and the disparity was attributable to gender-based discrimination. See *supra*, at 643–644.

Specifically, Ledbetter's evidence demonstrated that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear's pervasive discrimination against women managers in general and Ledbetter in particular. Ledbetter's former supervisor, for example, admitted to the jury that Ledbetter's pay, during a particular one-year period, fell below Goodyear's minimum threshold for her position. App. 93–97. Although Goodyear claimed the pay disparity was due to poor performance, the supervisor acknowledged that Ledbetter received a "Top Performance Award" in 1996. *Id.*, at 90–93. The jury also heard testimony that another supervisor—who evaluated Ledbetter in

1997 and whose evaluation led to her most recent raise denial—was openly biased against women. *Id.*, at 46, 77–82. And two women who had previously worked as managers at the plant told the jury they had been subject to pervasive discrimination and were paid less than their male counterparts. One was paid less than the men she supervised. *Id.*, at 51–68. Ledbetter herself testified about the discriminatory animus conveyed to her by plant officials. Toward the end of her career, for instance, the plant manager told Ledbetter that the "plant did not need women, that [women] didn't help it, [and] caused problems." *Id.*, at 36.[10] After weighing all the evidence, the jury found for Ledbetter, concluding that the pay disparity was due to intentional discrimination.

Yet, under the Court's decision, the discrimination Ledbetter proved is not redressable under Title VII. Each and every pay decision she did not immediately challenge wiped the slate clean. Consideration may not be given to the cumulative effect of a series of decisions that, together, set her pay well below that of every male area manager. Knowingly carrying past pay discrimination forward must be treated as lawful conduct. Ledbetter may not be compensated for the lower pay she was in fact receiving when she complained to the EEOC. Nor, were she still employed by Goodyear, could she gain, on the proof she presented at trial, injunctive relief requiring, prospectively, her receipt of the same compensation men receive for substantially similar work. The Court's approbation of these consequences is totally at odds with the robust protection against workplace discrimination Congress intended Title VII to secure. See, *e. g.*, *Teamsters* v. *United States*, 431 U. S., at 348 ("The primary purpose of Title VII was to assure equality of employment opportunities and to eliminate . . . discriminatory prac-

[10] Given this abundant evidence, the Court cannot tenably maintain that Ledbetter's case "turned principally on the misconduct of a single Goodyear supervisor." See *ante*, at 632, n. 4.

tices and devices . . . .” (internal quotation marks omitted)); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975) (“It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.”).

This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose. See *supra*, at 652–654. See also *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989) (superseded in part by the Civil Rights Act of 1991); *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989) (plurality opinion) (same); 1 B. Lindemann & P. Grossman, Employment Discrimination Law 2 (3d ed. 1996) (“A spate of Court decisions in the late 1980s drew congressional fire and resulted in demands for legislative change[,]” culminating in the 1991 Civil Rights Act (footnote omitted)). Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.

* * *

For the reasons stated, I would hold that Ledbetter’s claim is not time barred and would reverse the Eleventh Circuit’s judgment.

Reporter's Note

The next page is purposely numbered 901. The numbers between 661 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 APRIL 23 THROUGH MAY 29, 2007

APRIL 23, 2007

Certiorari Granted—Vacated and Remanded

No. 05–730. HERRING, COMMONWEALTH'S ATTORNEY FOR THE CITY OF RICHMOND, VIRGINIA, ET AL. *v.* RICHMOND MEDICAL CENTER FOR WOMEN ET AL. C. A. 4th Cir. Reported below: 409 F. 3d 619; and

No. 05–1124. NIXON, ATTORNEY GENERAL OF MISSOURI *v.* REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., ET AL. C. A. 8th Cir. Reported below: 429 F. 3d 803. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Gonzales* v. *Carhart*, *ante*, p. 124.

No. 05–766. APCC SERVICES, INC., ET AL. *v.* SPRINT COMMUNICATIONS CO., L. P., ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, *ante*, p. 45. Reported below: 418 F. 3d 1238.

No. 06–9516. HER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist.; and

No. 06–9559. ESCAMILLA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Cunningham* v. *California*, 549 U. S. 270 (2007).

Certiorari Dismissed

No. 06–9939. JERRY *v.* WILLIAMSON ET AL. 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: 211 Fed. Appx. 110.

Miscellaneous Orders

No. 06A914 (06–9969). MUHAMMAD *v.* MARYLAND ATTORNEY GRIEVANCE COMMISSION. Ct. App. Md. Application for stay, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 06M86. NICHOLAS *v.* NATIONAL SECURITY AGENCY; and No. 06M87. BETHEL ET UX. *v.* CLEAR CHANNEL COMMUNICATIONS, INC., DBA WPMI TV–15, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 06–10380. IN RE HADLEY. 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. 06–1146. IN RE DUBIN;
No. 06–9527. IN RE GIMBI;
No. 06–9570. IN RE LANE;
No. 06–9619. IN RE FRANKS;
No. 06–9713. IN RE TAYLOR;
No. 06–9718. IN RE THOMPSON;
No. 06–10125. IN RE SHERMAN; and
No. 06–10129. IN RE NEAL. Petitions for writs of mandamus denied.

No. 06–9721. IN RE SHEMONSKY. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 06–1005. UNITED STATES *v.* SANTOS ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 461 F. 3d 886.

Certiorari Denied

No. 06–306. SAWICKI *v.* MORGAN STATE UNIVERSITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 170 Fed. Appx. 271.

No. 06–600. SCHNEIDER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 06–691. UNITED STATES EX REL. NEW *v.* GATES, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 448 F. 3d 403.

No. 06–770. FLORIDA *v.* HARDEN ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 938 So. 2d 480.

No. 06–778. MUELLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 F. 3d 887.

No. 06–827. HRASKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 3d 1099.

No. 06–853. CHEMTURA CANADA CO./CIE, FKA CROMPTON CO./CIE, FKA UNIROYAL CHEMICAL LTD. *v.* UNITED STATES ET AL.;

No. 06–865. HERCULES INC. *v.* UNITED STATES; and

No. 06–1014. CHEMTURA CANADA CO./CIE, FKA CROMPTON CO./CIE, AKA UNIROYAL CHEMICAL LTD. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 3d 1031.

No. 06–985. PETRUSKA *v.* GANNON UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 462 F. 3d 294.

No. 06–1006. UNIVERSITY OF PHOENIX *v.* UNITED STATES EX REL. HENDOW ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 461 F. 3d 1166.

No. 06–1036. TAYLOR *v.* CITY OF FALMOUTH, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 187 Fed. Appx. 596.

No. 06–1134. PALMIERI *v.* NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 31 App. Div. 3d 647, 819 N. Y. S. 2d 76.

No. 06–1135. PALMIERI *v.* NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 31 App. Div. 3d 645, 820 N. Y. S. 2d 77.

No. 06–1137. ARRALEH *v.* RAMSEY COUNTY, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 461 F. 3d 967.

No. 06–1143. ALLEGIS REALTY INVESTORS ET AL. *v.* NOVAK ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 223 Ill. 2d 318, 860 N. E. 2d 246.

No. 06–1144. UTAH SHARED ACCESS ALLIANCE *v.* CARPENTER, MANAGER, SALT LAKE FIELD OFFICE OF THE BUREAU OF LAND MANAGEMENT, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 463 F. 3d 1125.

No. 06–1145. BENDER ET AL. *v.* HECHT'S DEPARTMENT STORES. C. A. 6th Cir. Certiorari denied. Reported below: 455 F. 3d 612.

No. 06–1150. ECKELBERRY, BENEFICIARY *v.* RELIASTAR LIFE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 469 F. 3d 340.

No. 06–1152. LINH DAO ET AL. *v.* WASHINGTON TOWNSHIP HEALTHCARE DISTRICT ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 06–1158. STROUP, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF ARCHIVES AND HISTORY, ET AL. *v.* WILLCOX ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 467 F. 3d 409.

No. 06–1212. TWO TREES ET AL. *v.* BUILDERS TRANSPORT, INC. C. A. 11th Cir. Certiorari denied. Reported below: 471 F. 3d 1178.

No. 06–1225. CUMMINGS *v.* EQUITABLE LIFE & CASUALTY INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 177 Fed. Appx. 794.

No. 06–1233. AMOS *v.* VIRGINIA EMPLOYMENT COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 194 Fed. Appx. 118.

No. 06–1260. WHITE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 367 Ark. 595, 242 S. W. 3d 240.

No. 06–1273. MAJOR *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 564.

No. 06–1274. WASHINGTON STATE DEPARTMENT OF HEALTH *v.* ONGOM. Sup. Ct. Wash. Certiorari denied. Reported below: 159 Wash. 2d 132, 148 P. 3d 1029.

No. 06–1276. MAXXON, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 465 F. 3d 1174.

No. 06–1277. CANADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 287.

No. 06–5729. BALLARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 179 Fed. Appx. 511.

No. 06–5749. LINDQUIST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 421 F. 3d 751.

No. 06–6221. EASTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 445 F. 3d 1019.

No. 06–6488. HANEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 174 Fed. Appx. 357.

No. 06–6541. ADAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 442 F. 3d 645.

No. 06–6551. PEYTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 183 Fed. Appx. 539.

No. 06–6705. GOFF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 449 F. 3d 884.

No. 06–7622. WADE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 458 F. 3d 1273.

No. 06–7877. LECROY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 441 F. 3d 914.

No. 06–7948. IRBY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 198 Fed. Appx. 650.

No. 06–8226. RICHARDS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 456 F. 3d 260.

No. 06–8427. MACIEL-VASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 458 F. 3d 994.

No. 06–8441. VACEK *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 447 F. 3d 1248.

No. 06–8472. GWARTNEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 197 Fed. Appx. 746.

No. 06–8633. MAYSONET *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 791.

No. 06–8696. STYLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 869.

No. 06–8990. WAGNER *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 191 Fed. Appx. 229.

No. 06–9140. SOLOMON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 620.

No. 06–9253. FOSTER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 466 F. 3d 359.

No. 06–9455. CARDENAS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 06–9461. DAFTARIAN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–9462. CRAWFORD *v.* PHAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 331.

No. 06–9463. DEASE *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–9464. COX *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–9523. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 253.

No. 06–9532. HOLLOWAY *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 06–9536. BRADBURY *v.* HALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–9538. DE JESUS PERALTA *v.* SCRUPPLES JANITORIAL SERVICES, INC., ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 169 Md. App. 752, 755.

No. 06–9539. CARTER *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 911 A. 2d 802.

No. 06–9547. MITCHAM *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 06–9554. WEST *v.* MCGINNIS, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 06–9556. PIWOWARSKI *v.* GREEN ET AL. C. A. D. C. Cir. Certiorari denied.

No. 06–9564. PRICE *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–9567. BARRIOS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 447 Mass. 701, 865 N. E. 2d 857.

No. 06–9569. MENDOZA MALDONADO *v.* ALEXANDER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 191 Fed. Appx. 3.

No. 06–9571. LEFORT *v.* HUNTER ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–9572. LEWIS *v.* PIAZZA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–9573. MONROE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 172 Fed. Appx. 545.

No. 06–9575. KING *v.* BARTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 317.

No. 06–9576. LINDELL *v.* O'DONNELL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 472.

No. 06–9580. SHEPP, AKA ROBERTS *v.* SHEPP. Sup. Ct. Pa. Certiorari denied. Reported below: 588 Pa. 691, 906 A. 2d 1165.

No. 06–9582. LINDSEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 365 Ill. App. 3d 1101, —— N. E. 2d ——.

No. 06–9585. MANIER *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON (two judgments). C. A. 9th Cir. Certiorari denied.

No. 06–9593. WILLIAMS *v.* TRAVIS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 06–9598. PEPPER *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 911 A. 2d 803.

No. 06–9605. SPURLOCK *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–9606. NOORDMAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 06–9609. WALCOTT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 06–9613. HOLZWARTH *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 225.

No. 06–9614. GODAIRE *v.* CONNECTICUT ET AL. App. Ct. Conn. Certiorari denied.

No. 06–9617. HITES *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–9618. GALLOWAY *v.* HUFFMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–9621. GATES *v.* SMITH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 06–9622. HERRING *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 160 S. W. 3d 618.

No. 06–9625. PITTMAN *v.* TURNER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–9630. WALKER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 06–9633. WHEELER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 946 So. 2d 606.

No. 06–9634. LAMBRIX *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 944 So. 2d 345.

No. 06–9636. KING *v.* HOWERTON, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 06–9637. MARTIN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 06–9638. TAYLOR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–9644. ISRAEL *v.* YOUNG. C. A. D. C. Cir. Certiorari denied. Reported below: 204 Fed. Appx. 906.

No. 06–9646. MURPHY, AKA MYLES *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–9647. POZO *v.* SAWINSKI ET AL. C. A. 7th Cir. Certiorari denied.

No. 06–9648. MCAFEE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 365 Ill. App. 3d 1101, —— N. E. 2d ——.

No. 06–9649. CROSBY *v.* SCHWARZENEGGER, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 191 Fed. Appx. 593.

No. 06–9662. HALL *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 06–9679. ROSARIO-DEL RIO *v.* PUERTO RICO TELEPHONE CO. C. A. 1st Cir. Certiorari denied.

No. 06–9692. FLOWERS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 06–9693. GUILD *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 06–9695. MOSS *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 06–9700. MAREK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 940 So. 2d 427.

No. 06–9735. HAWTHORNE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 06–9756. SAMPLE *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–9764. BANKS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 180 Fed. Appx. 470.

No. 06–9773. SCOTT *v.* HELLING, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–9782. ALLEN *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 06–9792. DUBALSKI *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 946 So. 2d 1074.

No. 06–9825. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–9831. CARTER *v.* RMH TELESERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 214.

No. 06–9840. MCINTOSH, AKA MACINTOCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 302.

No. 06–9843. VERGARA-ROMANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 678.

No. 06–9860. COLON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 474 F. 3d 95.

No. 06–9861. CHESTNUTT *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 853.

No. 06–9870. BANCROFT *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 06–9882. WEEKS *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 714.

No. 06–9883. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 370.

No. 06–9884. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 782.

No. 06–9900. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–9903. SMITH *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 168 Ohio App. 3d 141, 858 N. E. 2d 1222.

No. 06–9919. ARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 884.

No. 06–9961. BERNARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 214 Fed. Appx. 182.

No. 06–9991. OLSZEWSKI *v.* SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied. Reported below: 466 F. 3d 47.

No. 06–10017. DUMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10021. PEREZ *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 06–10025. SCHICHTEL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 890 A. 2d 1105.

No. 06–10075. WASHINGTON *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 931 So. 2d 1120.

No. 06–10095. EAMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–10173. PANDALES-ANGULO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10182. COOPER *v.* MCFADDEN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 06–10183. COLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 608.

No. 06–10184. COFIELD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 273.

No. 06–10188. QUINTERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–10193. BLAND *v.* SIRMONS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 459 F. 3d 999.

No. 06–10198. ANTLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 163 Fed. Appx. 214.

No. 06–10201. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 3d 241.

No. 06–10202. GARCIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–10208. GARDNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 299.

No. 06–10210. CLAYTOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 213.

No. 06–10220. TULLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 327.

No. 06–10223. LIBERATO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 169.

No. 06–10227. AKIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 606.

No. 06–10229. STEPTOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10231. SAUNDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 778.

No. 06–10235. MORALES-ORTIZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 773.

No. 06–10241. ROWE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 588.

No. 06–10244. BOWLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 209 Fed. Appx. 98.

No. 06–10245. BUCKNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 3d 551.

No. 06–10246. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10249. PLAYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 331.

No. 06–10250. MONTEPEQUE-PERALTA, AKA SALAZAR-CANASTU, AKA SALAZAR-SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 453.

No. 06–10252. WITHERSPOON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 256.

No. 06–10256. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 321.

No. 05–431. BURKE, BANKING COMMISSIONER, CONNECTICUT DEPARTMENT OF BANKING *v.* WACHOVIA BANK, N. A., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 414 F. 3d 305.

No. 05–1623. TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION *v.* BUCKLEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 441 F. 3d 688.

No. 06–653. TURNBAUGH, COMMISSIONER OF FINANCIAL REGULATION, MARYLAND DEPARTMENT OF LABOR, LICENSING AND REGULATION *v.* NATIONAL CITY BANK OF INDIANA ET AL. C. A.

4th Cir. Certiorari denied. JUSTICE THOMAS and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 463 F. 3d 325.

No. 06–1133. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE ET AL. *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 211 Fed. Appx. 91.

Rehearing Denied

No. 06–405. RAY *v.* CSX TRANSPORTATION, INC., 549 U. S. 1053;

No. 06–747. GILLARD *v.* MITCHELL, WARDEN, 549 U. S. 1264;

No. 06–909. SMITH *v.* COCHRAN, 549 U. S. 1265;

No. 06–6716. HARKEY *v.* UNITED STATES, 549 U. S. 1098;

No. 06–7021. PANNELL *v.* PENFOLD ET AL., 549 U. S. 1098;

No. 06–7965. THOMAS *v.* UNITED STATES, 549 U. S. 1144;

No. 06–8063. GROEBNER *v.* MINNESOTA ET AL., 549 U. S. 1218;

No. 06–8315. BURDEN *v.* HEMPELMAN ET AL., 549 U. S. 1224;

No. 06–8409. LINN *v.* KIOWA COUNTY DISTRICT COURT ET AL., 549 U. S. 1227;

No. 06–8426. NEUMAN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 549 U. S. 1227;

No. 06–8563. BURDEN *v.* WOOD, 549 U. S. 1231;

No. 06–8614. SMALL *v.* UNITED STATES, 549 U. S. 1233;

No. 06–8635. JOHNSON *v.* CITY OF NEW YORK, NEW YORK, ET AL., 549 U. S. 1268;

No. 06–8681. DEMARSH *v.* ISSAKS, JUDGE, DISTRICT COURT OF TEXAS, DENTON COUNTY, ET AL., 549 U. S. 1284;

No. 06–8877. MOORE *v.* POLISH AMERICAN DEFENSE COMMITTEE, INC., ET AL., 549 U. S. 1288;

No. 06–8879. YOUNG *v.* PIERCE, WARDEN (two judgments), 549 U. S. 1240;

No. 06–8922. MITCHELL *v.* WILD ET AL., 549 U. S. 1270; and

No. 06–9124. YANG *v.* KNIGHT RIDDER DIGITAL, 549 U. S. 1290. Petitions for rehearing denied.

No. 06–8276. SPURLOCK *v.* BANK OF AMERICA ET AL., 549 U. S. 1246. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 06–6418. MILLEN *v.* TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, 549 U. S. 1035. Motion for leave to file petition for rehearing denied.

APRIL 24, 2007

Miscellaneous Order

No. 06A998. FILIAGGI *v.* STRICKLAND, GOVERNOR OF OHIO, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

APRIL 26, 2007

Dismissal Under Rule 46

No. 06–82. HARTFORD FIRE INSURANCE CO. *v.* REYNOLDS. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 435 F. 3d 1081.

APRIL 27, 2007

Dismissal Under Rule 46

No. 06–10116. IN RE BAEZ ARROYO. Petition for writ of mandamus dismissed under this Court's Rule 46.

APRIL 30, 2007

Certiorari Granted—Vacated and Remanded

No. 06–523. PATRICK, WARDEN *v.* SMITH. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Carey* v. *Musladin*, 549 U. S. 70 (2006). Reported below: 437 F. 3d 884.

No. 06–7263. CHAMBERS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Abdul-Kabir* v. *Quarterman*, *ante*, p. 233. Reported below: 191 Fed. Appx. 290.

No. 06–9770. SHUPP *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cunningham* v. *California,* 549 U. S. 270 (2007).

Certiorari Dismissed

No. 06–9729. SIVAK *v.* SONNEN ET AL. Sup. Ct. Idaho. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 06–9730. SIVAK *v.* DEFENDANT A. Sup. Ct. Idaho. 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. 06–9737. HARRIS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. 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. 06A912 (06–10416). METZSCH *v.* AVAYA, INC. C. A. 8th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. 06M88. TRUSS *v.* MITCHEM, WARDEN, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

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*For the Court's orders prescribing an amendment to the Federal Rules of Appellate Procedure, see *post,* p. 985; amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 991; amendments to the Federal Rules of Civil Procedure, see *post,* p. 1005; and amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1167.

No. 06–10457. In re Malik;
No. 06–10464. In re Osoria;
No. 06–10482. In re Glover;
No. 06–10484. In re Guinn;
No. 06–10504. In re Perez Negron;
No. 06–10512. In re Campbell;
No. 06–10556. In re Anderson; and
No. 06–10590. In re Ward. Petitions for writs of habeas corpus denied.

No. 06–9683. In re Foose;
No. 06–9748. In re Duncan;
No. 06–9784. In re Arnold; and
No. 06–9806. In re Riggins. Petitions for writs of mandamus denied.

No. 06–9746. In re Clark; and
No. 06–10379. In re Ijemba. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 06–984. Medellin *v.* Texas. Ct. Crim. App. Tex. Certiorari granted. Reported below: 223 S. W. 3d 315.

Certiorari Denied

No. 06–462. Texas et al. *v.* Meyers et al. C. A. 5th Cir. Certiorari denied. Reported below: 410 F. 3d 236.

No. 06–740. Lopez-Cancinos et al. *v.* Gonzales, Attorney General. C. A. 9th Cir. Certiorari denied. Reported below: 186 Fed. Appx. 721.

No. 06–769. Weems et al. *v.* Johnson, Chief of Police, Little Rock Police Department, et al. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 3d 1010.

No. 06–906. Pradilla *v.* Gonzales, Attorney General, et al. C. A. 11th Cir. Certiorari denied. Reported below: 187 Fed. Appx. 959.

No. 06–955. Butler *v.* Fletcher. C. A. 8th Cir. Certiorari denied. Reported below: 465 F. 3d 340.

No. 06–1010. NIAGARA MOHAWK POWER CORP. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION; and

No. 06–1011. NEW YORK ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 452 F. 3d 822.

No. 06–1110. MILLER-JENKINS *v.* MILLER-JENKINS. Sup. Ct. Vt. Certiorari denied. Reported below: 180 Vt. 441, 912 A. 2d 951.

No. 06–1121. GOODMAN *v.* HBD INDUSTRIES, INC., ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 208 S. W. 3d 373.

No. 06–1159. KAUFMANN'S CAROUSEL, INC., ET AL. *v.* CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 32 App. Div. 3d 1340, 821 N. Y. S. 2d 519.

No. 06–1160. NISSELSON, TRUSTEE OF THE DICTAPHONE LITIGATION TRUST *v.* LERNOUT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 469 F. 3d 143.

No. 06–1161. P. M. REALTY & INVESTMENTS, INC. *v.* CITY OF TAMPA, FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 944 So. 2d 364.

No. 06–1165. MCGIRT ET AL. *v.* GULF INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 305.

No. 06–1168. BUFFALO TEACHERS FEDERATION ET AL. *v.* TOBE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 464 F. 3d 362.

No. 06–1170. CORY *v.* AZTEC STEEL BUILDING, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 468 F. 3d 1226.

No. 06–1173. FINCH *v.* BUECHEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 188 Fed. Appx. 139.

No. 06–1174. HORWITZ *v.* ILLINOIS STATE BOARD OF EDUCATION ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 365 Ill. App. 3d 1092, —— N. E. 2d ——.

No. 06–1177. GILLESPIE *v.* GILLESPIE. App. Ct. Mass. Certiorari denied. Reported below: 67 Mass. App. 1103, 852 N. E. 2d 136.

No. 06–1179. HALL *v.* CIVIL AIR PATROL, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 298.

No. 06–1185. MICKENS *v.* POLK COUNTY SCHOOL BOARD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 195 Fed. Appx. 928.

No. 06–1186. RHODES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 919 So. 2d 1238.

No. 06–1256. ADAMS ET AL. *v.* CITY OF CHICAGO, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 469 F. 3d 609.

No. 06–1259. NASCIMENTO *v.* SUPREME COURT OF MONTANA. Sup. Ct. Mont. Certiorari denied.

No. 06–1280. SHAPIRO *v.* INGRAM, JUDGE, SUPERIOR COURT OF GEORGIA, COBB COUNTY. C. A. 11th Cir. Certiorari denied.

No. 06–1297. KHOROZIAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–1301. GURR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 471 F. 3d 144.

No. 06–8034. RANGEL-TOVAR *v.* UNITED STATES (Reported below: 195 Fed. Appx. 287); OVALLE-CASTILLO, AKA AVILLA-VALENCIA *v.* UNITED STATES (202 Fed. Appx. 25); ESQUIVEL-CANTERA *v.* UNITED STATES (202 Fed. Appx. 10); SANCHEZ-LAZO *v.* UNITED STATES (202 Fed. Appx. 54); SOROSA-SANCHEZ *v.* UNITED STATES (202 Fed. Appx. 21); GARCIA-LOZANO *v.* UNITED STATES (202 Fed. Appx. 6); GARCIA-GARCIA *v.* UNITED STATES (203 Fed. Appx. 590); SINISTERRA-BANGUER, AKA BANGUER SINISTERRA, AKA SINISTERRA BANGUERA *v.* UNITED STATES (203 Fed. Appx. 658); SANCHEZ-RIVERA *v.* UNITED STATES (203 Fed. Appx. 621); PEREZ-CUEVAS, AKA GONZALEZ-HERNANDEZ *v.* UNITED STATES (203 Fed. Appx. 673); CANTU-RUELAS *v.* UNITED STATES (203 Fed. Appx. 670); LUNA, AKA MOISES *v.* UNITED STATES (203 Fed. Appx. 611); and REYES-REYES *v.* UNITED STATES (205 Fed. Appx. 262). C. A. 5th Cir. Certiorari denied.

No. 06–8507. CONSTANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 200 Fed. Appx. 85.

No. 06–8710. GARZA-REYNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 292.

No. 06–8936. ROGERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 4th 826, 141 P. 3d 135.

No. 06–9036. AMADOR *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 458 F. 3d 397.

No. 06–9074. DOLINSKA-MADURA *v.* FULL SPECTRUM LENDING, INC., ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 939 So. 2d 1067.

No. 06–9083. SANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 3d 572.

No. 06–9089. SANDRES *v.* STATE OFFICE OF GENERAL COUNSEL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 809.

No. 06–9146. OLIVER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 4th 970, 140 P. 3d 775.

No. 06–9173. LEWIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 4th 970, 140 P. 3d 775.

No. 06–9651. GUADALUPE *v.* PATRICK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HOUTZDALE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–9654. HURLSTON *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 06–9658. HARRIS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 06–9660. IBEABUCHI *v.* PALMER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–9663. GILLIS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 06–9664. HALES *v.* BROOKS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–9667. COOK *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 215.

No. 06–9670. COPLEY *v.* MOORE, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 06–9672. LEE *v.* DOTSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–9677. EARP *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–9678. MITCHELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 06–9682. ST. AUBIN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 3d 1096.

No. 06–9696. PERKIS *v.* SIRMONS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 648.

No. 06–9698. LUGO *v.* CARRANZA ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–9701. MACKEY *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 06–9702. JACKSON *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 934.

No. 06–9704. KING *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 260.

No. 06–9705. BLANKENSHIP *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 942 So. 2d 561.

No. 06–9709. WILLIAMS *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 494.

No. 06–9711. MCBRIDE *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 840.

No. 06–9714. MCNEIL *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–9716. WITKOWSKI *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–9717. WORRELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 170 Md. App. 737.

No. 06–9724. HELMIG *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 461 F. 3d 960.

No. 06–9727. LOVETT *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 06–9734. HOUGHTON *v.* HURD. C. A. 9th Cir. Certiorari denied.

No. 06–9736. GRAVES *v.* WILLIAMS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–9739. HOLLEY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 06–9743. FRIERSON *v.* AVILES ET AL.; and FRIERSON *v.* ROBINSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–9750. PERRY *v.* HOREL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–9755. SWEET *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–9757. SCOTT *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 170.

No. 06–9761. YOUNG *v.* SISTO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 155.

No. 06–9763. ANDERSON *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 06–9766. BURDEN *v.* COLORADO DEPARTMENT OF CORRECTIONS. Ct. App. Colo. Certiorari denied.

No. 06–9777. DEYOUNG *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 443.

No. 06–9780. TILLMAN *v.* HOFBAUER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–9789. CLAYTON *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. Ct. App. Mich. Certiorari denied.

No. 06–9791. ECHOLS *v.* KNIGHT, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 06–9798. LACEFIELD *v.* NEW YORK TIMES ET AL. C. A. 6th Cir. Certiorari denied.

No. 06–9803. TASKER *v.* MICHIGAN DEPARTMENT OF HUMAN SERVICES. Ct. App. Mich. Certiorari denied.

No. 06–9807. SCOTT *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 366 Ill. App. 3d 1231, —— N. E. 2d ——.

No. 06–9811. FOSTER *v.* BUCHANAN, JUDGE, CLEVELAND HEIGHTS MUNICIPAL COURT. Sup. Ct. Ohio. Certiorari denied.

No. 06–9842. VILLAMIZAR-RAMIREZ *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 738.

No. 06–9951. SIMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 279.

No. 06–10052. HICKS *v.* FENTY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 06–10069. LITWA *v.* REYNOLDS, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 06–10101. SNIPES *v.* PIERCE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–10102. STANLEY *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 06–10115. HILSKA *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 06–10128. WIMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10137. HOLLIMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 961.

No. 06–10151. THRIFT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 816.

No. 06–10165. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10171. MONTAGUE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 364 Ill. App. 3d 1051, —— N. E. 2d ——.

No. 06–10175. OTTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 576.

No. 06–10185. WILLIAMS *v.* RIDLEY-TURNER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 545.

No. 06–10214. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 372.

No. 06–10225. WADE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 456.

No. 06–10258. DIAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10271. NGHIA LE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 812.

No. 06–10272. JORDAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 672.

No. 06–10274. LEDESMA-CUESTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–10275. KLOSZEWSKI *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 192 Fed. Appx. 866.

No. 06–10276. MASON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10278. NIGRO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 218 Fed. Appx. 153.

No. 06–10279. MCDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 222.

No. 06–10284. SCHUMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 669.

No. 06–10286. ROBINSON *v.* REVELL, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–10287. KIMBLE *v.* LAMANNA, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 182 Fed. Appx. 190.

No. 06–10288. WELLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–10289. CHRISTIAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 337.

No. 06–10291. SIMS *v.* SHERMAN, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 207 Fed. Appx. 155.

No. 06–10295. BOKMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 203.

No. 06–10297. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 473 F. 3d 1147.

No. 06–10308. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 997.

No. 06–10310. ASKEW *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 203 Fed. Appx. 414.

No. 06–10313. LUNA-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 224.

No. 06–10318. VALENCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10321. PERRY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 906 A. 2d 334.

No. 06–10325. WEATHERSPOON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 06–10326. INGRAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 207 Fed. Appx. 147.

No. 06–10327. HOUSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 456 F. 3d 1328.

No. 06–10329. FUENTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 804.

No. 06–10331. GUERRA-MESTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 299.

No. 06–10334. HICKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 480.

No. 06–10337. PORTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 184 Fed. Appx. 112.

No. 06–10339. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10341. COLON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 305 F. 3d 627.

No. 06–10344. GARRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 187 Fed. Appx. 308.

No. 06–10348. BRAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 3d 179.

No. 06–10349. GONZALEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 842.

No. 06–10350. VUOLO *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 06–10351. ZAKHAROV *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 F. 3d 1171.

No. 06–10352. HISHAW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 06–10354. GWATHNEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 465 F. 3d 1133.

No. 06–10358. GECHT *v.* JONES, ASSISTANT WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–10360. ELSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 479 F. 3d 314.

No. 06–10362. DONEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 180.

No. 06–10363. ERVIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 519.

No. 06–10365. ZHIHAO LIU *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 311.

No. 06–10366. MAYERS-CARRILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 219 Fed. Appx. 364.

No. 06–10369. ANDERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–10377. IBARRA-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 777.

No. 06–10381. GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 06–10383. GARCIA-ESTUPINON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 468 F. 3d 771.

No. 06–10385. GADDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 245.

No. 06–10388. CASILLAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10393. IN RE SEALED CASE. C. A. D. C. Cir. Certiorari denied. Reported below: 449 F. 3d 118.

No. 06–10394. HENDERSON *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10397. MALLOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 342.

No. 06–10400. WEBB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 219.

No. 06–10401. SPANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 476 F. 3d 476.

No. 06–10403. DEWILLIAMS *v.* MARTINEZ, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 589.

No. 06–10407. THORPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 3d 652.

No. 06–10408. ANDREW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10414. PEREZ-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 226.

No. 06–10418. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 474 F. 3d 1208.

No. 06–10429. ARCE-LEON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–10431. VANDRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 627.

No. 06–10433. THOMPSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 473 F. 3d 1137.

No. 06–10434. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 584.

No. 06–736. ENVIRONMENTAL PROTECTION AGENCY *v.* NEW YORK ET AL.; and

No. 06–750. UTILITY AIR REGULATORY GROUP *v.* NEW YORK ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of these petitions. Reported below: 443 F. 3d 880.

No. 06–1169. HAMDAN *v.* GATES, SECRETARY OF DEFENSE, ET AL.; and KHADR *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. (Reported below: 476 F. 3d 981). C. A. D. C. Cir. Certiorari denied. JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the petition for writ of certiorari.

No. 06–1176. HIGH COUNTRY CITIZENS ALLIANCE ET AL. *v.* CLARKE, DIRECTOR, BUREAU OF LAND MANAGEMENT, ET AL. C. A. 10th Cir. Motion of Administrative Law and Public Lands Law Professors for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 454 F. 3d 1177.

Rehearing Denied

No. 06–518. CHADDA *v.* GILLESPIE ET AL., 549 U. S. 1205;

No. 06–943. BROWN ET UX. *v.* INTERBAY FUNDING, LLC, ET AL., 549 U. S. 1280;

No. 06–951. RAAD *v.* FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT, 549 U. S. 1253;

No. 06–7356. ALEX *v.* STALDER, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, 549 U. S. 1214;

No. 06–7606. BROOKS *v.* SUPERVALU, INC., 549 U. S. 1214;

No. 06–7758. LAMBERT *v.* BUSS, SUPERINTENDENT, INDIANA STATE PRISON, 549 U. S. 1283;

No. 06–8126. STALEY *v.* HALL, WARDEN (three judgments), 549 U. S. 1219;

No. 06–8301. MCGRATH *v.* GEORGIA, 549 U. S. 1223;

No. 06–8317. BACKMAN *v.* NEW YORK, 549 U. S. 1224;

No. 06–8344. VANSACH *v.* UNITED STATES, 549 U. S. 1174;

No. 06–8602. PARADA *v.* FLORIDA, 549 U. S. 1267;

No. 06–8673. WILLIAMS *v.* UNITED STATES POSTAL SERVICE, 549 U. S. 1235;

No. 06–8680. STROZIER *v.* UNITED STATES POSTAL SERVICE ET AL., 549 U. S. 1235;

No. 06–8765. BLACK *v.* FORT WADE CORRECTIONAL CENTER ET AL., 549 U. S. 1285;

No. 06–8912. MORERA-VIGO *v.* UNITED STATES, 549 U. S. 1241;

No. 06–9196. CREVELING *v.* WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, 549 U. S. 1290;

No. 06–9238. HUTSON *v.* UNITED STATES, 549 U. S. 1272; and

No. 06–9251. IN RE FUSELIER, 549 U. S. 1251. Petitions for rehearing denied.

MAY 1, 2007

Miscellaneous Order

No. 06A1005. ZALITA *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Application for injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

MAY 3, 2007

Certiorari Denied

No. 06–10863 (06A1015). WOODS *v.* INDIANA. Sup. Ct. Ind. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 863 N. E. 2d 301.

No. 06–10949 (06A1018). JONES *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 485 F. 3d 635.

No. 06–11060 (06A1033). WOODS *v.* BUSS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 496 F. 3d 620.

MAY 8, 2007

Miscellaneous Order

No. 06A1041. WORKMAN *v.* BELL, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

Certiorari Denied

No. 06–11103 (06A1052). WORKMAN *v.* BREDESEN, GOVERNOR OF TENNESSEE, ET AL. 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. JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 486 F. 3d 896.

May 11, 2007

Dismissals Under Rule 46

No. 06–1202. Doe, a Minor, by His Mother and Next Friend, Doe *v.* Kamehameha Schools/Bernice Pauahi Bishop Estate et al. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 470 F. 3d 827.

No. 06–1229. Wright *v.* Colville Tribal Enterprise Corp. et al. Sup. Ct. Wash. Certiorari dismissed under this Court's Rule 46.1. Reported below: 159 Wash. 2d 108, 147 P. 3d 1275.

May 14, 2007

Certiorari Granted—Vacated and Remanded

No. 06–359. Daviess County, Kentucky *v.* National Solid Wastes Management Assn. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Management Authority, ante,* p. 330. Reported below: 434 F. 3d 898.

No. 06–1068. Ford Motor Co. et al. *v.* Buell-Wilson et al. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Philip Morris USA* v. *Williams,* 549 U. S. 346 (2007). Reported below: 141 Cal. App. 4th 525, 46 Cal. Rptr. 3d 147.

No. 06–9820. Sherman *v.* California. Ct. App. Cal., 1st App. Dist.;

No. 06–9847. Bjorn *v.* California. Ct. App. Cal., 6th App. Dist.; and

No. 06–10055. Mba *v.* California. Ct. App. Cal., 2d App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Cunningham* v. *California,* 549 U. S. 270 (2007).

Certiorari Dismissed

No. 06–10533. Graves *v.* Social Security Boards Commissioner 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.

Miscellaneous Orders

No. 134, Orig. NEW JERSEY *v.* DELAWARE. Report of the Special Master is received and ordered filed. Exceptions to the report, if any, 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.*, 549 U. S. 950.]

No. 137, Orig. MONTANA *v.* WYOMING ET AL. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 06–766. NEW YORK STATE BOARD OF ELECTIONS ET AL. *v.* LOPEZ TORRES ET AL. C. A. 2d Cir. [Certiorari granted, 549 U. S. 1204.] Motion of petitioners to dispense with printing the joint appendix granted. Parties are directed to file 20 copies of the joint appendix and hearing exhibits filed in the United States Court of Appeals for the Second Circuit.

No. 06–1039. ESTATE OF ROXAS ET AL. *v.* PIMENTEL ET AL.; and

No. 06–1204. REPUBLIC OF THE PHILLIPINES ET AL. *v.* PIMENTEL ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 06–8820. HADDAD *v.* ADECCO USA, INC., ET AL. Ct. App. Mich. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [549 U. S. 1276] denied.

No. 06–9912. O'SHEA *v.* LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 4, 2007, 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. 06–10596. IN RE ANDERSON; and

No. 06–10709. IN RE DRABOVSKIY. Petitions for writs of habeas corpus denied.

No. 06–1198. In re Morrow;
No. 06–1323. In re Simons et ux.;
No. 06–9921. In re Archuleta;
No. 06–10194. In re Beauclair; and
No. 06–10454. In re Rogers. Petitions for writs of mandamus denied.

No. 06–1208. In re Chaganti & Associates, P. C. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 06–819. Flowers et ux. *v.* United States Army, 25th Infantry Division, et al. C. A. 9th Cir. Certiorari denied. Reported below: 179 Fed. Appx. 986.

No. 06–854. Wilson-Bey *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 903 A. 2d 818.

No. 06–893. Hao Zhu *v.* Gonzales, Attorney General. C. A. 7th Cir. Certiorari denied. Reported below: 465 F. 3d 316.

No. 06–902. Figueroa *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 466 F. 3d 1023.

No. 06–922. Nutraceutical Corp. et al. *v.* von Eschenbach, Commissioner, Food and Drug Administration, et al. C. A. 10th Cir. Certiorari denied. Reported below: 459 F. 3d 1033.

No. 06–975. Brown *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 459 F. 3d 509.

No. 06–1032. Newland, Warden *v.* Boyd. C. A. 9th Cir. Certiorari denied. Reported below: 467 F. 3d 1139.

No. 06–1046. Askia-Briggs *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 187 Fed. Appx. 540.

No. 06–1050. Burke et al. *v.* Utah Transit Authority et al. C. A. 10th Cir. Certiorari denied. Reported below: 462 F. 3d 1253.

No. 06–1084. Rongstad et al. *v.* Lassa. Sup. Ct. Wis. Certiorari denied. Reported below: 294 Wis. 2d 187, 718 N. W. 2d 673.

No. 06–1087. LUKS *v.* BAXTER HEALTHCARE CORP. C. A. 7th Cir. Certiorari denied. Reported below: 467 F. 3d 1049.

No. 06–1093. CITY OF ABERDEEN, SOUTH DAKOTA *v.* SENGER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 466 F. 3d 670.

No. 06–1111. BROOKS ET AL. *v.* VASSAR, CHAIRMAN, VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 462 F. 3d 341.

No. 06–1112. TOKAI CORP. *v.* SAIA, INDIVIDUALLY AND AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF SAIA, A DECEASED MINOR, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 366 Ill. App. 3d 419, 851 N. E. 2d 693.

No. 06–1156. NIGHT VISION CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 469 F. 3d 1369.

No. 06–1189. COHEN, SUCCESSOR PERSONAL REPRESENTATIVE AND SUCCESSOR TRUSTEE FOR THE ESTATE OF LANGLAND, ET AL. *v.* PARLETTA ET AL. Ct. App. Mich. Certiorari denied.

No. 06–1190. AMY G. ET VIR *v.* M. W. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 142 Cal. App. 4th 1, 47 Cal. Rptr. 3d 297.

No. 06–1191. PUNCHARD *v.* UNITED STATES ET AL.; and
No. 06–1192. PUNCHARD *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 832.

No. 06–1197. BARASH ET UX. *v.* NORTHERN TRUST BANK OF FLORIDA, N. A. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 944 So. 2d 1000.

No. 06–1203. SHALLOW *v.* ROGERS, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, 38TH JUDICIAL DISTRICT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 201 Fed. Appx. 901.

No. 06–1215. CLOVER PARK SCHOOL DISTRICT NO. 400 *v.* WASHINGTON STATE BOARD OF EDUCATION ET AL. Ct. App. Wash. Certiorari denied. Reported below: 131 Wash. App. 1046.

No. 06–1217. IOWA NETWORK SERVICES, INC. *v.* QWEST CORP. C. A. 8th Cir. Certiorari denied. Reported below: 466 F. 3d 1091.

No. 06–1220. BATES *v.* TOWNSHIP OF VAN BUREN, MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 459 F. 3d 731.

No. 06–1222. MUNOZ *v.* CENTRAL TELEPHONE COMPANY-NEVADA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 175 Fed. Appx. 803.

No. 06–1226. KIDWELL ET AL. *v.* CITY OF UNION, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 462 F. 3d 620.

No. 06–1227. RICHARDSON *v.* SAFEWAY, INC. C. A. 10th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 754.

No. 06–1231. ROBERTSON ET AL. *v.* KULONGOSKI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 466 F. 3d 1114.

No. 06–1235. ANSCHUTZ *v.* NEW JERSEY DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, BY TREASURER ABELOW; and

No. 06–1241. SZELIGA ET AL. *v.* NEW JERSEY DEPARTMENT OF TREASURY, DIVISION OF INVESTMENT, BY TREASURER ABELOW. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 387 N. J. Super. 487, 904 A. 2d 786.

No. 06–1238. HAYES *v.* GENESIS HEALTH VENTURES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 204 Fed. Appx. 144.

No. 06–1239. HAMILTON *v.* ENTERPRISE LEASING COMPANY OF ST. LOUIS. C. A. 8th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 551.

No. 06–1240. SIEGEL *v.* MCFADDEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–1242. NIXON ET AL. *v.* WHEATLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 674.

No. 06–1243. R. W. M. ET AL. *v.* V. C. ET AL. Ct. App. Utah. Certiorari denied.

No. 06–1247. LEITCH *v.* BRADBURY. Ct. App. Ore. Certiorari denied.

No. 06–1252. HOPKINS ET UX. *v.* NORTHBROOK MOBILE HOME PARK CORP. ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 363 Ill. App. 3d 1220, 917 N. E. 2d 646.

No. 06–1253. VOGELSBERG *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 297 Wis. 2d 519, 724 N. W. 2d 649.

No. 06–1255. BARRETT, ADMINISTRATRIX OF THE ESTATE OF BARRETT *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 462 F. 3d 28.

No. 06–1261. CROMER *v.* NICHOLSON, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 455 F. 3d 1346.

No. 06–1263. SANTA ROSA ET AL. *v.* COMBO RECORDS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 471 F. 3d 224.

No. 06–1266. VERNON *v.* GONZALES, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 181 Fed. Appx. 201.

No. 06–1284. USF-RED STAR EXPRESS, INC. *v.* TAYLOR. C. A. 3d Cir. Certiorari denied. Reported below: 212 Fed. Appx. 101.

No. 06–1292. MORETON ROLLESTON, JR., LIVING TRUST *v.* PERRY. C. A. 11th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 752.

No. 06–1293. METO ET UX. *v.* GONZALES, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 192 Fed. Appx. 481.

No. 06–1315. HESS *v.* LANDER UNIVERSITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 456.

No. 06–1326. LANS *v.* STUCKEY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 956.

No. 06–1335. MCIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 470 F. 3d 550.

No. 06–1337. BORDER BUSINESS PARK, INC. *v.* CITY OF SAN DIEGO, CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Cer-

tiorari denied. Reported below: 142 Cal. App. 4th 1538, 49 Cal. Rptr. 3d 259.

No. 06–1340. PENA *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 64 M. J. 259.

No. 06–1342. OROZCO-VASQUEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 469 F. 3d 1101.

No. 06–1349. SEGAL *v.* WHITMYRE. C. A. 11th Cir. Certiorari denied. Reported below: 177 Fed. Appx. 29.

No. 06–1357. SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 3d 1055.

No. 06–7588. RIVERA *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 187 Fed. Appx. 240.

No. 06–7897. GRELL *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 212 Ariz. 516, 135 P. 3d 696.

No. 06–7944. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 463 F. 3d 635.

No. 06–8140. GRIGSBY *v.* KNIGHT, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 456 F. 3d 727.

No. 06–8334. DIAZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 558.

No. 06–8440. WELLS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 38 Cal. 4th 1078, 136 P. 3d 810.

No. 06–8443. ARNETT *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 139 Cal. App. 4th 1609, 44 Cal. Rptr. 3d 206.

No. 06–8578. POPE *v.* VAZQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 183 Fed. Appx. 614.

No. 06–8600. MORY-LAMAS *v.* GONZALES, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 190 Fed. Appx. 144.

No. 06–8750. BARRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 464 F. 3d 496.

No. 06–8776. SOLANO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 588 Pa. 716, 906 A. 2d 1180.

No. 06–8783. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 665.

No. 06–8800. BURKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–8809. RELIFORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 471 F. 3d 913.

No. 06–8833. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 452 F. 3d 1009.

No. 06–8849. PERREIRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 826.

No. 06–8956. PAOPAO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 469 F. 3d 760.

No. 06–9019. HUNGERFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 465 F. 3d 1113.

No. 06–9172. KEEN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 06–9195. MOORE *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 06–9316. FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 269.

No. 06–9365. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 261.

No. 06–9418. VIEIRA *v.* GONZALES, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied.

No. 06–9812. GORDON *v.* SIBLEY MEMORIAL HOSPITAL ET AL. C. A. D. C. Cir. Certiorari denied.

No. 06–9821. SABBIA *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 06–9824. JAMES *v.* HERITAGE VALLEY FEDERAL CREDIT UNION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 197 Fed. Appx. 102.

No. 06–9827. SMITH *v.* ANDREWS, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 06–9828. BEATTIE *v.* MICHIGAN PAROLE BOARD ET AL. C. A. 6th Cir. Certiorari denied.

No. 06–9830. EDWARDS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 936 So. 2d 580.

No. 06–9835. ALI *v.* BENNETT, DIRECTOR, NORTH CAROLINA DEPARTMENT OF CORRECTION, DIVISION OF PRISONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 321.

No. 06–9841. MENDOZA *v.* LANE ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 06–9844. WINFIELD *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 460 F. 3d 1026.

No. 06–9846. LAL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 06–9849. BENNETT *v.* HOREL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–9852. LEWIS *v.* PRUNTY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–9855. SMITH *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 3d 565.

No. 06–9858. SPRINGS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 368 Ark. 256, 244 S. W. 3d 683.

No. 06–9862. DAVIS *v.* WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied.

No. 06–9863. CRAIG *v.* TUSCARAWAS COUNTY JOB AND FAMILY SERVICES ET AL. Ct. App. Ohio, Tuscarawas County. Certiorari denied.

No. 06–9867. PARKER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 06–9868. MONK *v.* PHIEFFER ET AL. C. A. 8th Cir. Certiorari denied.

No. 06–9871. BUTLER *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–9872. MITCHELL *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–9874. COOPER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 948 So. 2d 136.

No. 06–9877. DIETRICH *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 288.

No. 06–9879. LYNCH *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 744.

No. 06–9880. OBANDO *v.* FELKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–9888. BEATLEY *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–9890. DEANE *v.* MARSHALLS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 267.

No. 06–9897. HOLTZ *v.* SHEAHAN, SHERIFF, COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 577.

No. 06–9902. RIVAS *v.* REITZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 191 Fed. Appx. 457.

No. 06–9904. ROWE *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 206 Ore. App. 591, 138 P. 3d 935.

No. 06–9907. HAMILTON *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 945 So. 2d 1121.

No. 06–9908. GALLOWAY *v.* JOHNSON METROPOLITAN TERMITE & PEST CONTROL SERVICE CO. ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 167 Md. App. 771, 772.

No. 06–9922. ALEXANDER *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–9925. COURTNEY *v.* MARTINELLI ET AL.; COURTNEY *v.* SARAH LAWRENCE COLLEGE ET AL.; and COURTNEY *v.* NEW YORK STATE JUDICIARY ET AL. C. A. 2d Cir. Certiorari denied.

No. 06–9927. SMITH *v.* SCHNEITER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–9928. ROBERTS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 946 So. 2d 28.

No. 06–9932. PUGH *v.* WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–9935. PELLECER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 06–9938. HONG MAI *v.* NEW YORK CITY CORPORATION COUNSEL. C. A. 2d Cir. Certiorari denied.

No. 06–9945. BLACK *v.* TERRELL, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 06–9948. LAURY *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–9963. BULLOCK *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 590 Pa. 480, 913 A. 2d 207.

No. 06–9965. CRUMES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 06–9967. NDIAYE *v.* GONZALES, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 252.

No. 06–9968. MOORE *v.* CINGULAR WIRELESS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 717.

No. 06–9969. MUHAMMAD *v.* MARYLAND ATTORNEY GRIEVANCE COMMISSION. Ct. App. Md. Certiorari denied. Reported below: 395 Md. 676, 912 A. 2d 588.

No. 06–9971. MOSLEY *v.* HARMON ET AL. C. A. 8th Cir. Certiorari denied.

No. 06–9972. KLEINSCHMIDT *v.* THREE HORIZONS NORTH CONDOMINIUMS, INC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 945 So. 2d 521.

No. 06–9973. LEWIS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 06–9975. TURNER *v.* TILLMAN, WARDEN. Super. Ct. Ware County, Ga. Certiorari denied.

No. 06–9978. CARR, AKA JOHNSON *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 715.

No. 06–9983. NEUDECKER *v.* CITY OF BLOOMINGTON, MINNESOTA, ET AL. Ct. App. Minn. Certiorari denied.

No. 06–9989. WARNER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 144 P. 3d 838.

No. 06–10000. MYRON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 06–10002. LOCKHART *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10005. KETTERER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 111 Ohio St. 3d 70, 855 N. E. 2d 48.

No. 06–10009. LOWE *v.* WEST VIRGINIA. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 06–10010. LEWIS *v.* PHILLIPS. C. A. 2d Cir. Certiorari denied.

No. 06–10013. HERNANDEZ ANAYA *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10018. MILES *v.* WILKINSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 06–10020. LODEN *v.* HAYES, SHERIFF, ITAWAMBA COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 356.

No. 06–10036. WILLIAMSON *v.* VOORHIES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10040. ANTONIO *v.* COMMONWEALTH'S ATTORNEY FOR THE COUNTY OF ARLINGTON, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 224.

No. 06–10042. BEY *v.* GARCIA ET AL. (two judgments). C. A. 3d Cir. Certiorari denied.

No. 06–10044. HALL *v.* HILL, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 06–10051. FALCONER *v.* CHANOS, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 606.

No. 06–10064. RYAN *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied.

No. 06–10110. LUCKETT *v.* ADAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 703.

No. 06–10113. LOWERY *v.* CUMMINGS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 06–10140. DREW *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 447 Mass. 635, 856 N. E. 2d 808.

No. 06–10141. CHANDLER *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 471 F. 3d 1360.

No. 06–10144. MCKEAN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 06–10187. KNOTTS *v.* ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 987.

No. 06–10192. HAYMON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 06–10206. HANSEN *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 690.

No. 06–10213. CLIFFORD *v.* REDMANN, WARDEN. Sup. Ct. N. D. Certiorari denied.

No. 06–10215. SCOTT *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 954.

No. 06–10216. PETRILLA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 907 A. 2d 1136.

No. 06–10217. SINN *v.* PEN PRODUCTS ET AL. C. A. 7th Cir. Certiorari denied.

No. 06–10224. JAMES *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 06–10226. ALLEN *v.* KANSAS. Ct. App. Kan. Certiorari denied.

No. 06–10251. KHITER *v.* BLAINE. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 447 Mass. 1111, 856 N. E. 2d 181.

No. 06–10257. POMEROY *v.* WALLACE. C. A. 9th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 865.

No. 06–10264. PEARSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 951 So. 2d 563.

No. 06–10283. REEVES *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 667.

No. 06–10285. RAINIER *v.* MONTANA STATE PRISON ET AL. Sup. Ct. Mont. Certiorari denied.

No. 06–10305. SMITH *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 06–10306. ANAYA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 06–10307. BURNEY *v.* GREENE, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 06–10317. BENYAMINA *v.* MYERS, ASSISTANT SECRETARY, BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 622.

No. 06–10328. GRISWELL *v.* RELIANCE STANDARD INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 888.

No. 06–10332. GOODEN *v.* MATHES, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 06–10335. HARRIS *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FOREST. C. A. 3d Cir. Certiorari denied.

No. 06–10338. MOSLEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 06–10355. HARRISON *v.* LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 06–10359. GORDON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 905 A. 2d 1043.

No. 06–10367. LINGO *v.* CITY OF ALBANY DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 195 Fed. Appx. 891.

No. 06–10373. NORDON *v.* BARTLEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–10386. GILCHRIST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 258.

No. 06–10398. LISANICK *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 635.

No. 06–10416. METZSCH *v.* AVAYA, INC. C. A. 8th Cir. Certiorari denied.

No. 06–10422. JENNELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 483.

No. 06–10423. MIDDLETON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 181.

No. 06–10428. BULLOCK *v.* REHRIG INTERNATIONAL, INC. C. A. 4th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 198.

No. 06–10441. AHLERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–10442. BAILEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 232.

No. 06–10443. ABDULLAH *v.* BUREAU OF PRISONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 06–10447. TEJEDA RIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 589.

No. 06–10448. QUINONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 199 Fed. Appx. 774.

No. 06–10449. SEARCY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10453. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10458. MARK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 633.

No. 06–10460. MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 476 F. 3d 1077.

No. 06–10461. BARTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 272.

No. 06–10462. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10463. AGUILAR-LARA *v.* UNITED STATES (Reported below: 215 Fed. Appx. 389); AMADOR-FLORES *v.* UNITED STATES

(217 Fed. Appx. 370); ORNELAS-ARAIZA *v.* UNITED STATES (218 Fed. Appx. 309); and ARRELLANO-DELGADO *v.* UNITED STATES (218 Fed. Appx. 310). C. A. 5th Cir. Certiorari denied.

No. 06–10466. DELGADO-RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–10468. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10471. HARTFIELD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 211 Fed. Appx. 48.

No. 06–10472. GARCIA-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 519.

No. 06–10480. GROOMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 194 Fed. Appx. 355.

No. 06–10488. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10491. COLEMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 215 Fed. Appx. 28.

No. 06–10493. WALTON *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 776.

No. 06–10496. WHEELER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 224 Fed. Appx. 639.

No. 06–10497. YOUNG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–10498. DUARTE LANZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10499. CARMOUCHE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10501. CHARACTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10505. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10511. USSERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 348.

No. 06–10514. DODD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 473 F. 3d 873.

No. 06–10515. COLLINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 206 Fed. Appx. 23.

No. 06–10516. BLACKWELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 361 N. C. 41, 638 S. E. 2d 452.

No. 06–10517. CONNER *v.* KINGSTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–10521. LARA-GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 478 F. 3d 1231.

No. 06–10525. IRVING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 206 Fed. Appx. 80.

No. 06–10526. GARCIA *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10527. GORDON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10530. GRACEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10536. YEOMANS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 753.

No. 06–10540. MAHAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10541. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–10545. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 352.

No. 06–10546. RAMIRO *v.* VASQUEZ, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 901.

No. 06–10550. WATLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 461 F. 3d 1005.

No. 06–10552. Fleenor *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 418.

No. 06–10560. Macias *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 751.

No. 06–10561. Kil Soo Lee *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 3d 638.

No. 06–10563. Santiago *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 06–10564. Surratt *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 222.

No. 06–10568. Torres-Castro *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 470 F. 3d 992.

No. 06–10570. Parral, aka Parral-Raos, aka Parral-Ramos *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 309.

No. 06–10573. Land *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 06–10578. Rios Vizcarra *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 670.

No. 06–10579. Connie *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 06–10580. Chittick *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 06–10581. Cramer *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 213 Fed. Appx. 138.

No. 06–10582. Duran-Cabrera *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 635.

No. 06–10584. Rizzi *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 434 F. 3d 669.

No. 06–10586. Chapman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 253.

No. 06–10592. Otto *v.* Miner, Warden. C. A. 3d Cir. Certiorari denied. Reported below: 209 Fed. Appx. 149.

No. 06–10601. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 3d 1136.

No. 06–10604. MATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 236 Fed. Appx. 8.

No. 06–10608. ONG *v.* CLIENT PROTECTION FUND OF THE BAR OF MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 169 Md. App. 740, 752.

No. 06–10610. BEARDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 410.

No. 06–10612. BOYD *v.* WILLIAMSON, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 06–10613. NATERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 808.

No. 06–10615. EMUCHAY *v.* VASQUEZ, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 899.

No. 06–10617. CONAWAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10621. TRUNG THANH PHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 219 Fed. Appx. 682.

No. 06–10622. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 F. 3d 259.

No. 06–10625. REESE *v.* AMERICAN SIGNATURE, INC. C. A. 6th Cir. Certiorari denied.

No. 06–10627. BRUMLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 416.

No. 06–10628. WASHINGTON *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 64 M. J. 396.

No. 06–10629. JENNINGS *v.* MENIFEE, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 406.

No. 06–10631. MISSOURI *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 06–10633. GIBBONS *v.* UNITED STATES (Reported below: 197 Fed. Appx. 671); and GIBSON *v.* UNITED STATES (197 Fed. Appx. 661). C. A. 9th Cir. Certiorari denied.

No. 06–10635. MARTINEZ-VELEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–10636. ESPINOZA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 795.

No. 06–10639. KING *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 681.

No. 06–10642. ROHLFS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 368 Ill. App. 3d 540, 858 N. E. 2d 616.

No. 06–10652. GLOVER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 811.

No. 06–10653. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–10654. KEYES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 214 Fed. Appx. 145.

No. 06–10655. MAIBEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 219 Fed. Appx. 638.

No. 06–10661. SIEGEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 477 F. 3d 87.

No. 06–10664. SANTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 186 Fed. Appx. 419.

No. 06–10666. RUIZ *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 06–10670. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 340.

No. 06–10671. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 906.

No. 06–10672. REEDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 435.

No. 06–10675. KOTWICKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 657.

No. 06–10676. MAXWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 473 F. 3d 868.

No. 06–10679. KNIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 504.

No. 06–10680. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 298.

No. 06–10682. PINEDA-ARREGUIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 685.

No. 06–10685. NORAJ, AKA NORA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 223 Fed. Appx. 388.

No. 06–10688. SNIPE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 196.

No. 06–10703. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–10705. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–10714. QUINONES-GRUESO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10718. LARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 219 Fed. Appx. 637.

No. 06–10719. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 3d 660.

No. 06–1060. BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY *v.* DIETRICH. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 202 Fed. Appx. 288.

No. 06–1209. HIGHTOWER *v.* TERRY, WARDEN. C. A. 11th Cir. Motions of Cornell Law School Death Penalty Project and NAACP Legal Defense and Educational Fund, Inc., for leave to

file briefs as *amici curiae* granted. Certiorari denied. Reported below: 459 F. 3d 1067.

No. 06–1291. AMGEN INC. *v.* HOECHST MARION ROUSSEL, INC., ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 457 F. 3d 1293.

No. 06–10539. PROCTOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 06–1053. SEWELL ET AL. *v.* 1199 NATIONAL BENEFIT FUND FOR HEALTH AND HUMAN SERVICES, 549 U. S. 1282;

No. 06–1103. WOOD *v.* BILLINGTON, LIBRARIAN OF CONGRESS, 549 U. S. 1282;

No. 06–5340. LERMA *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 549 U. S. 1254;

No. 06–6669. FOGLE *v.* PIERSON ET AL., 549 U. S. 1059;

No. 06–7929. MADISON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 549 U. S. 1183;

No. 06–8055. KEYS *v.* UNITED STATES, 549 U. S. 1148;

No. 06–8081. CRUTCHFIELD *v.* ILLINOIS, 549 U. S. 1219;

No. 06–8255. OWENS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 549 U. S. 1222;

No. 06–8564. BRUMFIELD *v.* CAIN, WARDEN, 549 U. S. 1256;

No. 06–8619. RUSSELL *v.* SUBLETT ET AL., 549 U. S. 1233;

No. 06–8670. POLLEY *v.* JETER, WARDEN, 549 U. S. 1235;

No. 06–8683. CRAIG ET VIR *v.* TUSCARAWAS COUNTY JOB AND FAMILY SERVICES ET AL., 549 U. S. 1284;

No. 06–8698. BERRY *v.* FERRELL, WARDEN, ET AL., 549 U. S. 1236;

No. 06–8711. JOHNSON *v.* QUEENS ADMINISTRATION FOR CHILDREN'S SERVICES ET AL., 549 U. S. 1284;

No. 06–8728. PALMER *v.* AULT, WARDEN, 549 U. S. 1285;

No. 06–8748. IN RE BUTLER, 549 U. S. 1277;

No. 06–8821. AMERSON *v.* IOWA ET AL., 549 U. S. 1286;

No. 06–8822. HAYES *v.* IOWA ET AL., 549 U. S. 1286;

No. 06–8832. WANG *v.* UNITED STATES MEDICAL LICENSE EXAMINATION SECRETARIAT ET AL., 549 U. S. 1287;

No. 06–8937. SMITH *v.* WORKMAN, WARDEN, 549 U. S. 1307;

No. 06–8939. TURCUS *v.* OAKLAND COUNTY SHERIFF'S DEPARTMENT ET AL., 549 U. S. 1307;

No. 06–9048. MENDONCA *v.* TIDEWATER INC., 549 U. S. 1309;

No. 06–9107. PATTERSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 549 U. S. 1290;

No. 06–9309. ZUNIGA-HERNANDEZ *v.* CHILDRESS, WARDEN, 549 U. S. 1293;

No. 06–9315. BRYANT *v.* UNITED STATES, 549 U. S. 1293;

No. 06–9340. BAEZ *v.* MILLER, SHERIFF, DOUGLAS COUNTY, GEORGIA, 549 U. S. 1294;

No. 06–9366. MANNIX *v.* SHEETZ, 549 U. S. 1295;

No. 06–9595. PICQUIN-GEORGE, AKA DALEY *v.* HOLT, WARDEN, ET AL., 549 U. S. 1312;

No. 06–9610. IN RE WILLIAMS, 549 U. S. 1277;

No. 06–9620. IRORERE *v.* ADAMS, WARDEN, 549 U. S. 1312; and

No. 06–9723. IN RE SKILLERN, 549 U. S. 1304. Petitions for rehearing denied.

No. 05–1272. ROCKWELL INTERNATIONAL CORP. ET AL. *v.* UNITED STATES ET AL., 549 U. S. 457. Motion for substitution of party granted, and Virginia Belle Stone is substituted as respondent in place of James S. Stone, deceased. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this motion and this petition.

MAY 21, 2007

Certiorari Granted—Reversed and Remanded. (See No. 06–605, *ante*, p. 609.)

Miscellaneous Orders

No. D–2433. IN RE DISBARMENT OF BOYAR. Disbarment entered. [For earlier order herein, see 548 U. S. 929.]

No. D–2439. IN RE DISBARMENT OF MORALES. Disbarment entered. [For earlier order herein, see 548 U. S. 934.]

No. D–2440. IN RE DISBARMENT OF ANKERMAN. Disbarment entered. [For earlier order herein, see 548 U. S. 934.]

No. D–2442. IN RE DISBARMENT OF AMBROSE. Disbarment entered. [For earlier order herein, see 549 U. S. 949.]

No. D–2443. In re Disbarment of Beswick. Disbarment entered. [For earlier order herein, see 549 U. S. 949.]

No. D–2446. In re Disbarment of Kronenberg. Disbarment entered. [For earlier order herein, see 549 U. S. 949.]

No. D–2447. In re Disbarment of Suckling. Disbarment entered. [For earlier order herein, see 549 U. S. 950.]

No. 06M90. Franco-Guerrero *v.* United States. Motion for leave to file petition for writ of certiorari under seal granted.

No. 06M91. Ellis *v.* United States. Motion for leave to file petition for writ of certiorari under seal denied without prejudice to filing a renewed motion together with a redacted petition for writ of certiorari within 30 days.

No. 05–1589. Davenport et al. *v.* Washington Education Assn.; and

No. 05–1657. Washington *v.* Washington Education Assn. Sup. Ct. Wash. [Certiorari granted, 548 U. S. 942.] Motions of respondent and petitioner Washington for leave to file supplemental briefs after argument granted.

No. 06–1210. General Electric Co. *v.* Commissioner, New Hampshire Department of Revenue Administration. Sup. Ct. N. H.; and

No. 06–1249. Wyeth *v.* Levine. Sup. Ct. Vt. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 06–9178. Murdock *v.* American Axle & Manufacturing, Inc. (two judgments). Ct. App. Mich. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [549 U. S. 1319] denied.

No. 06–10371. Ochoa-Amaya *v.* Gonzales, Attorney General. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 11, 2007, 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. 06–10784. In re Jensen. Petition for writ of habeas corpus denied.

No. 06–10780. IN RE RONDEAU. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 06–10103. IN RE SKILLERN. Petition for writ of mandamus denied.

No. 06–10643. IN RE SIDDIQUE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 06–1265. KLEIN & CO. FUTURES, INC. *v.* BOARD OF TRADE OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 464 F. 3d 255.

No. 06–666. DEPARTMENT OF REVENUE OF KENTUCKY ET AL. *v.* DAVIS ET UX. Ct. App. Ky. Motion of National Association of State Treasurers for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 197 S. W. 3d 557.

No. 06–8273. DANFORTH *v.* MINNESOTA. Sup. Ct. Minn. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 718 N. W. 2d 451.

Certiorari Denied. (See also No. 06–618, *ante*, p. 511.)

No. 06–715. MAN-SEOK CHOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–866. YAX ET AL. *v.* UPS, AKA UNITED PARCEL SERVICE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 196 Fed. Appx. 379.

No. 06–895. BOSTIC, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY SHERIFF FOR TUSCALOOSA COUNTY, ALABAMA *v.* GRAY, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, ALEXANDER. C. A. 11th Cir. Certiorari denied. Reported below: 458 F. 3d 1295.

No. 06–1116. KHAN *v.* UNITED STATES; and

No. 06–9398. CHAPMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 461 F. 3d 477.

No. 06–1123. ANIMAS VALLEY SAND & GRAVEL, INC. *v.* BOARD OF COMMISSIONERS OF THE COUNTY OF LA PLATA, COLORADO. Ct. App. Colo. Certiorari denied.

No. 06–1230. EDEM *v.* CUOMO, ATTORNEY GENERAL OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 204 Fed. Appx. 95.

No. 06–1257. STEINER *v.* CONCENTRA INC. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 195 F. 3d 723.

No. 06–1258. MILLER *v.* HARGET ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 458 F. 3d 1251.

No. 06–1268. UNDERWOOD ET AL. *v.* GUAM ELECTION COMMISSION ET AL. Sup. Ct. Guam. Certiorari denied. Reported below: 2006 Guam 17.

No. 06–1272. SCOCCA *v.* CENDANT MORTGAGE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 197 Fed. Appx. 112.

No. 06–1275. SRAM CORP. *v.* AD–II ENGINEERING, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 465 F. 3d 1351.

No. 06–1290. ANDREWS ET AL. *v.* ROADWAY EXPRESS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 3d 565.

No. 06–1299. BAXTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 557.

No. 06–1334. SHAHIN ET VIR *v.* DELAWARE FEDERAL CREDIT UNION. Sup. Ct. Del. Certiorari denied. Reported below: 918 A. 2d 1171.

No. 06–1338. SIMOTAS *v.* KELSEY-SEYBOLD. C. A. 5th Cir. Certiorari denied. Reported below: 211 Fed. Appx. 273.

No. 06–1370. BOKER *v.* HATTOX. C. A. 5th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 293.

No. 06–1373. ROBINSON, NKA KELLY, ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 273 Va. 26, 639 S. E. 2d 217.

No. 06–1378. EMPACADORA DE CARNES DE FRESNILLO, S. A. DE C. V., ET AL. *v.* CURRY, DISTRICT ATTORNEY OF TARRANT COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 3d 326.

No. 06–1388. GUPTA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 463 F. 3d 1182.

No. 06–8391. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 481.

No. 06–8417. MESSIAH *v.* GREENE, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 06–8826. SANTIAGO-PACHECO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 196 Fed. Appx. 507.

No. 06–8839. WILKINSON-OKOTIE *v.* GONZALES, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 185 Fed. Appx. 327.

No. 06–9002. TAYLOR *v.* CALIFORNIA. App. Div., Super. Ct. Cal., County of San Bernardino. Certiorari denied.

No. 06–9495. CARPENTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 260.

No. 06–9999. SHULER *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 224.

No. 06–10033. HOBLEY *v.* KFC U. S. PROPERTIES, INC. C. A. D. C. Cir. Certiorari denied.

No. 06–10035. SCHNELLER *v.* J. W. INDUSTRIES, INC. Super. Ct. N. J., App. Div. Certiorari denied.

No. 06–10053. GROSSMAN *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 466 F. 3d 1325.

No. 06–10059. DELIRA *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 580.

No. 06–10060. CHENEY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 06–10063. LEMASURIER *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10066. MORTON *v.* UNITED STATES ATTORNEY'S OFFICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 208 Fed. Appx. 1.

No. 06–10070. KEATTS *v.* TECHNEGLAS, INC. Commw. Ct. Pa. Certiorari denied.

No. 06–10074. WILLIAMS *v.* WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 06–10076. THOMAS *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 06–10079. BRACKETT *v.* HAUTAMAA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 758.

No. 06–10083. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 366 Ill. App. 3d 1221, —— N. E. 2d ——.

No. 06–10092. CHAVEZ *v.* WORKMAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 924.

No. 06–10096. GONZALEZ *v.* EVANS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10097. RAYMER *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 06–10099. SLOTTO *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10107. VAN SICKLE *v.* MIZE ET AL. C. A. 8th Cir. Certiorari denied.

No. 06–10108. POWELL *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10109. WILSON *v.* FARLEY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 239.

No. 06–10112. PITCHFORD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 366 Ill. App. 3d 1223, —— N. E. 2d ——.

No. 06–10114. TREECE *v.* TERRELL, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 358.

No. 06–10118. SAVORY *v.* LYONS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 469 F. 3d 667.

No. 06–10123. SANDERS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 191 Fed. Appx. 240.

No. 06–10127. TIMBROOK *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 06–10138. FRANSUA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 06–10143. TYLER *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 196 S. W. 3d 638.

No. 06–10145. NEUMAN *v.* PEORIA COUNTY POLICE DEPARTMENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 187 Fed. Appx. 627.

No. 06–10146. GUTIERREZ NOVELO *v.* FELKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10153. MARSHALL *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10154. JONES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 06–10157. PROUT *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–10159. LEWIS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10162. ROSS *v.* HOUSTON COMMUNITY COLLEGE SYSTEM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 297.

No. 06–10163. SCHNELLER *v.* PROSPECT PARK NURSING AND REHABILITATION CENTER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 201 Fed. Appx. 864.

No. 06–10168. BANKS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 06–10174. PARRISH *v.* TILLMAN, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 06–10176. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 470 F. 3d 299.

No. 06–10177. MOORE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 365 Ill. App. 3d 1102, —— N. E. 2d ——.

No. 06–10178. JESSAMY *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 67 Mass. App. 1114, 856 N. E. 2d 917.

No. 06–10179. KRIEG *v.* U. M. C. HOSPITAL. C. A. 9th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 604.

No. 06–10181. DIXON *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–10189. JOHNSON *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10190. LOSH *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 721 N. W. 2d 886.

No. 06–10195. BROWN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 06–10196. ALLEN *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10197. BROWN *v.* FAHEY, CHAIRPERSON, VIRGINIA PAROLE BOARD, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 460.

No. 06–10218. SMITH *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 06–10228. BUCKHANON *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–10253. WITHERSPOON *v.* BURGE, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 210 Fed. Appx. 115.

No. 06–10263. MYERS *v.* METRISH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10282. VIRDIN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 918 A. 2d 1171.

No. 06–10302. COOK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 4th 566, 139 P. 3d 492.

No. 06–10372. ZAPPALA *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 192 Fed. Appx. 174.

No. 06–10376. HOLLOMAN *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–10404. WRIGHT *v.* FORR. Super. Ct. Pa. Certiorari denied. Reported below: 911 A. 2d 195.

No. 06–10411. WHEELER *v.* GARDNER. C. A. 8th Cir. Certiorari denied.

No. 06–10419. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 720.

No. 06–10436. CHIA *v.* FIDELITY INVESTMENTS, AKA FIDELITY BROKERAGE SERVICES. C. A. D. C. Cir. Certiorari denied.

No. 06–10451. SALAZAR-CHICA *v.* GONZALES, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied.

No. 06–10455. SIMMONS *v.* YATES, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 06–10459. NELSON *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 06–10467. DUNN *v.* TESSEMA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 210.

No. 06–10470. ILGES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 678.

No. 06–10513. D'ANDREA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 473 F. 3d 859.

No. 06–10537. CUMMINGS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 174 N. C. App. 772, 622 S. E. 2d 183.

No. 06–10547. RODRIGUEZ-SANTOS, AKA COELHO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 212 Fed. Appx. 7.

No. 06–10574. JACKSON *v.* BRANDON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 06–10587. THOMPSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 918 A. 2d 339.

No. 06–10589. STRALEY *v.* UTAH BOARD OF PARDONS. Ct. App. Utah. Certiorari denied.

No. 06–10594. BOND *v.* WYNNE, SECRETARY OF THE AIR FORCE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 391.

No. 06–10614. HERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 06–10626. BLAKE *v.* WEST VIRGINIA. Cir. Ct. Ohio County, W. Va. Certiorari denied.

No. 06–10660. SANDERS *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 368 Ill. App. 3d 533, 857 N. E. 2d 948.

No. 06–10683. POORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 382.

No. 06–10700. DECRISTOFARO *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 8th Cir. Certiorari denied.

No. 06–10706. TRUESDALE *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 533.

No. 06–10710. MELTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–10711. SCOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 473 F. 3d 1262.

No. 06–10716. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 465 F. 3d 658.

No. 06–10720. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 206 Fed. Appx. 158.

No. 06–10722. WILLIAMS *v.* DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 06–10730. CROWE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 732.

No. 06–10731. CLARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 183 Fed. Appx. 907.

No. 06–10732. CARTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 06–10734. PERALTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–10735. JAIME *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 3d 178.

No. 06–10736. ZAREMBER-CASTANON *v.* UNITED STATES (Reported below: 216 Fed. Appx. 419); VILLALTA-BOJORQUEZ, AKA BOJORQUEZ-VILLALTA, AKA MARTINO *v.* UNITED STATES (221 Fed. Appx. 375); MIRELES-GONZALEZ *v.* UNITED STATES (221 Fed. Appx. 360); SALDANA-GUERRERO, AKA SALDANA, AKA SALDANA GUERRERO *v.* UNITED STATES (216 Fed. Appx. 416); CARDENAS-SANCHEZ *v.* UNITED STATES (221 Fed. Appx. 367); and PEREZ-RIOS *v.* UNITED STATES (224 Fed. Appx. 390). C. A. 5th Cir. Certiorari denied.

No. 06–10739. DELESTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 205 Fed. Appx. 131.

No. 06–10740. ARNOLD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 3d 880.

No. 06–10742. ANGUIANO-VERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 621.

No. 06–10750. FERNANDEZ-CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 217 Fed. Appx. 311.

No. 06–10755. PINGLETON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 526.

No. 06–10756. LUCAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 194 Fed. Appx. 827.

No. 06–10758. DAHLER *v.* THORSON. C. A. 7th Cir. Certiorari denied.

No. 06–10759. HASKELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 3d 1064.

No. 06–10761. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 223 Fed. Appx. 212.

No. 06–10766. RODRIGUEZ-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–10769. SERRANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 796.

No. 06–10770. ATCHLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 474 F. 3d 840.

No. 06–10771. AVILEZ-MARTINEZ, AKA AVILES *v.* UNITED STATES (Reported below: 221 Fed. Appx. 345); DEL ANGEL-JUAREZ *v.* UNITED STATES (222 Fed. Appx. 373); GALICIA-CRUZ *v.* UNITED STATES; GARCIA-CASTILLO *v.* UNITED STATES (221 Fed. Appx. 375); GONZALEZ-RODRIGUEZ *v.* UNITED STATES; ORTEGA-HERRERA *v.* UNITED STATES; RAZO-SOTO *v.* UNITED STATES (224 Fed. Appx. 386); SILVA-ARAMBULA *v.* UNITED STATES (218 Fed. Appx. 321); VEGA-MARTINEZ *v.* UNITED STATES (220 Fed. Appx. 370); and VEGA-VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10774. DUNG LE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 215 Fed. Appx. 9.

No. 06–10777. MOOK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 787.

No. 06–10779. SHERROD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 306.

No. 06–10782. MARTINEZ-ROSAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 381.

No. 06–10785. AMADOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 303.

No. 06–10786. BELK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 06–10787. BOYD *v.* REVELL, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–10792. HAVNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 193 Fed. Appx. 503.

No. 06–10793. FRITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 198 Fed. Appx. 878.

No. 06–10794. HODGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10795. ISHAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–10796. PHARMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–11355 (06A1079). COMER *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 480 F. 3d 960.

Rehearing Denied

No. 06–966. JONES *v.* SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY ET AL., 549 U. S. 1280;

No. 06–996. PAULSON *v.* OREGON STATE BAR ET AL., 549 U. S. 1304;

No. 06–1151. CRUMP-DONAHUE *v.* UNITED STATES, 549 U. S. 1341;

No. 06–8343. JACKSON *v.* GRIMES ET AL., 549 U. S. 1225;

No. 06–8551. CASEY-BEICH *v.* BACKMAN, 549 U. S. 1255;

No. 06–8702. GAYLOR *v.* CATTELL, WARDEN, 549 U. S. 1284;

No. 06–8766. BLOM *v.* UNITED STATES, 549 U. S. 1238;

No. 06–8812. ROYSTER *v.* CITY OF NEW YORK, NEW YORK, ET AL., 549 U. S. 1286;

No. 06–8818. WALKER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 549 U. S. 1269;

No. 06–8875. THORNTON *v.* CULLIVER, WARDEN, ET AL., 549 U. S. 1287;

No. 06–9262. MORGAN *v.* INDIANA, 549 U. S. 1345;

No. 06–9685. HARRIS *v.* UNITED STATES, 549 U. S. 1315;

No. 06–9694. GENTRY *v.* UNITED STATES, 549 U. S. 1315;

No. 06–9712. MANGIARDI *v.* UNITED STATES, 549 U. S. 1315;

No. 06–9741. HYNDS-MATUTE *v.* UNITED STATES, 549 U. S. 1316; and

No. 06–10091. CORDELL *v.* UNITED STATES, 549 U. S. 1360. Petitions for rehearing denied.

MAY 29, 2007

Certiorari Granted—Vacated and Remanded

No. 06–10255. BOCANEGRA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist.; and

No. 06–10265. ESQUIBEL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Reported below: 143 Cal. App. 4th 645, 49 Cal. Rptr. 3d 393. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Cunningham* v. *California*, 549 U. S. 270 (2007).

Miscellaneous Orders

No. 06A1003. PLOUGH ET AL. *v.* LAVELLE ET AL. Ct. App. Ohio, Portage County. Application for stay, addressed to JUSTICE GINSBURG and referred to the court, denied.

No. 06M92. MOSLEY *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 06–1269. UNITED STATES EX REL. BLY-MAGEE *v.* PREMO 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. 06–11037. IN RE BROOKS. Petition for writ of habeas corpus denied.

No. 06–10243. IN RE NEUMAN; and
No. 06–10300. IN RE CARDWELL. Petitions for writs of mandamus denied.

No. 06–10413. IN RE COX. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 06–989. HALL STREET ASSOCIATES, L. L. C. *v.* MATTEL, INC. C. A. 9th Cir. Certiorari granted. Reported below: 196 Fed. Appx. 476.

No. 06–1287. CSX TRANSPORTATION, INC. *v.* GEORGIA STATE BOARD OF EQUALIZATION ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 472 F. 3d 1281.

No. 06–1164. JOHN R. SAND & GRAVEL CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 457 F. 3d 1345.

No. 06–9130. ALI *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 204 Fed. Appx. 778.

Certiorari Denied

No. 06–887. CITY OF REVERE, MASSACHUSETTS, ET AL. *v.* T&D VIDEO, INC., DBA MOONLITE READER. App. Ct. Mass. Certiorari denied. Reported below: 66 Mass. App. 461, 848 N. E. 2d 1221.

No. 06–990. HARMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 442 F. 3d 367.

No. 06–1142. AYERS, WARDEN *v.* DANIELS. C. A. 9th Cir. Certiorari denied. Reported below: 428 F. 3d 1181.

No. 06–1224. DAHIYA *v.* TALMIDGE INTERNATIONAL, LTD., ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 931 So. 2d 1163.

No. 06–1279. PEQUENO *v.* SCHMIDT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 938.

No. 06–1283. ATKINSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 06–1288. KOYNOK *v.* HAMILTON ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 907 A. 2d 1145.

No. 06–1296. COVARRUBIAS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–1300. HACKWORTH *v.* PROGRESSIVE CASUALTY INSURANCE CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 468 F. 3d 722.

No. 06–1302. HUNTSMAN *v.* HUNTSMAN, FKA MORGAN. Ct. App. Minn. Certiorari denied.

No. 06–1309. PUGH *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–1310. TUNSTALL *v.* DEESE. C. A. 11th Cir. Certiorari denied. Reported below: 198 Fed. Appx. 831.

No. 06–1316. NAFZIGER ET AL. *v.* MCDERMOTT INTERNATIONAL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 467 F. 3d 514.

No. 06–1401. KIMHONG THI LE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 474 F. 3d 511.

No. 06–1404. SHANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 220 Fed. Appx. 518.

No. 06–1412. SHELTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 06–1419. CAUSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 3d 146.

No. 06–1422. CURRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 181.

No. 06–8940. BLACKBURN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 461 F. 3d 259.

No. 06–8942. JORDAN *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 191 Fed. Appx. 639.

No. 06–9001. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 353.

No. 06–9190. MCQUIRTER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 477 Mich. 909, 722 N. W. 2d 851.

No. 06–9319. GONZALEZ-GARCIA *v.* UNITED STATES (Reported below: 205 Fed. Appx. 278); DUARTE-JIMENEZ *v.* UNITED STATES (207 Fed. Appx. 501); GONZALEZ-CRUZ *v.* UNITED STATES (209 Fed. Appx. 414); RIVAS-PRUNEDA, AKA PRUNEDA RIVAS *v.* UNITED STATES (208 Fed. Appx. 307); ACOSTA-LICEA, AKA ACOSTA *v.* UNITED STATES (209 Fed. Appx. 407); and VALDEZ-MEDINA *v.* UNITED STATES (210 Fed. Appx. 419). C. A. 5th Cir. Certiorari denied.

No. 06–9371. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 195 Fed. Appx. 52.

No. 06–9414. WATFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 468 F. 3d 891.

No. 06–9517. HULL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 3d 133.

No. 06–9529. RAMIREZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 39 Cal. 4th 398, 139 P. 3d 64.

No. 06–9588. WINGFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 206 Fed. Appx. 208.

No. 06–9813. HOFFNER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–10027. STURM *v.* AYRES, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 06–10191. RICHIE *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 06–10200. MILES *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 201 Fed. Appx. 916.

No. 06–10204. FARRELL *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 06–10209. HACKNER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 06–10211. COLLINS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10212. COOK *v.* TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10219. MILES *v.* HAWS, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 80.

No. 06–10221. WILLIAMS *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 932 So. 2d 693.

No. 06–10222. JOHNSON *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 207 S. W. 3d 24.

No. 06–10232. COLEMAN-BEY *v.* DOVE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 191 Fed. Appx. 397.

No. 06–10233. CAMPBELL *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 940 So. 2d 434.

No. 06–10234. CARBIN *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 942 So. 2d 231.

No. 06–10236. TAEK SANG YOON *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 557.

No. 06–10237. RUFFIN *v.* HELLING, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 848.

No. 06–10238. STEVENSON *v.* DELAWARE; and
No. 06–10314. MANLEY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 918 A. 2d 321.

No. 06–10240. SHELL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 148 P. 3d 162.

No. 06–10242. NEUMAN *v.* MCCOY, SHERIFF, PEORIA COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 210 Fed. Appx. 542.

No. 06–10254. BLAND *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 849 N. E. 2d 788.

No. 06–10261. WHEELER *v.* KANE ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 907 A. 2d 1148.

No. 06–10262. R. R. *v.* FRANKLIN COUNTY CHILDREN SERVICES. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 06–10269. PUSKAC *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 946 So. 2d 952.

No. 06–10273. MADEJ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 365 Ill. App. 3d 1101, —— N. E. 2d ——.

No. 06–10290. RAMSEYER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 06–10292. SKILLERN *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 202 Fed. Appx. 403.

No. 06–10293. BOND *v.* BLAINE ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–10299. WATKINS *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10301. DEJESUS ESTACIO *v.* MULTNOMAH COUNTY CIRCUIT COURT. C. A. 9th Cir. Certiorari denied.

No. 06–10304. DURHAM *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10309. BARTIE *v.* QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 06–10312. PALACIOS *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10316. DROZ *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 06–10319. VILLA *v.* OHIO. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 06–10322. MOLYNEAUX *v.* MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 947 So. 2d 440.

No. 06–10382. HYNES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 365 Ill. App. 3d 1100, —— N. E. 2d ——.

No. 06–10396. HASTINGS *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 06–10409. BLANCK *v.* LUNSFORD ET AL. C. A. 7th Cir. Certiorari denied.

No. 06–10410. MORALES CAMACHO *v.* CLARK, SECRETARY, WASHINGTON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 207 Fed. Appx. 763.

No. 06–10417. PATTERSON *v.* MACIEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 529.

No. 06–10478. RUDD *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 36 Kan. App. 2d xviii, 142 P. 3d 338.

No. 06–10481. GREER *v.* KING, SUPERINTENDENT, SOUTH MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 06–10500. CUEVAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 207 Fed. Appx. 12.

No. 06–10510. VIDETTO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 06–10518. DARTING *v.* FARWELL ET AL. C. A. 9th Cir. Certiorari denied.

No. 06–10535. TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 212 Fed. Appx. 361.

No. 06–10549. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 365 Ill. App. 3d 1100, —— N. E. 2d ——.

No. 06–10551. TILL *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 06–10598. BENNETT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 06–10603. SERRANO *v.* MCGRATH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 06–10606. ANAYA *v.* BROWN, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 06–10607. PALMER *v.* CORSINI, SUPERINTENDENT, BAY STATE CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 06–10618. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 787.

No. 06–10619. BOONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 818.

No. 06–10623. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10634. FITZGERALD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 212 Fed. Appx. 113.

No. 06–10644. STORM *v.* TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 578.

No. 06–10656. NICOLELLA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 211 Fed. Appx. 12.

No. 06–10674. MATEO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 471 F. 3d 1162.

No. 06–10696. WILLIAMS *v.* FOX TELEVISION STATIONS OF BIRMINGHAM, INC. Ct. Civ. App. Ala. Certiorari denied. Reported below: 959 So. 2d 1120.

No. 06–10723. SARGENT *v.* KINGSTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 06–10738. VATANSEVER *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 210 Fed. Appx. 26.

No. 06–10743. STUBBS *v.* CARR, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 06–10783. KELLEY *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 198 Fed. Appx. 940.

No. 06–10799. IRWIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–10800. GUERRERO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–10801. FLOWERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–10803. FRAZIER *v.* JORDAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 06–10806. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10807. GEIGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–10811. GARCIA-GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10814. JACKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 909 A. 2d 1009.

No. 06–10817. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 3d 369.

No. 06–10818. WARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 725.

No. 06–10821. LEFFEBRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 445.

No. 06–10822. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 725.

No. 06–10823. CINEUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 944.

No. 06–10827. SEPULVEDA-CATANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–10831. BUSANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 633.

No. 06–10833. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 06–10837. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10843. TIMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10845. MCLENDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 196.

No. 06–10847. JARVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 277.

No. 06–10853. KERKMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 578.

No. 06–10854. FLINT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 178 Fed. Appx. 964.

No. 06–10855. CARRAWAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 478 F. 3d 845.

No. 06–10856. CAWTHON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 200 Fed. Appx. 902.

No. 06–10857. CHRISTIANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–10858. COLEMAN *v.* SAMUELS, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 218 Fed. Appx. 178.

No. 06–10861. OLVERA-PALACIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 487.

No. 06–10865. GARCIA-GONZALEZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10866. ONEAL, AKA BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10867. PEYTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–10873. BOYD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 480 F. 3d 1178.

No. 06–10875. ADEKOYA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 214 Fed. Appx. 82.

No. 06–10880. BYRD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 06–10884. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 3d 908.

No. 06–10885. BOOKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 246.

No. 06–10886. BYERS *v.* ADAMS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 209 Fed. Appx. 354.

No. 06–10892. SANCHEZ-ROCHA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 208 Fed. Appx. 503.

No. 06–10893. SANCHEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 853.

No. 06–10895. AKINOLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–10896. HOOVER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 06–10897. FREEMAN *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 06–10900. FAISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 346.

No. 06–10903. FALLS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 204 Fed. Appx. 736.

No. 06–10908. DEVINE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 637.

No. 06–10909. COLLINS, AKA SMALL, AKA DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–10919. SUTTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 555.

No. 06–10920. STEVENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 219 Fed. Appx. 108.

No. 06–10930. ARIAS-ROBLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 3d 245.

No. 06–10931. GRADY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 06–10939. HOWARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 216 Fed. Appx. 463.

No. 06–10941. GREGORY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 228 Fed. Appx. 303.

No. 06–10943. FANNIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10947. MASESA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 218 Fed. Appx. 880.

No. 06–10948. JIMENEZ-COHENETE, AKA CRISOSTOMO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 206 Fed. Appx. 224.

No. 06–10953. BAILEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 206 Fed. Appx. 650.

No. 06–10955. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 216 Fed. Appx. 67.

No. 06–10964. UNDERWOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 219 Fed. Appx. 298.

No. 06–10965. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 225 Fed. Appx. 151.

No. 06–10967. WYNN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 214 Fed. Appx. 118.

No. 06–10970. PETERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 206 Fed. Appx. 170.

No. 06–10971. PABELLON *v.* O'BRIEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 332.

No. 06–10973. LINDSAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 06–10975. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 469 F. 3d 563.

No. 06–10980. DAUGHERTY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 314.

No. 06–10981. DELGADO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 06–10982. CAMACHO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10983. DELGADO-CASTILLO, AKA RUIZ-CASTILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 06–10987. GLENN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–10989. HENDRICKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 195 Fed. Appx. 136.

No. 06–10993. GRANDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 213 Fed. Appx. 155.

No. 06–10995. HOUGHTON *v.* WINN, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 06–10998. PEREZ *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 64 M. J. 424.

No. 06–10999. PROCTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 215 Fed. Appx. 409.

No. 06–11001. SPENCER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 06–11015. GOMEZ-GOMEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 847.

No. 06–11024. MORALES-RAMIREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 214 Fed. Appx. 767.

No. 06–11035. SAMARAH, AKA ABDULKARIM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 203 Fed. Appx. 156.

No. 06–11041. BLOCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 06–1081. WASHINGTON *v.* VANDELFT. Sup. Ct. Wash. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 158 Wash. 2d 731, 147 P. 3d 573.

No. 06–1303. YANNA-TROMBLEY *v.* SATURN CORP. C. A. 6th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 06–1304. ALPHA TELECOMMUNICATIONS, INC. *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 6th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 194 Fed. Appx. 385.

No. 06–1367. FODOR *v.* AOL TIME WARNER, INC. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 217 Fed. Appx. 622.

No. 06–9608. WAKEFIELD *v.* CORDIS CORP. C. A. 11th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 211 Fed. Appx. 834.

No. 06–10281. WALMSLEY *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 220 Fed. Appx. 578.

Rehearing Denied

No. 06–801. SHAVERS *v.* UNITED STATES FIRE INSURANCE CO. ET AL., 549 U. S. 1278;

No. 06–1000. KISSI *v.* KREMEN ET AL., 549 U. S. 1305;

No. 06–1048. McFarland *v.* Bryan Cave LLP et al., 549 U. S. 1322;

No. 06–1071. K&K Construction, Inc., et al. *v.* Michigan Department of Environmental Quality et al., 549 U. S. 1323;

No. 06–1114. Nwadiogbu *v.* Department of Education, 549 U. S. 1323;

No. 06–7967. Brown *v.* Chicago Transit Authority Retirement Plan, 549 U. S. 1216;

No. 06–8693. Lewis *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 549 U. S. 1284;

No. 06–8764. Shaw *v.* Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 549 U. S. 1285;

No. 06–9128. Johnson *v.* Johns et al., 549 U. S. 1324;

No. 06–9266. Mohammed *v.* Racine Unified School District, 549 U. S. 1345;

No. 06–9344. Davidson *v.* Mohegan Tribal Gaming Authority et al., 549 U. S. 1346;

No. 06–9475. In re Butcher, 549 U. S. 1337;

No. 06–9483. Dillard *v.* Burt, Warden, 549 U. S. 1349;

No. 06–9574. Mercado, aka Mercado-Cervantes *v.* United States, 549 U. S. 1301;

No. 06–9626. Peyla *v.* United States, 549 U. S. 1351;

No. 06–9671. Cooper *v.* United States, 549 U. S. 1314;

No. 06–9747. DuBose *v.* United States, 549 U. S. 1316;

No. 06–9960. Brown *v.* United States, 549 U. S. 1356; and

No. 06–9977. Diaz *v.* United States, 549 U. S. 1356. Petitions for rehearing denied.

No. 06–1069. Keyter *v.* McCain, United States Senator, et al., 549 U. S. 1362. Petition for rehearing denied. The Chief Justice took no part in the consideration or decision of this petition.

AMENDMENT TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendment to the Federal Rules of Appellate Procedure was prescribed by the Supreme Court of the United States on April 30, 2007, pursuant to 28 U. S. C. § 2072, and was reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 984. 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 Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, 538 U. S. 1071, 544 U. S. 1151, and 547 U. S. 1221.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 2007

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 amendment to the Federal Rules of Appellate Procedure that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule 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) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 30, 2007

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein an amendment to Appellate Rule 25.

[See *infra*, p. 987.]

2. That the foregoing amendment to the Federal Rules of Appellate Procedure shall take effect on December 1, 2007, and shall govern in all proceedings 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 amendment to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 25. Filing and service.

(*a*) *Filing.*

. . . . .

(*5*) *Privacy protection.*—An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

. . . . .

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 30, 2007, 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. 990. 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, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, and 547 U. S. 1227.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 2007

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) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 30, 2007

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1014, 3007, 4001, 6006, 7007.1, and new Rules 6003, 9005.1, and 9037.

[See *infra*, pp. 993–1002.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2007, 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 1014. Dismissal and change of venue.

(*a*) *Dismissal and transfer of cases.*

(*1*) *Cases filed in proper district.*—If a petition is filed in the proper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may transfer the case to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

(*2*) *Cases filed in improper district.*—If a petition is filed in an improper district, the court, on the timely motion of a party in interest or on its own motion, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may dismiss the case or transfer it to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

. . . . .

Rule 3007. Objections to claims.

(*a*) *Objections to claims.*—An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing.

(*b*) *Demand for relief requiring an adversary proceeding.*—A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allow-

ance of a claim, but may include the objection in an adversary proceeding.

(*c*) *Limitation on joinder of claims objections.*—Unless otherwise ordered by the court or permitted by subdivision (d), objections to more than one claim shall not be joined in a single objection.

(*d*) *Omnibus objection.*—Subject to subdivision (e), objections to more than one claim may be joined in an omnibus objection if all the claims were filed by the same entity, or the objections are based solely on the grounds that the claims should be disallowed, in whole or in part, because:

(1) they duplicate other claims;

(2) they have been filed in the wrong case;

(3) they have been amended by subsequently filed proofs of claim;

(4) they were not timely filed;

(5) they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;

(6) they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;

(7) they are interests, rather than claims; or

(8) they assert priority in an amount that exceeds the maximum amount under § 507 of the Code.

(*e*) *Requirements for omnibus objection.*—An omnibus objection shall:

(1) state in a conspicuous place that claimants receiving the objection should locate their names and claims in the objection;

(2) list claimants alphabetically, provide a cross-reference to claim numbers, and, if appropriate, list claimants by category of claims;

(3) state the grounds of the objection to each claim and provide a cross-reference to the pages in the omnibus objection pertinent to the stated grounds;

(4) state in the title the identity of the objector and the grounds for the objections;

(5) be numbered consecutively with other omnibus objections filed by the same objector; and

(6) contain objections to no more than 100 claims.

(*f*) *Finality of objection.*—The finality of any order regarding a claim objection included in an omnibus objection shall be determined as though the claim had been subject to an individual objection.

Rule 4001. Relief from automatic stay; prohibiting or conditioning the use, sale, or lease of property; use of cash collateral; obtaining credit; agreements.

. . . . .

(*b*) *Use of cash collateral.*

(*1*) *Motion; service.*

(*A*) *Motion.*—A motion for authority to use cash collateral shall be made in accordance with Rule 9014 and shall be accompanied by a proposed form of order.

(*B*) *Contents.*—The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions, including:

(i) the name of each entity with an interest in the cash collateral;

(ii) the purposes for the use of the cash collateral;

(iii) the material terms, including duration, of the use of the cash collateral; and

(iv) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.

(*C*) *Service.*—The motion shall be served on: (1) any entity with an interest in the cash collateral; (2) any

committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and (3) any other entity that the court directs.

. . . . .

(*c*) *Obtaining credit.*

(*1*) *Motion; service.*

(*A*) *Motion.*—A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be accompanied by a copy of the credit agreement and a proposed form of order.

(*B*) *Contents.*—The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2). In addition, the motion shall describe the nature and extent of each provision listed below:

(i) a grant of priority or a lien on property of the estate under § 364(c) or (d);

(ii) the providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property

of the estate or credit obtained under § 364 to make cash payments on account of the claim;

(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;

(iv) a waiver or modification of Code provisions or applicable rules relating to the automatic stay;

(v) a waiver or modification of any entity's authority or right to file a plan, seek an extension of time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under § 363(c), or request authority to obtain credit under § 364;

(vi) the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order;

(vii) a waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;

(viii) a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;

(ix) the indemnification of any entity;

(x) a release, waiver, or limitation of any right under § 506(c); or

(xi) the granting of a lien on any claim or cause of action arising under §§ 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).

(*C*) *Service.*—The motion shall be served on: (1) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included

on the list filed under Rule 1007(d); and (2) on any other entity that the court directs.

. . . . .

(*d*) *Agreement relating to relief from the automatic stay, prohibiting or conditioning the use, sale, or lease of property, providing adequate protection, use of cash collateral, and obtaining credit.*

(*1*) *Motion; service.*

(*A*) *Motion.*—A motion for approval of any of the following shall be accompanied by a copy of the agreement and a proposed form of order:

(i) an agreement to provide adequate protection;

(ii) an agreement to prohibit or condition the use, sale, or lease of property;

(iii) an agreement to modify or terminate the stay provided for in § 362;

(iv) an agreement to use cash collateral; or

(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property.

(*B*) *Contents.*—The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the agreement. In addition, the concise statement shall briefly list or summarize, and identify the specific location of, each provision in the proposed form of order, agreement, or other document of the type listed in subdivision (c)(1)(B). The motion shall also describe the nature and extent of each such provision.

(*C*) *Service.*—The motion shall be served on: (1) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganiza-

tion case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity the court directs.

. . . . .

Rule 6003. Interim and final relief immediately following the commencement of the case—applications for employment; motions for use, sale, or lease of property; and motions for assumption or assignment of executory contracts.

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding the following:

(a) an application under Rule 2014;

(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; and

(c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.

Rule 6006. Assumption, rejection or assignment of an executory contract or unexpired lease.

. . . . .

(*e*) *Limitations.*—The trustee shall not seek authority to assume or assign multiple executory contracts or unexpired leases in one motion unless: (1) all executory contracts or unexpired leases to be assumed or assigned are between the same parties or are to be assigned to the same assignee; (2) the trustee seeks to assume, but not assign to more than one assignee, unexpired leases of real property; or (3) the court otherwise authorizes the motion to be filed. Subject to subdivision (f), the trustee may join requests for authority to reject multiple executory contracts or unexpired leases in one motion.

(*f*) *Omnibus motions.*—A motion to reject or, if permitted under subdivision (e), a motion to assume or assign multiple executory contracts or unexpired leases that are not between the same parties shall:

(1) state in a conspicuous place that parties receiving the omnibus motion should locate their names and their contracts or leases listed in the motion;

(2) list parties alphabetically and identify the corresponding contract or lease;

(3) specify the terms, including the curing of defaults, for each requested assumption or assignment;

(4) specify the terms, including the identity of each assignee and the adequate assurance of future performance by each assignee, for each requested assignment;

(5) be numbered consecutively with other omnibus motions to assume, assign, or reject executory contracts or unexpired leases; and

(6) be limited to no more than 100 executory contracts or unexpired leases.

(*g*) *Finality of determination.*—The finality of any order respecting an executory contract or unexpired lease included in an omnibus motion shall be determined as though such contract or lease had been the subject of a separate motion.

Rule 7007.1. Corporate ownership statement.

. . . . .

(*b*) *Time for filing.*—A party shall file the statement required under Rule 7007.1(a) with its first appearance, pleading, motion, response, or other request addressed to the court. A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose.

Rule 9005.1. Constitutional challenge to a statute—notice, certification, and intervention.

Rule 5.1 F. R. Civ. P. applies in cases under the Code.

Rule 9037. Privacy protection for filings made with the court.

(*a*) *Redacted filings.*—Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(*b*) *Exemptions from the redaction requirement.*—The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding unless filed with a proof of claim;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by subdivision (c) of this rule; and

(6) a filing that is subject to § 110 of the Code.

(*c*) *Filings made under seal.*—The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.

(*d*) *Protective orders.*—For cause, the court may by order in a case under the Code:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(*e*) *Option for additional unredacted filing under seal.*—An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(*f*) *Option for filing a reference list.*—A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(*g*) *Waiver of protection of identifiers.*—An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 30, 2007, 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. 1004. 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 Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, 538 U. S. 1083, 544 U. S. 1173, and 547 U. S. 1233.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 2007

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 Civil Procedure 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) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 30, 2007

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein the amendments to Civil Rules 1 through 86 and new Rule 5.2.

[See *infra*, pp. 1007–1146.]

2. That Forms 1 through 35 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended to become restyled Forms 1 through 82.

[See *infra*, pp. 1147–1164.]

3. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2007, 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 Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

TITLE I. SCOPE OF RULES; FORM OF ACTION

Rule 1. Scope and purpose.

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Rule 2. One form of action.

There is one form of action—the civil action.

TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencing an action.

A civil action is commenced by filing a complaint with the court.

Rule 4. Summons.

(*a*) *Contents; amendments.*

(*1*) *Contents.*—A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(*2*) *Amendments.*—The court may permit a summons to be amended.

(*b*) *Issuance.*—On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

(*c*) *Service.*

(*1*) *In general.*—A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(*2*) *By whom.*—Any person who is at least 18 years old and not a party may serve a summons and complaint.

(*3*) *By a marshal or someone specially appointed.*—At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U. S. C. § 1915 or as a seaman under 28 U. S. C. § 1916.

(*d*) *Waiving service.*

(*1*) *Requesting a waiver.*—An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any

other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(*2*) *Failure to waive.*—If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(*3*) *Time to answer after a waiver.*—A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(*4*) *Results of filing a waiver.*—When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(*5*) *Jurisdiction and venue not waived.*—Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(*e*) *Serving an individual within a judicial district of the United States.*—Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(*f*) *Serving an individual in a foreign country.*—Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(*g*) *Serving a minor or an incompetent person.*—A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(*h*) *Serving a corporation, partnership, or association.*—Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(*i*) *Serving the United States and its agencies, corporations, officers, or employees.*

(*1*) *United States.*—To serve the United States, a party must:

(A)

(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D. C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(*2*) *Agency; corporation; officer or employee sued in an official capacity.*—To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(*3*) *Officer or employee sued individually.*—To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(*4*) *Extending time.*—The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(*j*) *Serving a foreign, state, or local government.*

(*1*) *Foreign state.*—A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U. S. C. § 1608.

(*2*) *State or local government.*—A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(*k*) *Territorial limits of effective service.*

(*1*) *In general.*—Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued;

(C) when authorized by a federal statute.

(*2*) *Federal claim outside state-court jurisdiction.*—For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(*l*) *Proving service.*

(*1*) *Affidavit required.*—Unless service is waived, proof of service must be made to the court. Except for service

by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(*2*) *Service outside the United States.*—Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(*3*) *Validity of service; amending proof.*—Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(*m*) *Time limit for service.*—If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(*n*) *Asserting jurisdiction over property or assets.*

(*1*) *Federal law.*—The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(*2*) *State law.*—On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

Rule 4.1. Serving other process.

(*a*) *In general.*—Process—other than a summons under Rule 4 or a subpoena under Rule 45—must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(*l*).

(*b*) *Enforcing orders: committing for civil contempt.*—An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

Rule 5. Serving and filing pleadings and other papers.

(*a*) *Service: when required.*

(*1*) *In general.*—Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(*2*) *If a party fails to appear.*—No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(*3*) *Seizing property.*—If an action is begun by seizing property and no person is or need be named as a defend-

ant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(*b*) *Service: how made.*

(*1*) *Serving an attorney.*—If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(*2*) *Service in general.*—A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it by electronic means if the person consented in writing—in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(*3*) *Using court facilities.*—If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

(*c*) *Serving numerous defendants.*

(*1*) *In general.*—If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(*2*) *Notifying parties.*—A copy of every such order must be served on the parties as the court directs.

(*d*) *Filing.*

(*1*) *Required filings; certificate of service.*—Any paper after the complaint that is required to be served—together with a certificate of service—must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(*2*) *How filing is made—in general.*—A paper is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(*3*) *Electronic filing, signing, or verification.*—A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.

(*4*) *Acceptance by the clerk.*—The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

Rule 5.1. Constitutional challenge to a statute—notice, certification, and intervention.

(*a*) *Notice by a party.*—A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or

(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned—or on the state attorney general if a state statute is questioned—either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(*b*) *Certification by the court.*—The court must, under 28 U. S. C. §2403, certify to the appropriate attorney general that a statute has been questioned.

(*c*) *Intervention; final decision on the merits.*—Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(*d*) *No forfeiture.*—A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

Rule 5.2. Privacy protection for filings made with the court.

(*a*) *Redacted filings.*—Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(*b*) *Exemptions from the redaction requirement.*—The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U. S. C. §§ 2241, 2254, or 2255.

(*c*) *Limitations on remote access to electronic files; social-security appeals and immigration cases.*—Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(*d*) *Filings made under seal.*—The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(*e*) *Protective orders.*—For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(*f*) *Option for additional unredacted filing under seal.*—A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(*g*) *Option for filing a reference list.*—A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(*h*) *Waiver of protection of identifiers.*—A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

Rule 6. Computing and extending time; time for motion papers.

(*a*) *Computing time.*—The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:

(*1*) *Day of the event excluded.*—Exclude the day of the act, event, or default that begins the period.

(*2*) *Exclusions from brief periods.*—Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

(*3*) *Last day.*—Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(*4*) *"Legal holiday" defined.*—As used in these rules, "legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

(*b*) *Extending time.*

(*1*) *In general.*—When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(*2*) *Exceptions.*—A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

(*c*) *Motions, notices of hearing, and affidavits.*

(*1*) *In general.*—A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order—which a party may, for good cause, apply for ex parte—sets a different time.

(*2*) *Supporting affidavit.*—Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.

(*d*) *Additional time after certain kinds of service.*—When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

Title III. Pleadings and Motions

Rule 7. Pleadings allowed; form of motions and other papers.

(*a*) *Pleadings.*—Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; and

(7) if the court orders one, a reply to an answer.

(*b*) *Motions and other papers.*

(*1*) *In general.*—A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(*2*) *Form.*—The rules governing captions and other matters of form in pleadings apply to motions and other papers.

Rule 7.1. Disclosure statement.

(*a*) *Who must file; contents.*—A nongovernmental corporate party must file two copies of a disclosure statement that:

(1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(2) states that there is no such corporation.

(*b*) *Time to file; supplemental filing.*—A party must:

(1) file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

(2) promptly file a supplemental statement if any required information changes.

Rule 8. General rules of pleading.

(*a*) *Claim for relief.*—A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(*b*) *Defenses; admissions and denials.*

(*1*) *In general.*—In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(*2*) *Denials—responding to the substance.*—A denial must fairly respond to the substance of the allegation.

(*3*) *General and specific denials.*—A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(*4*) *Denying part of an allegation.*—A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(*5*) *Lacking knowledge or information.*—A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(*6*) *Effect of failing to deny.*—An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(*c*) *Affirmative defenses.*

(*1*) *In general.*—In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;

- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(*2*) *Mistaken designation.*—If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(*d*) *Pleading to be concise and direct; alternative statements; inconsistency.*

(*1*) *In general.*—Each allegation must be simple, concise, and direct. No technical form is required.

(*2*) *Alternative statements of a claim or defense.*—A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(*3*) *Inconsistent claims or defenses.*—A party may state as many separate claims or defenses as it has, regardless of consistency.

(*e*) *Construing pleadings.*—Pleadings must be construed so as to do justice.

Rule 9. Pleading special matters.

(*a*) *Capacity or authority to sue; legal existence.*

(*1*) *In general.*—Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(*2*) *Raising those issues.*—To raise any of those issues, a party must do so by a specific denial, which must state

any supporting facts that are peculiarly within the party's knowledge.

(*b*) *Fraud or mistake; conditions of mind.*—In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(*c*) *Conditions precedent.*—In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(*d*) *Official document or act.*—In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(*e*) *Judgment.*—In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(*f*) *Time and place.*—An allegation of time or place is material when testing the sufficiency of a pleading.

(*g*) *Special damages.*—If an item of special damage is claimed, it must be specifically stated.

(*h*) *Admiralty or maritime claim.*

(*1*) *How designated.*—If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

(*2*) *Designation for appeal.*—A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U. S. C. § 1292(a)(3).

Rule 10. Form of pleadings.

(*a*) *Caption; names of parties.*—Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(*b*) *Paragraphs; separate statements.*—A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

(*c*) *Adoption by reference; exhibits.*—A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

Rule 11. Signing pleadings, motions, and other papers; representations to the court; sanctions.

(*a*) *Signature.*—Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(*b*) *Representations to the court.*—By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of

the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(*c*) *Sanctions.*

(*1*) *In general.*—If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(*2*) *Motion for sanctions.*—A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(*3*) *On the court's initiative.*—On its own, the court may order an attorney, law firm, or party to show cause

why conduct specifically described in the order has not violated Rule 11(b).

(*4*) *Nature of a sanction.*—A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(*5*) *Limitations on monetary sanctions.*—The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(*6*) *Requirements for an order.*—An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(*d*) *Inapplicability to discovery.*—This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Rule 12. Defenses and objections: when and how presented; motion for judgment on the pleadings; consolidating motions; waiving defenses; pretrial hearing.

(*a*) *Time to serve a responsive pleading.*

(*1*) *In general.*—Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 20 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 20 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 20 days after being served with an order to reply, unless the order specifies a different time.

(*2*) *United States and its agencies, officers, or employees sued in an official capacity.*—The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(*3*) *United States officers or employees sued in an individual capacity.*—A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(*4*) *Effect of a motion.*—Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the more definite statement is served.

(*b*) *How to present defenses.*—Every defense to a claim for relief in any pleading must be asserted in the responsive

pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(*c*) *Motion for judgment on the pleadings.*—After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(*d*) *Result of presenting matters outside the pleadings.*—If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(*e*) *Motion for a more definite statement.*—A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(*f*) *Motion to strike.*—The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 20 days after being served with the pleading.

(*g*) *Joining motions.*

(*1*) *Right to join.*—A motion under this rule may be joined with any other motion allowed by this rule.

(*2*) *Limitation on further motions.*—Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(*h*) *Waiving and preserving certain defenses.*

(*1*) *When some are waived.*—A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(*2*) *When to raise others.*—Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(*3*) *Lack of subject-matter jurisdiction.*—If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(*i*) *Hearing before trial.*—If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 13. Counterclaim and crossclaim.

(*a*) *Compulsory counterclaim.*

(*1*) *In general.*—A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(*2*) *Exceptions.*—The pleader need not state the claim if:

(A) when the action was commenced, the claim was the subject of another pending action; or

(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(*b*) *Permissive counterclaim.*—A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(*c*) *Relief sought in a counterclaim.*—A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(*d*) *Counterclaim against the United States.*—These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency.

(*e*) *Counterclaim maturing or acquired after pleading.*—The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(*f*) *Omitted counterclaim.*—The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

(*g*) *Crossclaim against a coparty.*—A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(*h*) *Joining additional parties.*—Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(*i*) *Separate trials; separate judgments.*—If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

Rule 14. Third-party practice.

(*a*) *When a defending party may bring in a third party.*

(*1*) *Timing of the summons and complaint.*—A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer.

(*2*) *Third-party defendant's claims and defenses.*—The person served with the summons and third-party complaint—the "third-party defendant":

(A) must assert any defense against the third-party plaintiff's claim under Rule 12;

(B) must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g);

(C) may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and

(D) may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.

(*3*) *Plaintiff's claims against a third-party defendant.*—The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The third-party defendant must then assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g).

(*4*) *Motion to strike, sever, or try separately.*—Any party may move to strike the third-party claim, to sever it, or to try it separately.

(*5*) *Third-party defendant's claim against a nonparty.*—A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

(*6*) *Third-party complaint in rem.*—If it is within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, when appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(i) in the property arrested.

(*b*) *When a plaintiff may bring in a third party.*—When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(*c*) *Admiralty or maritime claim.*

(*1*) *Scope of impleader.*—If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(a)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable—either to the plaintiff or to the third-party plaintiff—for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

(*2*) *Defending against a demand for judgment for the plaintiff.*—The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

Rule 15. Amended and supplemental pleadings.

(*a*) *Amendments before trial.*

(*1*) *Amending as a matter of course.*—A party may amend its pleading once as a matter of course:

(A) before being served with a responsive pleading; or

(B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.

(*2*) *Other amendments.*—In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(*3*) *Time to respond.*—Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the origi-

nal pleading or within 10 days after service of the amended pleading, whichever is later.

(*b*) *Amendments during and after trial.*

(*1*) *Based on an objection at trial.*—If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(*2*) *For issues tried by consent.*—When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(*c*) *Relation back of amendments.*

(*1*) *When an amendment relates back.*—An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(*2*) *Notice to the United States.*—When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(*d*) *Supplemental pleadings.*—On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Rule 16. Pretrial conferences; scheduling; management.

(*a*) *Purposes of a pretrial conference.*—In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(*b*) *Scheduling.*

(*1*) *Scheduling order.*—Except in categories of actions exempted by local rule, the district judge—or a magistrate

judge when authorized by local rule—must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(*2*) *Time to issue.*—The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(*3*) *Contents of the order.*

(*A*) *Required contents.*—The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(*B*) *Permitted contents.*—The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(*4*) *Modifying a schedule.*—A schedule may be modified only for good cause and with the judge's consent.

(*c*) *Attendance and matters for consideration at a pretrial conference.*

(*1*) *Attendance.*—A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its rep-

resentative be present or reasonably available by other means to consider possible settlement.

(*2*) *Matters for consideration.*—At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(*d*) *Pretrial orders.*—After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(*e*) *Final pretrial conference and orders.*—The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(*f*) *Sanctions.*

(*1*) *In general.*—On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(*2*) *Imposing fees and costs.*—Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

TITLE IV. PARTIES

Rule 17. Plaintiff and defendant; capacity; public officers.

(*a*) *Real party in interest.*

(*1*) *Designation in general.*—An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(*2*) *Action in the name of the United States for another's use or benefit.*—When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(*3*) *Joinder of the real party in interest.*—The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(*b*) *Capacity to sue or be sued.*—Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U. S. C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(*c*) *Minor or incompetent person.*

(*1*) *With a representative.*—The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(*2*) *Without a representative.*—A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

(*d*) *Public officer's title and name.*—A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

Rule 18. Joinder of claims.

(*a*) *In general.*—A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(*b*) *Joinder of contingent claims.*—A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim

to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

Rule 19. Required joinder of parties.

(*a*) *Persons required to be joined if feasible.*

(*1*) *Required party.*—A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(*2*) *Joinder by court order.*—If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(*3*) *Venue.*—If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(*b*) *When joinder is not feasible.*—If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;
(B) shaping the relief; or
(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(*c*) *Pleading the reasons for nonjoinder.*—When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(*d*) *Exception for class actions.*—This rule is subject to Rule 23.

Rule 20. Permissive joinder of parties.

(*a*) *Persons who may join or be joined.*

(*1*) *Plaintiffs.*—Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(*2*) *Defendants.*—Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(*3*) *Extent of relief.*—Neither a plaintiff nor a defendant need be interested in obtaining or defending against all

the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(*b*) *Protective measures.*—The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

Rule 21. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

Rule 22. Interpleader.

(*a*) *Grounds.*

(*1*) *By a plaintiff.*—Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead. Joinder for interpleader is proper even though:

(A) the claims of the several claimants, or the titles on which their claims depend, lack a common origin or are adverse and independent rather than identical; or

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(*2*) *By a defendant.*—A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(*b*) *Relation to other rules and statutes.*—This rule supplements—and does not limit—the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to—and does not supersede or limit—the remedy provided by 28 U. S. C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

Rule 23. Class actions.

(*a*) *Prerequisites.*—One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(*b*) *Types of class actions.*—A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(*c*) *Certification order; notice to class members; judgment; issues classes; subclasses.*

(*1*) *Certification order.*

(*A*) *Time to issue.*—At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(*B*) *Defining the class; appointing class counsel.*—An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(*C*) *Altering or amending the order.*—An order that grants or denies class certification may be altered or amended before final judgment.

(*2*) *Notice.*

(*A*) *For (b)(1) or (b)(2) classes.*—For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(*B*) *For (b)(3) classes.*—For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(*3*) *Judgment.*—Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(*4*) *Particular issues.*—When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(*5*) *Subclasses.*—When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(*d*) *Conducting the action.*

(*1*) *In general.*—In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(*2*) *Combining and amending orders.*—An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(*e*) *Settlement, voluntary dismissal, or compromise.*—The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(*f*) *Appeals.*—A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(*g*) *Class counsel.*

(*1*) *Appointing class counsel.*—Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(*2*) *Standard for appointing class counsel.*—When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(*3*) *Interim counsel.*—The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(*4*) *Duty of class counsel.*—Class counsel must fairly and adequately represent the interests of the class.

(*h*) *Attorney's fees and nontaxable costs.*—In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Rule 23.1. Derivative actions.

(*a*) *Prerequisites.*—This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

(*b*) *Pleading requirements.*—The complaint must be verified and must:

(1) allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;

(2) allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and

(3) state with particularity:

(A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and

(B) the reasons for not obtaining the action or not making the effort.

(*c*) *Settlement, dismissal, and compromise.*—A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

Rule 23.2. Actions relating to unincorporated associations.

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).

Rule 24. Intervention.

(*a*) *Intervention of right.*—On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(*b*) *Permissive intervention.*

(*1*) *In general.*—On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(*2*) *By a government officer or agency.*—On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(*3*) *Delay or prejudice.*—In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(*c*) *Notice and pleading required.*—A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Rule 25. Substitution of parties.

(*a*) *Death.*

(*1*) *Substitution if the claim is not extinguished.*—If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(*2*) *Continuation among the remaining parties.*—After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does

not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(*3*) *Service.*—A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

(*b*) *Incompetency.*—If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

(*c*) *Transfer of interest.*—If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

(*d*) *Public officers; death or separation from office.*—An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

Title V. Disclosures and Discovery

Rule 26. Duty to disclose; general provisions governing discovery.

(*a*) *Required disclosures.*

(*1*) *Initial disclosure.*

(*A*) *In general.*—Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have dis-

coverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(*B*) *Proceedings exempt from initial disclosure.*—The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to a proceeding in another court; and

(viii) an action to enforce an arbitration award.

(*C*) *Time for initial disclosures—in general.*—A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(*D*) *Time for initial disclosures—for parties served or joined later.*—A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(*E*) *Basis for initial disclosure; unacceptable excuses.*—A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(*2*) *Disclosure of expert testimony.*

(*A*) *In general.*—In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(*B*) *Written report.*—Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one

whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(*C*) *Time to disclose expert testimony.*—A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(*D*) *Supplementing the disclosure.*—The parties must supplement these disclosures when required under Rule 26(e).

(*3*) *Pretrial disclosures.*

(*A*) *In general.*—In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—sepa-

rately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(*B*) *Time for pretrial disclosures; objections.*—Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(*4*) *Form of disclosures.*—Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(*b*) *Discovery scope and limits.*

(*1*) *Scope in general.*—Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissi-

ble at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(*2*) *Limitations on frequency and extent.*

(*A*) *When permitted.*—By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(*B*) *Specific limitations on electronically stored information.*—A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(*C*) *When required.*—On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the

action, and the importance of the discovery in resolving the issues.

(*3*) *Trial preparation: materials.*

(*A*) *Documents and tangible things.*—Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(*B*) *Protection against disclosure.*—If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(*C*) *Previous statement.*—Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(*4*) *Trial preparation: experts.*

(*A*) *Expert who may testify.*—A party may depose any person who has been identified as an expert whose

opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(*B*) *Expert employed only for trial preparation.*—Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(*C*) *Payment.*—Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(*5*) *Claiming privilege or protecting trial-preparation materials.*

(*A*) *Information withheld.*—When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(*B*) *Information produced.*—If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making

the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(*c*) *Protective orders.*

(*1*) *In general.*—A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(*2*) *Ordering discovery.*—If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(*3*) *Awarding expenses.*—Rule 37(a)(5) applies to the award of expenses.

(*d*) *Timing and sequence of discovery.*

(*1*) *Timing.*—A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(*2*) *Sequence.*—Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(*e*) *Supplementing disclosures and responses.*

(*1*) *In general.*—A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(*2*) *Expert witness.*—For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the

report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(*f*) *Conference of the parties; planning for discovery.*

(*1*) *Conference timing.*—Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(*2*) *Conference content; parties' responsibilities.*—In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(*3*) *Discovery plan.*—A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(*4*) *Expedited schedule.*—If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(*g*) *Signing disclosures and discovery requests, responses, and objections.*

(*1*) *Signature required; effect of signature.*—Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(*2*) *Failure to sign.*—Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(*3*) *Sanction for improper certification.*—If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Rule 27. Depositions to perpetuate testimony.

(*a*) *Before an action is filed.*

(*1*) *Petition.*—A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(*2*) *Notice and service.*—At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(*3*) *Order and examination.*—If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons whose depositions may be taken, specifies the subject matter of the examinations, and states whether the depositions will be taken orally or by written interrogatories. The depositions may then be taken under these rules, and the court may issue orders like those authorized by Rules 34 and 35. A reference in these rules to the court where an action is pending means, for purposes of this rule, the court where the petition for the deposition was filed.

(*4*) *Using the deposition.*—A deposition to perpetuate testimony may be used under Rule 32(a) in any later-filed district-court action involving the same subject matter if the deposition either was taken under these rules or, al-

though not so taken, would be admissible in evidence in the courts of the state where it was taken.

(*b*) *Pending appeal.*

(*1*) *In general.*—The court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.

(*2*) *Motion.*—The party who wants to perpetuate testimony may move for leave to take the depositions, on the same notice and service as if the action were pending in the district court. The motion must show:

(A) the name, address, and expected substance of the testimony of each deponent; and

(B) the reasons for perpetuating the testimony.

(*3*) *Court order.*—If the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the depositions to be taken and may issue orders like those authorized by Rules 34 and 35. The depositions may be taken and used as any other deposition taken in a pending district-court action.

(*c*) *Perpetuation by an action.*—This rule does not limit a court's power to entertain an action to perpetuate testimony.

Rule 28. Persons before whom depositions may be taken.

(*a*) *Within the United States.*

(*1*) *In general.*—Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(*2*) *Definition of "officer."*—The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(*b*) *In a foreign country.*

(*1*) *In general.*—A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(*2*) *Issuing a letter of request or a commission.*—A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(*3*) *Form of a request, notice, or commission.*—When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(*4*) *Letter of request—admitting evidence.*—Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(*c*) *Disqualification.*—A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

Rule 29. Stipulations about discovery procedure.

Unless the court orders otherwise, the parties may stipulate that:

(a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(b) other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

Rule 30. Depositions by oral examination.

(*a*) *When a deposition may be taken.*

(*1*) *Without leave.*—A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(*2*) *With leave.*—A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(*b*) *Notice of the deposition; other formal requirements.*

(*1*) *Notice in general.*—A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(*2*) *Producing documents.*—If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(*3*) *Method of recording.*

(*A*) *Method stated in the notice.*—The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(*B*) *Additional method.*—With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(*4*) *By remote means.*—The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(*5*) *Officer's duties.*

(*A*) *Before the deposition.*—Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(*B*) *Conducting the deposition; avoiding distortion.*—If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(*C*) *After the deposition.*—At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(*6*) *Notice or subpoena directed to an organization.*—In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not

preclude a deposition by any other procedure allowed by these rules.

(*c*) *Examination and cross-examination; record of the examination; objections; written questions.*

(*1*) *Examination and cross-examination.*—The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(*2*) *Objections.*—An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(*3*) *Participating through written questions.*—Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(*d*) *Duration; sanction; motion to terminate or limit.*

(*1*) *Duration.*—Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(*2*) *Sanction.*—The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(*3*) *Motion to terminate or limit.*

(*A*) *Grounds.*—At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(*B*) *Order.*—The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(*C*) *Award of expenses.*—Rule 37(a)(5) applies to the award of expenses.

(*e*) *Review by the witness; changes.*

(*1*) *Review; statement of changes.*—On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(*2*) *Changes indicated in the officer's certificate.*—The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(*f*) *Certification and delivery; exhibits; copies of the transcript or recording; filing.*

(*1*) *Certification and delivery.*—The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(*2*) *Documents and tangible things.*

(*A*) *Originals and copies.*—Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(*B*) *Order regarding the originals.*—Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(*3*) *Copies of the transcript or recording.*—Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(*4*) *Notice of filing.*—A party who files the deposition must promptly notify all other parties of the filing.

(*g*) *Failure to attend a deposition or serve a subpoena; expenses.*—A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

Rule 31. Depositions by written questions.

(*a*) *When a deposition may be taken.*

(*1*) *Without leave.*—A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(*2*) *With leave.*—A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take a deposition before the time specified in Rule 26(d); or

(B) if the deponent is confined in prison.

(*3*) *Service; required notice.*—A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the

name or descriptive title and the address of the officer before whom the deposition will be taken.

(*4*) *Questions directed to an organization.*—A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6).

(*5*) *Questions from other parties.*—Any questions to the deponent from other parties must be served on all parties as follows: cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The court may, for good cause, extend or shorten these times.

(*b*) *Delivery to the officer; officer's duties.*—The party who noticed the deposition must deliver to the officer a copy of all the questions served and of the notice. The officer must promptly proceed in the manner provided in Rule 30(c), (e), and (f) to:

(1) take the deponent's testimony in response to the questions;

(2) prepare and certify the deposition; and

(3) send it to the party, attaching a copy of the questions and of the notice.

(*c*) *Notice of completion or filing.*

(*1*) *Completion.*—The party who noticed the deposition must notify all other parties when it is completed.

(*2*) *Filing.*—A party who files the deposition must promptly notify all other parties of the filing.

Rule 32. Using depositions in court proceedings.

(*a*) *Using depositions.*

(*1*) *In general.*—At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(*2*) *Impeachment and other uses.*—Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(*3*) *Deposition of party, agent, or designee.*—An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(*4*) *Unavailable witness.*—A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(*5*) *Limitations on use.*

(*A*) *Deposition taken on short notice.*—A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(*B*) *Unavailable deponent; party could not obtain an attorney.*—A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(*6*) *Using part of a deposition.*—If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(*7*) *Substituting a party.*—Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(*8*) *Deposition taken in an earlier action.*—A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(*b*) *Objections to admissibility.*—Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(*c*) *Form of presentation.*—Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(*d*) *Waiver of objections.*

(*1*) *To the notice.*—An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(*2*) *To the officer's qualification.*—An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or

(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(*3*) *To the taking of the deposition.*

(*A*) *Objection to competence, relevance, or materiality.*—An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(*B*) *Objection to an error or irregularity.*—An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

(*C*) *Objection to a written question.*—An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 5 days after being served with it.

(*4*) *To completing and returning the deposition.*—An objection to how the officer transcribed the testimony—or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition—is waived unless a motion to suppress is made promptly after the error or

irregularity becomes known or, with reasonable diligence, could have been known.

Rule 33. Interrogatories to parties.

(*a*) *In general.*

(*1*) *Number.*—Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

(*2*) *Scope.*—An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(*b*) *Answers and objections.*

(*1*) *Responding party.*—The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(*2*) *Time to respond.*—The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(*3*) *Answering each interrogatory.*—Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(*4*) *Objections.*—The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(*5*) *Signature.*—The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) *Use.*—An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(*d*) *Option to produce business records.*—If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

Rule 34. Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.

(*a*) *In general.*—A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(*b*) *Procedure.*

(*1*) *Contents of the request.*—The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(*2*) *Responses and objections.*

(*A*) *Time to respond.*—The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(*B*) *Responding to each item.*—For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(*C*) *Objections.*—An objection to part of a request must specify the part and permit inspection of the rest.

(*D*) *Responding to a request for production of electronically stored information.*—The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(*E*) *Producing the documents or electronically stored information.*—Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(*c*) *Nonparties.*—As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

Rule 35. Physical and mental examinations.

(*a*) *Order for an examination.*

(*1*) *In general.*—The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

(*2*) *Motion and notice; contents of the order.*—The order:

(A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and

(B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(*b*) *Examiner's report.*

(*1*) *Request by the party or person examined.*—The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the

same condition. The request may be made by the party against whom the examination order was issued or by the person examined.

(*2*) *Contents.*—The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests.

(*3*) *Request by the moving party.*—After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them.

(*4*) *Waiver of privilege.*—By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

(*5*) *Failure to deliver a report.*—The court on motion may order—on just terms—that a party deliver the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial.

(*6*) *Scope.*—This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

Rule 36. Requests for admission.

(*a*) *Scope and procedure.*

(*1*) *Scope.*—A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:

(A) facts, the application of law to fact, or opinions about either; and

(B) the genuineness of any described documents.

(*2*) *Form; copy of a document.*—Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(*3*) *Time to respond; effect of not responding.*—A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(*4*) *Answer.*—If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(*5*) *Objections.*—The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for trial.

(*6*) *Motion regarding the sufficiency of an answer or objection.*—The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 37(a)(5) applies to an award of expenses.

(*b*) *Effect of an admission; withdrawing or amending it.*—A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

Rule 37. Failure to make disclosures or to cooperate in discovery; sanctions.

(*a*) *Motion for an order compelling disclosure or discovery.*

(*1*) *In general.*—On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(*2*) *Appropriate court.*—A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(*3*) *Specific motions.*

(*A*) *To compel disclosure.*—If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(*B*) *To compel a discovery response.*—A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(*C*) *Related to a deposition.*—When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(*4*) *Evasive or incomplete disclosure, answer, or response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(*5*) *Payment of expenses; protective orders.*

(*A*) *If the motion is granted (or disclosure or discovery is provided after filing).*—If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(*B*) *If the motion is denied.*—If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who op-

posed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(*C*) *If the motion is granted in part and denied in part.*—If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(*b*) *Failure to comply with a court order.*

(*1*) *Sanctions in the district where the deposition is taken.*—If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(*2*) *Sanctions in the district where the action is pending.*

(*A*) *For not obeying a discovery order.*—If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(*B*) *For not producing a person for examination.*—If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.

(*C*) *Payment of expenses.*—Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(*c*) *Failure to disclose, to supplement an earlier response, or to admit.*

(*1*) *Failure to disclose or supplement.*—If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

(*2*) *Failure to admit.*—If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to

admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(*d*) *Party's failure to attend its own deposition, serve answers to interrogatories, or respond to a request for inspection.*

(*1*) *In general.*

(*A*) *Motion; grounds for sanctions.*—The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(*B*) *Certification.*—A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(*2*) *Unacceptable excuse for failing to act.*—A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(*3*) *Types of sanctions.*—Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)–(vi). Instead of or

in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(*e*) *Failure to provide electronically stored information.*—Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(*f*) *Failure to participate in framing a discovery plan.*—If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

TITLE VI. TRIALS

Rule 38. Right to a jury trial; demand.

(*a*) *Right preserved.*—The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.

(*b*) *Demand.*—On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 10 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(*c*) *Specifying issues.*—In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on

only some issues, any other party may—within 10 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(*d*) *Waiver; withdrawal.*—A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(*e*) *Admiralty and maritime claims.*—These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

Rule 39. Trial by jury or by the court.

(*a*) *When a demand is made.*—When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

(*b*) *When no demand is made.*—Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(*c*) *Advisory jury; jury trial by consent.*—In an action not triable of right by a jury, the court, on motion or on its own:

(1) may try any issue with an advisory jury; or

(2) may, with the parties' consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right, unless the action is against the United States and a federal statute provides for a nonjury trial.

Rule 40. Scheduling cases for trial.

Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a federal statute.

Rule 41. Dismissal of actions.

(*a*) *Voluntary dismissal.*

(*1*) *By the Plaintiff.*

(*A*) *Without a court order.*—Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(*B*) *Effect.*—Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(*2*) *By court order; effect.*—Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(*b*) *Involuntary dismissal; effect.*—If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(*c*) *Dismissing a counterclaim, crossclaim, or third-party claim.*—This rule applies to a dismissal of any counterclaim,

crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(*d*) *Costs of a previously dismissed action.*—If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

Rule 42. Consolidation; separate trials.

(*a*) *Consolidation.*—If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(*b*) *Separate trials.*—For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Rule 43. Taking testimony.

(*a*) *In open court.*—At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(*b*) *Affirmation instead of an oath.*—When these rules require an oath, a solemn affirmation suffices.

(*c*) *Evidence on a motion.*—When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(*d*) *Interpreter.*—The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

Rule 44. Proving an official record.

(*a*) *Means of proving.*

(*1*) *Domestic record.*—Each of the following evidences an official record—or an entry in it—that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:

(A) an official publication of the record; or

(B) a copy attested by the officer with legal custody of the record—or by the officer's deputy—and accompanied by a certificate that the officer has custody. The certificate must be made under seal:

(i) by a judge of a court of record in the district or political subdivision where the record is kept; or

(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

(*2*) *Foreign record.*

(*A*) *In general.*—Each of the following evidences a foreign official record—or an entry in it—that is otherwise admissible:

(i) an official publication of the record; or

(ii) the record—or a copy—that is attested by an authorized person and is accompanied either by a final certification of genuineness or by a certification under a treaty or convention to which the United States and the country where the record is located are parties.

(*B*) *Final certification of genuineness.*—A final certification must certify the genuineness of the signature and official position of the attester or of any foreign official whose certificate of genuineness relates to the attestation or is in a chain of certificates of genuineness relating to the attestation. A final certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(*C*) *Other means of proof.*—If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, either:

(i) admit an attested copy without final certification; or

(ii) permit the record to be evidenced by an attested summary with or without a final certification.

(*b*) *Lack of a record.*—A written statement that a diligent search of designated records revealed no record or entry of a specified tenor is admissible as evidence that the records contain no such record or entry. For domestic records, the statement must be authenticated under Rule 44(a)(1). For foreign records, the statement must comply with (a)(2)(C)(ii).

(*c*) *Other proof.*—A party may prove an official record—or an entry or lack of an entry in it—by any other method authorized by law.

Rule 44.1. Determining foreign law.

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Rule 45. Subpoena.

(*a*) *In general.*

(*1*) *Form and Contents.*

(*A*) *Requirements—in general.*—Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

(*B*) *Command to attend a deposition—notice of the recording method.*—A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(*C*) *Combining or separating a command to produce or to permit inspection; specifying the form for electronically stored information.*—A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(*D*) *Command to produce; included obligations.*—A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(*2*) *Issued from which court.*—A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(*3*) *Issued by whom.*—The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(*b*) *Service.*

(*1*) *By whom; tendering fees; serving a copy of certain subpoenas.*—Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(*2*) *Service in the United States.*—Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(*3*) *Service in a foreign country.*—28 U. S. C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(*4*) *Proof of service.*—Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(*c*) *Protecting a person subject to a subpoena.*

(*1*) *Avoiding undue burden or expense; sanctions.*—A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(*2*) *Command to produce materials or permit inspection.*

(*A*) *Appearance not required.*—A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(*B*) *Objections.*—A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(*3*) *Quashing or modifying a subpoena.*

(*A*) *When required.*—On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(*B*) *When permitted.*—To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(*C*) *Specifying conditions as an alternative.*—In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(*d*) *Duties in responding to a subpoena.*

(*1*) *Producing documents or electronically stored information.*—These procedures apply to producing documents or electronically stored information:

(*A*) *Documents.*—A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(*B*) *Form for producing electronically stored information not specified.*—If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(*C*) *Electronically stored information produced in only one form.*—The person responding need not produce the same electronically stored information in more than one form.

(*D*) *Inaccessible electronically stored information.*—The person responding need not provide discovery of

electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(*2*) *Claiming privilege or protection.*

(*A*) *Information withheld.*—A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(*B*) *Information produced.*—If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(*e*) *Contempt.*—The issuing court may hold in contempt a person who, having been served, fails without adequate ex-

cuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Rule 46. Objecting to a ruling or order.

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

Rule 47. Selecting jurors.

(*a*) *Examining jurors.*—The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.

(*b*) *Peremptory challenges.*—The court must allow the number of peremptory challenges provided by 28 U. S. C. § 1870.

(*c*) *Excusing a juror.*—During trial or deliberation, the court may excuse a juror for good cause.

Rule 48. Number of jurors; verdict.

A jury must initially have at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c). Unless the parties stipulate otherwise, the verdict must be unanimous and be returned by a jury of at least 6 members.

Rule 49. Special verdict; general verdict and questions.

(*a*) *Special verdict.*

(*1*) *In general.*—The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(*2*) *Instructions.*—The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(*3*) *Issues not submitted.*—A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(*b*) *General verdict with answers to written questions.*

(*1*) *In general.*—The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(*2*) *Verdict and answers consistent.*—When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(*3*) *Answers inconsistent with the verdict.*—When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(*4*) *Answers inconsistent with each other and the verdict.*—When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

Rule 50. Judgment as a matter of law in a jury trial; related motion for a new trial; conditional ruling.

(*a*) *Judgment as a matter of law.*

(*1*) *In general.*—If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(*2*) *Motion.*—A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(*b*) *Renewing the motion after trial; alternative motion for a new trial.*—If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 10 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or

joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(*c*) *Granting the renewed motion; conditional ruling on a motion for a new trial.*

(*1*) *In general.*—If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(*2*) *Effect of a conditional ruling.*—Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(*d*) *Time for a losing party's new-trial motion.*—Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment.

(*e*) *Denying the motion for judgment as a matter of law; reversal on appeal.*—If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Rule 51. Instructions to the jury; objections; preserving a claim of error.

(*a*) *Requests.*

(*1*) *Before or at the close of the evidence.*—At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(*2*) *After the close of the evidence.*—After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(*b*) *Instructions.*—The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(*c*) *Objections.*

(*1*) *How to make.*—A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(*2*) *When to make.*—An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(*d*) *Assigning error; plain error.*

(*1*) *Assigning error.*—A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(*2*) *Plain error.*—A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Rule 52. Findings and conclusions by the court; judgment on partial findings.

(*a*) *Findings and conclusions.*

(*1*) *In general.*—In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(*2*) *For an interlocutory injunction.*—In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(*3*) *For a motion.*—The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(*4*) *Effect of a master's findings.*—A master's findings, to the extent adopted by the court, must be considered the court's findings.

(*5*) *Questioning the evidentiary support.*—A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(*6*) *Setting aside the findings.*—Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(*b*) *Amended or additional findings.*—On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(*c*) *Judgment on partial findings.*—If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Rule 53. Masters.

(*a*) *Appointment.*

(*1*) *Scope.*—Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by:

(i) some exceptional condition; or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.

(*2*) *Disqualification.*—A master must not have a relationship to the parties, attorneys, action, or court that

would require disqualification of a judge under 28 U. S. C. § 455, unless the parties, with the court's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(*3*) *Possible expense or delay.*—In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(*b*) *Order appointing a master.*

(*1*) *Notice.*—Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates for appointment.

(*2*) *Contents.*—The appointing order must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, if any, in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(g).

(*3*) *Issuing.*—The court may issue the order only after:

(A) the master files an affidavit disclosing whether there is any ground for disqualification under 28 U. S. C. § 455; and

(B) if a ground is disclosed, the parties, with the court's approval, waive the disqualification.

(*4*) *Amending.*—The order may be amended at any time after notice to the parties and an opportunity to be heard.

(*c*) *Master's authority.*

(*1*) *In general.*—Unless the appointing order directs otherwise, a master may:

(A) regulate all proceedings;

(B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(*2*) *Sanctions.*—The master may by order impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(*d*) *Master's orders.*—A master who issues an order must file it and promptly serve a copy on each party. The clerk must enter the order on the docket.

(*e*) *Master's reports.*—A master must report to the court as required by the appointing order. The master must file the report and promptly serve a copy on each party, unless the court orders otherwise.

(*f*) *Action on the master's order, report, or recommendations.*

(*1*) *Opportunity for a hearing; action in general.*—In acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard; may receive evidence; and may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions.

(*2*) *Time to object or move to adopt or modify.*—A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than 20 days after a copy is served, unless the court sets a different time.

(*3*) *Reviewing factual findings.*—The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

(A) the findings will be reviewed for clear error; or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(*4*) *Reviewing legal conclusions.*—The court must decide de novo all objections to conclusions of law made or recommended by a master.

(*5*) *Reviewing procedural matters.*—Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(*g*) *Compensation.*

(*1*) *Fixing compensation.*—Before or after judgment, the court must fix the master's compensation on the basis and terms stated in the appointing order, but the court may set a new basis and terms after giving notice and an opportunity to be heard.

(*2*) *Payment.*—The compensation must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(*3*) *Allocating payment.*—The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(*h*) *Appointing a magistrate judge.*—A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule.

TITLE VII. JUDGMENT

Rule 54. Judgment; costs.

(*a*) *Definition; form.*—"Judgment" as used in these rules includes a decree and any order from which an appeal lies.

A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(*b*) *Judgment on multiple claims or involving multiple parties.*—When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(*c*) *Demand for judgment; relief to be granted.*—A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(*d*) *Costs; attorney's fees.*

(*1*) *Costs other than attorney's fees.*—Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 1 day's notice. On motion served within the next 5 days, the court may review the clerk's action.

(*2*) *Attorney's fees.*

(*A*) *Claim to be by motion.*—A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(*B*) *Timing and contents of the motion.*—Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(*C*) *Proceedings.*—Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(*D*) *Special procedures by local rule; reference to a master or a magistrate judge.*—By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(*E*) *Exceptions.*—Subparagraphs (A)–(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U. S. C. § 1927.

Rule 55. Default; default judgment.

(*a*) *Entering a default.*—When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(*b*) *Entering a default judgment.*

(*1*) *By the clerk.*—If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit

showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(*2*) *By the court.*—In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(*c*) *Setting aside a default or a default judgment.*—The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b).

(*d*) *Judgment against the United States.*—A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

Rule 56. Summary judgment.

(*a*) *By a claiming party.*—A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(*b*) *By a defending party.*—A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(*c*) *Serving the motion; proceedings.*—The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(*d*) *Case not fully adjudicated on the motion.*

(*1*) *Establishing facts.*—If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts—including items of damages or other relief—are not genuinely at issue. The facts so specified must be treated as established in the action.

(*2*) *Establishing liability.*—An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(*e*) *Affidavits; further testimony.*

(*1*) *In general.*—A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(*2*) *Opposing party's obligation to respond.*—When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allega-

tions or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(*f*) *When affidavits are unavailable.*—If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(*g*) *Affidavit submitted in bad faith.*—If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.

Rule 57. Declaratory judgment.

These rules govern the procedure for obtaining a declaratory judgment under 28 U. S. C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

Rule 58. Entering judgment.

(*a*) *Separate document.*—Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:

(1) for judgment under Rule 50(b);

(2) to amend or make additional findings under Rule 52(b);

(3) for attorney's fees under Rule 54;

(4) for a new trial, or to alter or amend the judgment, under Rule 59; or

(5) for relief under Rule 60.

(*b*) *Entering judgment.*

(*1*) *Without the court's direction.*—Subject to Rule 54(b) and unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

(B) the court awards only costs or a sum certain; or

(C) the court denies all relief.

(*2*) *Court's approval required.*—Subject to Rule 54(b), the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(A) the jury returns a special verdict or a general verdict with answers to written questions; or

(B) the court grants other relief not described in this subdivision (b).

(*c*) *Time of entry.*—For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

(*d*) *Request for entry.*—A party may request that judgment be set out in a separate document as required by Rule 58(a).

(*e*) *Cost or fee awards.*—Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may

act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Rule 59. New trial; altering or amending a judgment.

(*a*) *In general.*

(*1*) *Grounds for new trial.*—The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(*2*) *Further action after a nonjury trial.*—After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(*b*) *Time to file a motion for a new trial.*—A motion for a new trial must be filed no later than 10 days after the entry of judgment.

(*c*) *Time to serve affidavits.*—When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

(*d*) *New trial on the court's initiative or for reasons not in the motion.*—No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial

for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(*e*) *Motion to alter or amend a judgment.*—A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

Rule 60. Relief from a judgment or order.

(*a*) *Corrections based on clerical mistakes; oversights and omissions.*—The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(*b*) *Grounds for relief from a final judgment, order, or proceeding.*—On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(*c*) *Timing and effect of the motion.*

(*1*) *Timing.*—A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(*2*) *Effect on finality.*—The motion does not affect the judgment's finality or suspend its operation.

(*d*) *Other powers to grant relief.*—This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U. S. C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(*e*) *Bills and writs abolished.*—The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Rule 61. Harmless error.

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Rule 62. Stay of proceedings to enforce a judgment.

(*a*) *Automatic stay; exceptions for injunctions, receiverships, and patent accountings.*—Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 10 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(*b*) *Stay pending the disposition of a motion.*—On appropriate terms for the opposing party's security, the court may stay the execution of a judgment—or any proceedings to enforce it—pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(*c*) *Injunction pending an appeal.*—While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(*d*) *Stay with bond on appeal.*—If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(*e*) *Stay without bond on an appeal by the United States, its officers, or its agencies.*—The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

(*f*) *Stay in favor of a judgment debtor under state law.*—If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(*g*) *Appellate court's power not limited.*—This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings—or suspend, modify, restore, or grant an injunction—while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(*h*) *Stay with multiple claims or parties.*—A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

Rule 63. Judge's inability to proceed.

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Title VIII. Provisional and Final Remedies

Rule 64. Seizing a person or property.

(*a*) *Remedies under state law—in general.*—At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(*b*) *Specific kinds of remedies.*—The remedies available under this rule include the following—however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;

- sequestration; and
- other corresponding or equivalent remedies.

Rule 65. Injunctions and restraining orders.

(*a*) *Preliminary injunction.*

(*1*) *Notice.*—The court may issue a preliminary injunction only on notice to the adverse party.

(*2*) *Consolidating the hearing with the trial on the merits.*—Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(*b*) *Temporary restraining order.*

(*1*) *Issuing without notice.*—The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(*2*) *Contents; expiration.*—Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 10 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(*3*) *Expediting the preliminary-injunction hearing.*—If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(*4*) *Motion to dissolve.*—On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(*c*) *Security.*—The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(*d*) *Contents and scope of every injunction and restraining order.*

(*1*) *Contents.*—Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(*2*) *Persons bound.*—The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(*e*) *Other laws not modified.*—These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U. S. C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U. S. C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

(*f*) *Copyright impoundment.*—This rule applies to copyright-impoundment proceedings.

Rule 65.1. Proceedings against a surety.

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given through a bond or other undertaking with one or more sureties, each surety submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the bond or undertaking. The surety's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

Rule 66. Receivers.

These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

Rule 67. Deposit into court.

(*a*) *Depositing property.*—If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party—on notice to every other party and by leave of court—may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(*b*) *Investing and withdrawing funds.*—Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U. S. C. §§ 2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

Rule 68. Offer of judgment.

(*a*) *Making an offer; judgment on an accepted offer.*—More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(*b*) *Unaccepted offer.*—An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(*c*) *Offer after liability is determined.*—When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 10 days—before a hearing to determine the extent of liability.

(*d*) *Paying costs after an unaccepted offer.*—If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Rule 69. Execution.

(*a*) *In general.*

(*1*) *Money judgment; applicable procedure.*—A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(*2*) *Obtaining discovery.*—In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.

(*b*) *Against certain public officers.*—When a judgment has been entered against a revenue officer in the circumstances stated in 28 U. S. C. § 2006, or against an officer of Congress in the circumstances stated in 2 U. S. C. § 118, the judgment must be satisfied as those statutes provide.

Rule 70. Enforcing a judgment for a specific act.

(*a*) *Party's failure to act; ordering another to act.*—If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party's expense—by another person appointed by the court. When done, the act has the same effect as if done by the party.

(*b*) *Vesting title.*—If the real or personal property is within the district, the court—instead of ordering a conveyance—may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(*c*) *Obtaining a writ of attachment or sequestration.*—On application by a party entitled to performance of an act, the

clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(*d*) *Obtaining a writ of execution or assistance.*—On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(*e*) *Holding in contempt.*—The court may also hold the disobedient party in contempt.

Rule 71. Enforcing relief for or against a nonparty.

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

Title IX. Special Proceedings

Rule 71.1. Condemning real or personal property.

(*a*) *Applicability of other rules.*—These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise.

(*b*) *Joinder of properties.*—The plaintiff may join separate pieces of property in a single action, no matter whether they are owned by the same persons or sought for the same use.

(*c*) *Complaint.*

(*1*) *Caption.*—The complaint must contain a caption as provided in Rule 10(a). The plaintiff must, however, name as defendants both the property—designated generally by kind, quantity, and location—and at least one owner of some part of or interest in the property.

(*2*) *Contents.*—The complaint must contain a short and plain statement of the following:

(A) the authority for the taking;

(B) the uses for which the property is to be taken;

(C) a description sufficient to identify the property;

(D) the interests to be acquired; and

(E) for each piece of property, a designation of each defendant who has been joined as an owner or owner of an interest in it.

(*3*) *Parties.*—When the action commences, the plaintiff need join as defendants only those persons who have or claim an interest in the property and whose names are then known. But before any hearing on compensation, the plaintiff must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records, considering both the property's character and value and the interests to be acquired. All others may be made defendants under the designation "Unknown Owners."

(*4*) *Procedure.*—Notice must be served on all defendants as provided in Rule 71.1(d), whether they were named as defendants when the action commenced or were added later. A defendant may answer as provided in Rule 71.1(e). The court, meanwhile, may order any distribution of a deposit that the facts warrant.

(*5*) *Filing; additional copies.*—In addition to filing the complaint, the plaintiff must give the clerk at least one copy for the defendants' use and additional copies at the request of the clerk or a defendant.

(*d*) *Process.*

(*1*) *Delivering notice to the clerk.*—On filing a complaint, the plaintiff must promptly deliver to the clerk joint or several notices directed to the named defendants. When adding defendants, the plaintiff must deliver to the clerk additional notices directed to the new defendants.

(*2*) *Contents of the notice.*

(*A*) *Main contents.*—Each notice must name the court, the title of the action, and the defendant to whom it is directed. It must describe the property sufficiently to identify it, but need not describe any property other than that to be taken from the named defendant. The notice must also state:

(i) that the action is to condemn property;

(ii) the interest to be taken;

(iii) the authority for the taking;

(iv) the uses for which the property is to be taken;

(v) that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice;

(vi) that the failure to so serve an answer constitutes consent to the taking and to the court's authority to proceed with the action and fix the compensation; and

(vii) that a defendant who does not serve an answer may file a notice of appearance.

(*B*) *Conclusion.*—The notice must conclude with the name, telephone number, and e-mail address of the plaintiff's attorney and an address within the district in which the action is brought where the attorney may be served.

(*3*) *Serving the notice.*

(*A*) *Personal service.*—When a defendant whose address is known resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4.

(*B*) *Service by publication.*

(i) A defendant may be served by publication only when the plaintiff's attorney files a certificate stating that the attorney believes the defendant cannot be personally served, because after diligent inquiry within the state where the complaint is filed, the defendant's place of residence is still unknown or, if known, that it is beyond the territorial limits of personal service. Service is then made by publishing the notice—once a week for at least three successive weeks—in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located. Before the last publication, a copy of the notice must also be mailed to every defendant who cannot be personally served but whose

place of residence is then known. Unknown owners may be served by publication in the same manner by a notice addressed to "Unknown Owners."

(ii) Service by publication is complete on the date of the last publication. The plaintiff's attorney must prove publication and mailing by a certificate, attach a printed copy of the published notice, and mark on the copy the newspaper's name and the dates of publication.

(*4*) *Effect of delivery and service.*—Delivering the notice to the clerk and serving it have the same effect as serving a summons under Rule 4.

(*5*) *Proof of service; amending the proof or notice.*—Rule 4(*l*) governs proof of service. The court may permit the proof or the notice to be amended.

(*e*) *Appearance or answer.*

(*1*) *Notice of appearance.*—A defendant that has no objection or defense to the taking of its property may serve a notice of appearance designating the property in which it claims an interest. The defendant must then be given notice of all later proceedings affecting the defendant.

(*2*) *Answer.*—A defendant that has an objection or defense to the taking must serve an answer within 20 days after being served with the notice. The answer must:

(A) identify the property in which the defendant claims an interest;

(B) state the nature and extent of the interest; and

(C) state all the defendant's objections and defenses to the taking.

(*3*) *Waiver of other objections and defenses; evidence on compensation.*—A defendant waives all objections and defenses not stated in its answer. No other pleading or motion asserting an additional objection or defense is allowed. But at the trial on compensation, a defendant—whether or not it has previously appeared or answered—may present evidence on the amount of compensation to be paid and may share in the award.

(*f*) *Amending pleadings.*—Without leave of court, the plaintiff may—as often as it wants—amend the complaint at any time before the trial on compensation. But no amendment may be made if it would result in a dismissal inconsistent with Rule 71.1(i)(1) or (2). The plaintiff need not serve a copy of an amendment, but must serve notice of the filing, as provided in Rule 5(b), on every affected party who has appeared and, as provided in Rule 71.1(d), on every affected party who has not appeared. In addition, the plaintiff must give the clerk at least one copy of each amendment for the defendants' use, and additional copies at the request of the clerk or a defendant. A defendant may appear or answer in the time and manner and with the same effect as provided in Rule 71.1(e).

(*g*) *Substituting parties.*—If a defendant dies, becomes incompetent, or transfers an interest after being joined, the court may, on motion and notice of hearing, order that the proper party be substituted. Service of the motion and notice on a nonparty must be made as provided in Rule 71.1(d)(3).

(*h*) *Trial of the issues.*

(*1*) *Issues other than compensation; compensation.*—In an action involving eminent domain under federal law, the court tries all issues, including compensation, except when compensation must be determined:

(A) by any tribunal specially constituted by a federal statute to determine compensation; or

(B) if there is no such tribunal, by a jury when a party demands one within the time to answer or within any additional time the court sets, unless the court appoints a commission.

(*2*) *Appointing a commission; commission's powers and report.*

(*A*) *Reasons for appointing.*—If a party has demanded a jury, the court may instead appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned or for other just reasons.

(*B*) *Alternate commissioners.*—The court may appoint up to two additional persons to serve as alternate commissioners to hear the case and replace commissioners who, before a decision is filed, the court finds unable or disqualified to perform their duties. Once the commission renders its final decision, the court must discharge any alternate who has not replaced a commissioner.

(*C*) *Examining the prospective commissioners.*—Before making its appointments, the court must advise the parties of the identity and qualifications of each prospective commissioner and alternate, and may permit the parties to examine them. The parties may not suggest appointees, but for good cause may object to a prospective commissioner or alternate.

(*D*) *Commission's powers and report.*—A commission has the powers of a master under Rule 53(c). Its action and report are determined by a majority. Rule 53(d), (e), and (f) apply to its action and report.

(*i*) *Dismissal of the action or a defendant.*

(*1*) *Dismissing the action.*

(*A*) *By the plaintiff.*—If no compensation hearing on a piece of property has begun, and if the plaintiff has not acquired title or a lesser interest or taken possession, the plaintiff may, without a court order, dismiss the action as to that property by filing a notice of dismissal briefly describing the property.

(*B*) *By stipulation.*—Before a judgment is entered vesting the plaintiff with title or a lesser interest in or possession of property, the plaintiff and affected defendants may, without a court order, dismiss the action in whole or in part by filing a stipulation of dismissal. And if the parties so stipulate, the court may vacate a judgment already entered.

(*C*) *By court order.*—At any time before compensation has been determined and paid, the court may, after a motion and hearing, dismiss the action as to a piece of property. But if the plaintiff has already taken title, a

lesser interest, or possession as to any part of it, the court must award compensation for the title, lesser interest, or possession taken.

(*2*) *Dismissing a defendant.*—The court may at any time dismiss a defendant who was unnecessarily or improperly joined.

(*3*) *Effect.*—A dismissal is without prejudice unless otherwise stated in the notice, stipulation, or court order.

(*j*) *Deposit and its distribution.*

(*1*) *Deposit.*—The plaintiff must deposit with the court any money required by law as a condition to the exercise of eminent domain and may make a deposit when allowed by statute.

(*2*) *Distribution; adjusting distribution.*—After a deposit, the court and attorneys must expedite the proceedings so as to distribute the deposit and to determine and pay compensation. If the compensation finally awarded to a defendant exceeds the amount distributed to that defendant, the court must enter judgment against the plaintiff for the deficiency. If the compensation awarded to a defendant is less than the amount distributed to that defendant, the court must enter judgment against that defendant for the overpayment.

(*k*) *Condemnation under a state's power of eminent domain.*—This rule governs an action involving eminent domain under state law. But if state law provides for trying an issue by jury—or for trying the issue of compensation by jury or commission or both—that law governs.

(*l*) *Costs.*—Costs are not subject to Rule 54(d).

Rule 72. Magistrate judges: pretrial order.

(*a*) *Nondispositive matters.*—When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 10 days

after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(*b*) *Dispositive motions and prisoner petitions.*

(*1*) *Findings and recommendations.*—A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly mail a copy to each party.

(*2*) *Objections.*—Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(*3*) *Resolving objections.*—The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Rule 73. Magistrate judges: trial by consent; appeal.

(*a*) *Trial by consent.*—When authorized under 28 U. S. C. § 636(c), a magistrate judge may, if all parties consent, conduct a civil action or proceeding, including a jury or non-

jury trial. A record must be made in accordance with 28 U. S. C. § 636(c)(5).

(*b*) *Consent procedure.*

(*1*) *In general.*—When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U. S. C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

(*2*) *Reminding the parties about consenting.*—A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

(*3*) *Vacating a referral.*—On its own for good cause—or when a party shows extraordinary circumstances—the district judge may vacate a referral to a magistrate judge under this rule.

(*c*) *Appealing a judgment.*—In accordance with 28 U. S. C. § 636(c)(3), an appeal from a judgment entered at a magistrate judge's direction may be taken to the court of appeals as would any other appeal from a district-court judgment.

Rule 74. [Abrogated.]

Rule 75. [Abrogated.]

Rule 76. [Abrogated.]

Title X. District Courts and Clerks: Conducting Business; Issuing Orders

Rule 77. Conducting business; clerk's authority; notice of an order or judgment.

(*a*) *When court is open.*—Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(*b*) *Place for trial and other proceedings.*—Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing—other than one ex parte—may be conducted outside the district unless all the affected parties consent.

(*c*) *Clerk's office hours; clerk's orders.*

(*1*) *Hours.*—The clerk's office—with a clerk or deputy on duty—must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(4)(A).

(*2*) *Orders.*—Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

(A) issue process;

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1); and

(D) act on any other matter that does not require the court's action.

(*d*) *Serving notice of an order or judgment.*

(*1*) *Service.*—Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. The clerk must record the service on the docket. A party also may serve notice of the entry as provided in Rule 5(b).

(*2*) *Time to appeal not affected by lack of notice.*—Lack of notice of the entry does not affect the time for appeal or relieve—or authorize the court to relieve—a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure (4)(a).

Rule 78. Hearing motions; submission on briefs.

(*a*) *Providing a regular schedule for oral hearings.*—A court may establish regular times and places for oral hearings on motions.

(*b*) *Providing for submission on briefs.*—By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.

Rule 79. Records kept by the clerk.

(*a*) *Civil docket.*

(*1*) *In general.*—The clerk must keep a record known as the "civil docket" in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned consecutive file numbers, which must be noted in the docket where the first entry of the action is made.

(*2*) *Items to be entered.*—The following items must be marked with the file number and entered chronologically in the docket:

(A) papers filed with the clerk;

(B) process issued, and proofs of service or other returns showing execution; and

(C) appearances, orders, verdicts, and judgments.

(*3*) *Contents of entries; jury trial demanded.*—Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

(*b*) *Civil judgments and orders.*—The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept.

The clerk must keep these in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

(*c*) *Indexes; calendars.*—Under the court's direction, the clerk must:

(1) keep indexes of the docket and of the judgments and orders described in Rule 79(b); and

(2) prepare calendars of all actions ready for trial, distinguishing jury trials from nonjury trials.

(*d*) *Other records.*—The clerk must keep any other records required by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

Rule 80. Stenographic transcript as evidence.

If stenographically reported testimony at a hearing or trial is admissible in evidence at a later trial, the testimony may be proved by a transcript certified by the person who reported it.

Title XI. General Provisions

Rule 81. Applicability of the rules in general; removed actions.

(*a*) *Applicability to particular proceedings.*

(*1*) *Prize proceedings.*—These rules do not apply to prize proceedings in admiralty governed by 10 U. S. C. §§ 7651–7681.

(*2*) *Bankruptcy.*—These rules apply to bankruptcy proceedings to the extent provided by the Federal Rules of Bankruptcy Procedure.

(*3*) *Citizenship.*—These rules apply to proceedings for admission to citizenship to the extent that the practice in those proceedings is not specified in federal statutes and has previously conformed to the practice in civil actions. The provisions of 8 U. S. C. § 1451 for service by publica-

tion and for answer apply in proceedings to cancel citizenship certificates.

(*4*) *Special writs.*—These rules apply to proceedings for habeas corpus and for quo warranto to the extent that the practice in those proceedings:

(A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and

(B) has previously conformed to the practice in civil actions.

(*5*) *Proceedings involving a subpoena.*—These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.

(*6*) *Other proceedings.*—These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures:

(A) 7 U. S. C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture;

(B) 9 U. S. C., relating to arbitration;

(C) 15 U. S. C. § 522, for reviewing an order of the Secretary of the Interior;

(D) 15 U. S. C. § 715d(c), for reviewing an order denying a certificate of clearance;

(E) 29 U. S. C. §§ 159, 160, for enforcing an order of the National Labor Relations Board;

(F) 33 U. S. C. §§ 918, 921, for enforcing or reviewing a compensation order under the Longshore and Harbor Workers' Compensation Act; and

(G) 45 U. S. C. § 159, for reviewing an arbitration award in a railway-labor dispute.

(*b*) *Scire facias and mandamus.*—The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.

(*c*) *Removed actions.*

(*1*) *Applicability.*—These rules apply to a civil action after it is removed from a state court.

(*2*) *Further pleading.*—After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 20 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief;

(B) 20 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 5 days after the notice of removal is filed.

(*3*) *Demand for a jury trial.*

(*A*) *As affected by state law.*—A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(*B*) *Under Rule 38.*—If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 10 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

(*d*) *Law applicable.*

(*1*) *State law.*—When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(*2*) *District of Columbia.*—The term "state" includes, where appropriate, the District of Columbia. When these rules provide for state law to apply, in the District Court for the District of Columbia:

(A) the law applied in the District governs; and

(B) the term "federal statute" includes any Act of Congress that applies locally to the District.

Rule 82. Jurisdiction and venue unaffected.

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U. S. C. §§ 1391–1392.

Rule 83. Rules by district courts; judge's directives.

(*a*) *Local rules.*

(*1*) *In general.*—After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U. S. C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(*2*) *Requirement of form.*—A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(*b*) *Procedure when there is no controlling law.*—A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U. S. C. §§ 2072 and 2075, and the

district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Rule 84. Forms.

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

Rule 85. Title.

These rules may be cited as the Federal Rules of Civil Procedure.

Rule 86. Effective dates.

(*a*) *In general.*—These rules and any amendments take effect at the time specified by the Supreme Court, subject to 28 U. S. C. § 2074. They govern:

(1) proceedings in an action commenced after their effective date; and

(2) proceedings after that date in an action then pending unless:

(A) the Supreme Court specifies otherwise; or

(B) the court determines that applying them in a particular action would be infeasible or work an injustice.

(*b*) *December 1, 2007 amendments.*—If any provision in Rules 1–5.1, 6–73, or 77–86 conflicts with another law, priority in time for the purpose of 28 U. S. C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.

APPENDIX OF FORMS

FORM 1. CAPTION
(Use on every summons, complaint, answer, motion, or other document.)

United States District Court
for the
_____ District of _____

A B, Plaintiff
v.
C D, Defendant

E F, Third-Party Defendant
(Use if needed.)

} Civil Action No. _____

(Name of Document)

FORM 2. DATE, SIGNATURE, ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER
(Use at the conclusion of pleadings and other papers that require a signature.)

Date _____

_____
(Signature of the attorney or unrepresented party)

_____
(Printed name)

_____
(Address)

_____
(E-mail address)

_____
(Telephone number)

FORM 3. SUMMONS

(Caption—See Form 1.)

To *name the defendant*:

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, _____, whose address is _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

_____ _____

Date Clerk of Court

(Court Seal)

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

FORM 4. SUMMONS ON A THIRD-PARTY COMPLAINT

(Caption—See Form 1.)

To *name the third-party defendant*:

A lawsuit has been filed against defendant _____, who as third-party plaintiffis making this claim against you to pay part or all of what [he] may owe to the plaintiff _____.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff and on the defendant an answer to the attached third-party complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the defendant's attorney, _____, whose address is, _____, and also on the plaintiff's attorney, _____, whose address is, _____. If you fail to do so, judgment by default will be entered against you for the relief demanded in the third-party complaint. You also must file the answer or motion with the court and serve it on any other parties.

A copy of the plaintiff's complaint is also attached. You may—but are not required to—respond to it.

_____ _____

Date Clerk of Court

(Court Seal)

FORM 5. NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS

(Caption—See Form 1.)

To *name the defendant—or if the defendant is a corporation, partnership, or association name an officer or agent authorized to receive service*:

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within *give at least 30 days or at least 60 days if the defendant is outside any judicial district of the United States* from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

(Date and sign—See Form 2.)

FORM 6. WAIVER OF THE SERVICE OF SUMMONS

(Caption—See Form 1.)

To *name the plaintiff's attorney or the unrepresented plaintiff*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

(Date and sign—See Form 2.)

(Attach the following to Form 6.)

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Form 7. Statement of Jurisdiction

a. *(For diversity-of-citizenship jurisdiction.)* The plaintiff is [a citizen of *Michigan*] [a corporation incorporated under the laws of *Michigan* with its principal place of business in *Michigan*]. The defendant is [a citizen of *New York*] [a corporation incorporated under the laws of *New York* with its principal place of business in *New York*]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U. S. C. § 1332.

b. *(For federal-question jurisdiction.)* This action arises under [the United States Constitution, *specify the article or amendment and the section*] [a United States treaty *specify*] [a federal statute, —— U. S. C. § ——].

c. *(For a claim in the admiralty or maritime jurisdiction.)* This is a case of admiralty or maritime jurisdiction. (*To invoke admiralty status under Rule 9(h) use the following:* This is an admiralty or maritime claim within the meaning of Rule 9(h).)

Form 8. Statement of Reasons for Omitting a Party

(If a person who ought to be made a party under Rule 19(a) is not named, include this statement in accordance with Rule 19(c).)

This complaint does not join as a party *name* who [is not subject to this court's personal jurisdiction] [cannot be made a party without depriving this court of subject-matter jurisdiction] because *state the reason*.

Form 9. Statement Noting a Party's Death

(Caption—See Form 1.)

In accordance with Rule 25(a) *name the person*, who is [a party to this action] [a representative of or successor to the deceased party] notes the death during the pendency of this action of *name*, [*describe as party* in this action].

(Date and sign—See Form 2.)

Form 10. Complaint to Recover a Sum Certain

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

(Use one or more of the following as appropriate and include a demand for judgment.)

(a) On a Promissory Note

2. On *date*, the defendant executed and delivered a note promising to pay the plaintiff on *date* the sum of $_____ with interest at the rate of ___ percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: _____].

3. The defendant has not paid the amount owed.

(b) On an Account

2. The defendant owes the plaintiff $_____ according to the account set out in Exhibit A.

(c) For Goods Sold and Delivered

2. The defendant owes the plaintiff $_____ for goods sold and delivered by the plaintiff to the defendant from *date* to *date*.

(d) For Money Lent

2. The defendant owes the plaintiff $_____ for money lent by the plaintiff to the defendant on *date*.

(e) For Money Paid by Mistake

2. The defendant owes the plaintiff $_____ for money paid by mistake to the defendant on *date* under these circumstances: *describe with particularity in accordance with Rule 9(b)*.

(f) For Money Had and Received

2. The defendant owes the plaintiff $_____ for money that was received from *name* on *date* to be paid by the defendant to the plaintiff.

Demand for Judgment

Therefore, the plaintiff demands judgment against the defendant for $_____, plus interest and costs.

(Date and sign—See Form 2.)

Form 11. Complaint for Negligence

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

(Date and sign—See Form 2.)

Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against one or both defendants for $_____, plus costs.

(Date and sign—See Form 2.)

Form 13. Complaint for Negligence Under the Federal Employers' Liability Act

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at _____.

3. On *date*, the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.

4. During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.

5. The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel.

6. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, and costs.

(Date and sign—See Form 2.)

Form 14. Complaint for Damages Under the Merchant Marine Act

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. At the times below, the defendant owned and operated the vessel *name* and used it to transport cargo for hire by water in interstate and foreign commerce.

3. On *date*, at *place*, the defendant hired the plaintiff under seamen's articles of customary form for a voyage from _____ to _____ and return at a wage of $_____ a month and found, which is equal to a shore worker's wage of $_____ a month.

4. On *date*, the vessel was at sea on the return voyage. *(Describe the weather and the condition of the vessel.)*

5. *(Describe as in Form 11 the defendant's negligent conduct.)*

6. As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

(Date and sign—See Form 2.)

Form 15. Complaint for the Conversion of Property

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*.

3. The property is worth $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

(Date and sign—See Form 2.)

Form 16. Third-Party Complaint

(Caption—See Form 1.)

1. Plaintiff *name* has filed against defendant *name* a complaint, a copy of which is attached.

2. *(State grounds entitling defendant's name to recover from third-party defendant's name for all or an identified share of any judgment for plaintiff's name against defendant's name.)*

Therefore, the defendant demands judgment against *third-party defendant's name* for *all or an identified share* of sums that may be adjudged against the defendant in the plaintiff's favor.

(Date and sign—See Form 2.)

Form 17. Complaint for Specific Performance of a Contract to Convey Land

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, the parties agreed to the contract [attached as Exhibit A] [summarize the contract].

3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.

4. The plaintiff now offers to pay the purchase price.

Therefore, the plaintiff demands that:

(a) the defendant be required to specifically perform the agreement and pay damages of $_____, plus interest and costs, or

(b) if specific performance is not ordered, the defendant be required to pay damages of $_____, plus interest and costs.

(Date and sign—See Form 2.)

Form 18. Complaint for Patent Infringement

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, United States Letters Patent No. _____ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

(a) a preliminary and final injunction against the continuing infringement;

(b) an accounting for damages; and

(c) interest and costs.

(Date and sign—See Form 2.)

Form 19. Complaint for Copyright Infringement and Unfair Competition

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. Before *date*, the plaintiff, a United States citizen, wrote a book entitled _____.

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between *date* and *date*, the plaintiff applied to the copyright office and received a certificate of registration dated _____ and identified as *date, class, number*.

5. Since *date*, the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled _____, which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book, thus causing irreparable damage.

Therefore, the plaintiff demands that:

(a) until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) the plaintiff be awarded any other just relief.

(Date and sign—See Form 2.)

Form 20. Complaint for Interpleader and Declaratory Relief

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, the plaintiff issued a life insurance policy on the life of *name* with *name* as the named beneficiary.

3. As a condition for keeping the policy in force, the policy required payment of a premium during the first year and then annually.

4. The premium due on *date* was never paid, and the policy lapsed after that date.

5. On *date*, after the policy had lapsed, both the insured and the named beneficiary died in an automobile collision.

6. Defendant *name* claims to be the beneficiary in place of *name* and has filed a claim to be paid the policy's full amount.

7. The other two defendants are representatives of the deceased persons' estates. Each defendant has filed a claim on behalf of each estate to receive payment of the policy's full amount.

8. If the policy was in force at the time of death, the plaintiff is in doubt about who should be paid.

Therefore, the plaintiff demands that:

(a) each defendant be restrained from commencing any action against the plaintiff on the policy;

(b) a judgment be entered that no defendant is entitled to the proceeds of the policy or any part of it, but if the court determines that the policy was in effect at the time of the insured's death, that the defendants be required to interplead and settle among themselves their rights to the proceeds, and that the plaintiff be discharged from all liability except to the defendant determined to be entitled to the proceeds; and

(c) the plaintiff recover its costs.

(Date and sign—See Form 2.)

FORM 21. COMPLAINT ON A CLAIM FOR A DEBT AND TO SET ASIDE A FRAUDULENT CONVEYANCE UNDER RULE 18(b)

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, defendant *name* signed a note promising to pay to the plaintiff on *date* the sum of $_____ with interest at the rate of _____ percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant *name* owes the plaintiff the amount of the note and interest.

4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.

Therefore, the plaintiff demands that:

(a) judgment for $_____, plus costs, be entered against defendant(s) *name(s)*; and

(b) the conveyance to defendant *name* be declared void and any judgment granted be made a lien on the property.

(Date and sign—See Form 2.)

FORM 30. ANSWER PRESENTING DEFENSES UNDER RULE 12(b)

(Caption—See Form 1.)

Responding to Allegations in the Complaint

1. Defendant admits the allegations in paragraphs _____.

2. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraphs _____.

3. Defendant admits *identify part of the allegation* in paragraph _____ and denies or lacks knowledge or information sufficient to form a belief about the truth of the rest of the paragraph.

Failure to State a Claim

4. The complaint fails to state a claim upon which relief can be granted.

Failure to Join a Required Party

5. If there is a debt, it is owed jointly by the defendant and *name* who is a citizen of _____. This person can be made a party without depriving this court of jurisdiction over the existing parties.

Affirmative Defense—Statute of Limitations

6. The plaintiff's claim is barred by the statute of limitations because it arose more than _____ years before this action was commenced.

Counterclaim

7. *(Set forth any counterclaim in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.)*

Crossclaim

8. *(Set forth a crossclaim against a coparty in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.)*

(Date and sign—See Form 2.)

FORM 31. ANSWER TO A COMPLAINT FOR MONEY HAD AND RECEIVED WITH A COUNTERCLAIM FOR INTERPLEADER

(Caption—See Form 1.)

Response to the Allegations in the Complaint

(See Form 30.)

Counterclaim for Interpleader

1. The defendant received from *name* a deposit of $_____.

2. The plaintiff demands payment of the deposit because of a purported assignment from *name* who has notified the defendant that the assignment is not valid and who continues to hold the defendant responsible for the deposit.

Therefore, the defendant demands that:

(a) *name* be made a party to this action;

(b) the plaintiff and *name* be required to interplead their respective claims;

(c) the court decide whether the plaintiff or *name* or either of them is entitled to the deposit and discharge the defendant of any liability except to the person entitled to the deposit; and

(d) the defendant recover costs and attorney's fees.

(Date and sign—See Form 2.)

Form 40. Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction, Improper Venue, Insufficient Service of Process, or Failure to State a Claim

(Caption—See Form 1.)

The defendant moves to dismiss the action because:

1. the amount in controversy is less than the sum or value specified by 28 U. S. C. § 1332;

2. the defendant is not subject to the personal jurisdiction of this court;

3. venue is improper (this defendant does not reside in this district and no part of the events or omissions giving rise to the claim occurred in the district);

4. the defendant has not been properly served, as shown by the attached affidavits of _____; or

5. the complaint fails to state a claim upon which relief can be granted.

(Date and sign—See Form 2.)

Form 41. Motion to Bring in a Third-Party Defendant

(Caption—See Form 1.)

The defendant, as third-party plaintiff, moves for leave to serve on *name* a summons and third-party complaint, copies of which are attached.

(Date and sign—See Form 2.)

Form 42. Motion to Intervene as a Defendant Under Rule 24

(Caption—See Form 1.)

1. *Name* moves for leave to intervene as a defendant in this action and to file the attached answer.

(State grounds under Rule 24(a) or (b).)

2. The plaintiff alleges patent infringement. We manufacture and sell to the defendant the articles involved, and we have a defense to the plaintiff's claim.

3. Our defense presents questions of law and fact that are common to this action.

(Date and sign—See Form 2.)

[An Intervener's Answer must be attached. See Form 30.]

Form 50. Request to Produce Documents and Tangible Things, or to Enter onto Land Under Rule 34

(Caption—See Form 1.)

The plaintiff *name* requests that the defendant *name* respond within _____ days to the following requests:

1. To produce and permit the plaintiff to inspect and copy and to test or sample the following documents, including electronically stored information:

(Describe each document and the electronically stored information, either individually or by category.)

(State the time, place, and manner of the inspection and any related acts.)

2. To produce and permit the plaintiff to inspect and copy—and to test or sample—the following tangible things:

(Describe each thing, either individually or by category.)

(State the time, place, and manner of the inspection and any related acts.)

3. To permit the plaintiff to enter onto the following land to inspect, photograph, test, or sample the property or an object or operation on the property.

(Describe the property and each object or operation.)

(State the time and manner of the inspection and any related acts.)

(Date and sign—See Form 2.)

Form 51. Request for Admissions Under Rule 36

(Caption—See Form 1.)

The plaintiff *name* asks the defendant *name* to respond within 30 days to these requests by admitting, for purposes of this action only and subject to objections to admissibility at trial:

1. The genuineness of the following documents, copies of which [are attached] [are or have been furnished or made available for inspection and copying].

(List each document.)

2. The truth of each of the following statements:
(List each statement.)

(Date and sign—See Form 2.)

FORM 52. REPORT OF THE PARTIES' PLANNING MEETING

(Caption—See Form 1.)

1. The following persons participated in a Rule 26(f) conference on *date* by *state the method of conferring*:

(*e.g., name* representing the plaintiff).

2. Initial Disclosures. The parties [have completed] [will complete by *date*] the initial disclosures required by Rule 26(a)(1).

3. Discovery Plan. The parties propose this discovery plan:
(Use separate paragraphs or subparagraphs if the parties disagree.)

(a) Discovery will be needed on these subjects: *(describe).*

(b) (Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.)

(c) (Maximum number of interrogatories by each party to another party, along with the dates the answers are due.)

(d) (Maximum number of requests for admission, along with the dates responses are due.)

(e) (Maximum number of depositions by each party.)

(f) (Limits on the length of depositions, in hours.)

(g) (Dates for exchanging reports of expert witnesses.)

(h) (Dates for supplementations under Rule 26(e).)

4. Other Items:

(a) (A date if the parties ask to meet with the court before a scheduling order.)

(b) (Requested dates for pretrial conferences.)

(c) (Final dates for the plaintiff to amend pleadings or to join parties.)

(d) (Final dates for the defendant to amend pleadings or to join parties.)

(e) (Final dates to file dispositive motions.)

(f) (State the prospects for settlement.)

(g) (Identify any alternative dispute resolution procedure that may enhance settlement prospects.)

(h) (Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.)

(i) (Final dates to file objections under Rule 26(a)(3).)

(j) (Suggested trial date and estimate of trial length.)

(k) (Other matters.)

(Date and sign—see Form 2.)

Form 60. Notice of Condemnation

(Caption—See Form 1.)

To *name the defendant*.

1. A complaint in condemnation has been filed in the United States District Court for the _____ District of _____, to take property to use for *purpose*. The interest to be taken is *describe*. The court is located in the United States courthouse at this address: _____.

2. The property to be taken is described below. You have or claim an interest in it.

(Describe the property.)

3. The authority for taking this property is *cite*.

4. If you want to object or present any defense to the taking you must serve an answer on the plaintiff's attorney within 20 days [after being served with this notice] [from *insert the date of the last publication of notice*]. Send your answer to this address: _____.

5. Your answer must identify the property in which you claim an interest, state the nature and extent of that interest, and state all your objections and defenses to the taking. Objections and defenses not presented are waived.

6. If you fail to answer you consent to the taking and the court will enter a judgment that takes your described property interest.

7. Instead of answering, you may serve on the plaintiff's attorney a notice of appearance that designates the property in which you claim an interest. After you do that, you will receive a notice of any proceedings that affect you. Whether or not you have previously appeared or answered, you may present evidence at a trial to determine compensation for the property and share in the overall award.

(Date and sign—See Form 2.)

Form 61. Complaint for Condemnation

(Caption—See Form 1; name as defendants the property and at least one owner.)

1. (Statement of Jurisdiction—See Form 7.)

2. This is an action to take property under the power of eminent domain and to determine just compensation to be paid to the owners and parties in interest.

3. The authority for the taking is _____.

4. The property is to be used for _____.

5. The property to be taken is *describe in enough detail for identification—or attach the description and state "is described in Exhibit A, attached"*.

6. The interest to be acquired is _____.

7. The persons known to the plaintiff to have or claim an interest in the property are: _____. *(For each person include the interest claimed.)*

8. There may be other persons who have or claim an interest in the property and whose names could not be found after a reasonably diligent search. They are made parties under the designation "Unknown Owners."

Therefore, the plaintiff demands judgment:

(a) condemning the property;

(b) determining and awarding just compensation; and

(c) granting any other lawful and proper relief.

(Date and sign—See Form 2.)

Form 70. Judgment on a Jury Verdict

(Caption—See Form 1.)

This action was tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

It is ordered that:

[the plaintiff *name* recover from the defendant *name* the amount of $_____ with interest at the rate of __%, along with costs].

[the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff *name*].

_____ _____

Date Clerk of Court

Form 71. Judgment by the Court Without a Jury

(Caption—See Form 1.)

This action was tried by Judge _____ without a jury and the following decision was reached:

It is ordered that:

[the plaintiff *name* recover from the defendant *name* the amount of $_____, with prejudgment interest at the rate of __%, postjudgment interest at the rate of __%, along with costs].

[the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *name* recover costs from the plaintiff *name*].

_____ _____

Date Clerk of Court

FORM 80. NOTICE OF A MAGISTRATE JUDGE'S AVAILABILITY

1. A magistrate judge is available under title 28 U. S. C. § 636(c) to conduct the proceedings in this case, including a jury or nonjury trial and the entry of final judgment. But a magistrate judge can be assigned only if all parties voluntarily consent.

2. You may withhold your consent without adverse substantive consequences. The identity of any party consenting or withholding consent will not be disclosed to the judge to whom the case is assigned or to any magistrate judge.

3. If a magistrate judge does hear your case, you may appeal directly to a United States court of appeals as you would if a district judge heard it.

A form called *Consent to an Assignment to a United States Magistrate Judge* is available from the court clerk's office.

FORM 81. CONSENT TO AN ASSIGNMENT TO A MAGISTRATE JUDGE

(Caption—See Form 1.)

I voluntarily consent to have a United States magistrate judge conduct all further proceedings in this case, including a trial, and order the entry of final judgment. (Return this form to the court clerk—not to a judge or magistrate judge.)

_____ _____

Date Signature of the Party

FORM 82. ORDER OF ASSIGNMENT TO A MAGISTRATE JUDGE

(Caption—See Form 1.)

With the parties' consent it is ordered that this case be assigned to United States Magistrate Judge _____ of this district to conduct all proceedings and enter final judgment in accordance with 28 U. S. C. § 636(c).

_____ _____

Date United States District Judge

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 30, 2007, 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. 1166. 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, 535 U. S. 1157, 541 U. S. 1103, 544 U. S. 1181, and 547 U. S. 1269.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 2007

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 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) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 30, 2007

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 11, 32, 35, 45, and new Rule 49.1.

[See *infra*, pp. 1169–1173.]

2. That the Model Form for Use in 28 U. S. C. § 2254 Cases Involving a Rule 9 Issue under Section 2254 of Title 28, United States Code, be, and hereby is, abrogated.

[See *infra*, p. 1173.]

3. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2007, 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 in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

. . . . .

(*b*) *Considering and accepting a guilty or nolo contendere plea.*

(*1*) *Advising and questioning the defendant.*—Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

. . . . .

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U. S. C. § 3553(a); and

. . . . .

Rule 32. Sentence and judgment.

. . . . .

(*d*) *Presentence report.*

(*1*) *Applying the advisory sentencing guidelines.*—The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(*2*) *Additional information.*—The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U. S. C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U. S. C. § 3553(a).

. . . . .

Rule 35. Correcting or reducing a sentence.

. . . . .

(*b*) *Reducing a sentence for substantial assistance.*

(*1*) *In general.*—Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substan-

tial assistance in investigating or prosecuting another person.

. . . . .

Rule 45. Computing and extending time.

. . . . .

(*c*) *Additional time after certain kinds of service.*—Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 49.1. Privacy protection for filings made with the court.

(*a*) *Redacted filings.*—Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(*b*) *Exemptions from the redaction requirement.*—The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U. S. C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(*c*) *Immigration cases.*—A filing in an action brought under 28 U. S. C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(*d*) *Filings made under seal.*—The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(*e*) *Protective orders.*—For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(*f*) *Option for additional unredacted filing under seal.*—A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(*g*) *Option for filing a reference list.*—A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case

to a listed identifier will be construed to refer to the corresponding item of information.

(*h*) *Waiver of protection of identifiers.*—A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

Model Form for Use in 28 U. S. C. § 2254 Cases Involving a Rule 9 Issue Under Section 2254 of Title 28, United States Code

[Abrogated.]

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1173 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

BOUMEDIENE ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

ON APPLICATION FOR EXTENSION OF TIME AND SUSPENSION OF ORDER DENYING CERTIORARI

No. 06A1001 (06–1195). Decided April 26, 2007*

Applicants' requests for (1) an extension of time in which to file a petition for a rehearing of this Court's order denying certiorari and (2) a suspension of the order denying certiorari are denied. This Court's Rules do not contemplate extending the time to file a petition for a rehearing of an order denying certiorari. See Rules 44.1, 44.2. And applicants have not satisfied the rigorous standard for suspending an order denying certiorari, a form of extraordinary relief that will not be granted unless there is a "reasonable likelihood of this Court's reversing its previous position and granting certiorari," *Richmond* v. *Arizona*, 434 U. S. 1323.

CHIEF JUSTICE ROBERTS, Circuit Justice.

We denied applicants' petitions for certiorari, 549 U. S. 1328 (2007), and they now bring two requests: first, a 122-day extension of time in which to file a petition for rehearing of the order denying certiorari, and second, suspension of the order denying certiorari. Both applications are denied.

1. This Court's Rules expressly provide for extensions of time in which to file a petition for writ of certiorari, Rule 13.5, or a petition for rehearing of a "judgment or decision . . . on the merits," Rule 44.1, but they do not provide for any extension of time in which to file a petition for rehearing

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*Together with No. 06A1002 (06–1196), *Al Odah, Next Friend of Al Odah, et al.* v. *United States et al.*, also on application for extension of time and suspension of order denying certiorari.

of an order denying certiorari. Such an order is plainly not a "judgment or decision . . . on the merits." Indeed, while Rule 44.1 establishes a 25-day period for filing a petition for rehearing of a judgment on the merits "unless the Court or a Justice shortens or extends the time," Rule 44.2, articulating a 25-day period for filing a petition for rehearing of an order denying certiorari, contains no such exception, confirming that the Rules do not contemplate granting an extension for such petitions.

2. An order denying certiorari "will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice." Rule 16.3. This most extraordinary relief will not be granted unless there is a "reasonable likelihood of this Court's reversing its previous decision and granting certiorari." *Richmond* v. *Arizona*, 434 U. S. 1323 (1977) (Rehnquist, J., in chambers). In arguing for suspension, applicants point to a motion filed by the Government in the District Court as part of ongoing proceedings below. They contend that, if the motion is granted, or if certain other actions are taken by the lower courts, there will be an adverse effect on the review available to them under the Detainee Treatment Act of 2005, Tit. X, 119 Stat. 2739. This does not satisfy the rigorous standard we have established for Rule 16.3 relief. Applicants do not even point to any action by the lower courts as prompting their request for extraordinary relief—only the filing of motions and *possible* court action. Such grounds can hardly provide a basis for believing this Court would reverse course and grant certiorari. Accordingly, suspension of the order is not warranted.

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