THE UNITED STATES SUPREME COURT:
THE JOHN ROBERTS COURT

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Theodore Roosevelt Inn of Court

Tuesday, March 15, 2022
6:00 PM

[ZOOM Presentation]

Co-chairs
Hon. Michael A. Ciaffa
Sarika Kapoor, Esq.

Allison Canarick, Esq.
Matthew Flanagan, Esq.
Omid Zareh, Esq.

Special Guest
John Q. Barrett, Esq.
Cardozo Professor of Law at St. John's University School of Law

Law Students
Jamie Bernstein, 1L, Hofstra Law School
Krystle Fitzpatrick, 1L, Hofstra Law School

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Program Outline

Introduction	Sarika Kapoor	6:00 PM – 6:20 PM
Part I: Fly-On-The-Wall Segment		
Introduction	Judge Ciaffa	6:20 PM – 6:30 PM
Conservative Flank	Allison Canarick Judge Ciaffa Krystle Fitzpatrick	6:30 PM – 6:45 PM
Liberal/neutral Flank	Matt Flanagan Omid Zareh Jamie Bernstein	6:45 PM – 7:00 PM
Part II: Hot Button Issues		
Abortion	Jamie Bernstein & Prof. Barrett	7:00 PM – 7:10 PM
Gun Rights	Allison Canarick & Prof. Barrett	7:10 PM – 7:20 PM
Chevron/Agency Deference	Krystle Fitzpatrick & Prof. Barrett	7:20 PM – 7:30 PM
Part III		
State of Play: March 15, 2022	Professor Barrett	7:30 PM – 7:55 PM
Conclusion/Q&A		7:55 PM – 8:00 PM

Intro Cases and Materials:

Beverly R GILL et al Appellants v William Whitford et al Appellees
Biden v Missouri
Department of Commerce v New York
June Medical Services L L C v Russo
National Federation of Independent Business v Department of Labor Occupational Safety and Health Adm
Shelby County Ala v Holder
The Evolution of Chief Justice John Roberts Michael C. Dorf Verdict Legal

Fly on the Wall Materials:

Catholic Charities of Diocese of Albany v Serio
Does 13 v Mills
Employment Div Dept of Human Resources of Oregon v Smith
Fulton v City of Philadelphia Pennsylvania
Masterpiece Cakeshop Ltd v Colorado Civil Rights Comn
Roman Catholic Diocese of Albany v Emami
Roman Catholic Diocese of Albany v. Emami - SCOTUSblog
Roman Catholic Diocese of Albany v Vullo
Roman Catholic Diocese of Albany v. Lacewell - Cert Petition
Article: Justices will hear free-speech claim from website designer who opposes same-sex

Fly on the Wall Additional Materials (Links only)
Sherbert v. Verner, 374 U.S. 398 (1963)
Summary, Annotations, Audio & Media of Oral Argument – April 24, 1963
https://supreme.justia.com/cases/federal/us/374/398/

Hot Button Issues Additional Materials:

42 USC 7411 Standards of performance for new stationary sources
2020-12-17 NRA-Corlett Cert Petition FINAL
20-843_Brief in Opposition
Chevron USA Inc v Natural Resources Defense Council Inc
District of Columbia v. Heller
Whole Woman's Health, et al. v. Jackson
Kachalsky v. County of Westchester_ 701 F.3d 81
NYS Rifle & Pistol Assn. v. Bruen transcript oral argument

Thomas E DOBBS MD MPH State Health Officer Mississippi Department of Health et al
Thomas E DOBBS MD MPH State Health Officer of the Mississippi Department of Health et al
Article: The Supreme Court's Conservatives May Be Set To Kneecap Federal Regulations Huffington Post

Chevron/Agency Deference (Links only)

This is the link to the brief filed by the State of West Virginia in *State of West Virginia, et. al. v. United States Environmental Protection Agency, et. al.*, No. 20-1530.
Brief for the North American Coal Corporation
Brief for Westmoreland Mining Holdings
Brief for the State of North Dakota
Brief for the Federal Respondents

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516-248-1700

Michael A. Ciaffa is Of Counsel in the firm's Litigation Department. He handles a wide variety of complex civil litigation matters, from their inception through appeal, together with select criminal appeals.

Mr. Ciaffa was a Nassau County District Court Judge from 2009-2014, where he presided over the busy trial and motion calendar, hearing thousands of no-fault disputes and other civil and criminal cases. During his tenure, he had many "Decisions of Interest" published in the *New York Law Journal*. More than two dozen of his decisions were accepted for publication in the New York Miscellaneous Reports – the most of any District Court Judge during his six years on the bench.

Throughout the course of a legal career spanning more than three decades, Mr. Ciaffa has achieved notable success litigating high profile commercial cases, partnership disputes, insurance coverage issues, and lawsuits challenging illegal or unconstitutional government actions. In McCann v Scaduto, for example, he saved a widow's home after Nassau County sold it to a tax lien speculator because the widow had missed a small tax payment. In a precedent setting ruling by the New York Court of Appeals, it accepted his argument that Nassau County's tax foreclosure law violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Between 1984 and 2008, he worked as a litigator at Meyer, Suozzi, English & Klein, P.C. Before that, he served as the Law Secretary to Justice Jeffrey G. Stark of the Supreme Court, Nassau County. During the first six years of his legal career, he was a member of the Criminal Appeals Bureau of the Legal Aid Society of New York. He obtained his J.D. degree from St. John's Law School in 1977. In 1974, he received a B.A. from Colgate University

Mr. Ciaffa is a member of the New York State and Nassau County Bar Associations. He is admitted to practice law in the State of New York, and before the United States District Courts for the Southern and Eastern Districts of New York, the U.S. Court of Appeals for the Second Circuit, and the United States Supreme Court. In 2008, 2014, 2016, and again in 2017, he was found "well qualified" to serve as a District Court Judge by the Nassau County Bar Association.

Sarika Kapoor

Sarika Kapoor is an Associate Court Attorney in the Nassau County Supreme Court Law Department.

Ms. Kapoor has also served an interim law clerk to the Hon. William R. LaMarca (deceased), Justice of the Supreme Court, Nassau County and the Hon. Jerome C. Murphy, Justice of the Supreme Court, Nassau County.

In 2005, Ms. Kapoor was appointed by the former Chief Administrative Judge of the New York State Courts, Jonathan Lippman, to serve as a Small Claims Assessment Review (SCAR) Hearing Officer. In 2015, Ms. Kapoor was appointed by the Nassau County Administrative Judge, Thomas A. Adams, to serve as a Special Election Law Referee. She continues to serve as both a SCAR Hearing Officer and Special Election Law Referee to date.

Ms. Kapoor received her Bachelor of Arts, Political Science, *magna cum laude*, *Phi Beta Kappa*, from Queens College in 2001. She received her Juris Doctorate from the Maurice A. Deane School of Law at Hofstra University in 2004. At Hofstra Law, she was a recipient of the Walter Sackur Scholarship, the Senior Notes and Comments Editor for the *Hofstra Journal of International Business & Law*, a member of the Hofstra Moot Court Association, the sole recipient of the Best Brief Award at the Hofstra Moot Court Competition (2003-2004) and, more recently, on various occasions, a guest lecturer at Hofstra Law School and a diversity program panelist.

Ms. Kapoor's professional accomplishments include her being appointed to the Committee on Character and Fitness in the Second Judicial Department, a former member of the Hofstra Law School Alumni Association Board, a former member of the Nassau County Bar Association's Board of Directors, former co-chair of the WE CARE Advisory Board (the charitable arm of the Nassau County Bar Association) as well as a member of almost a dozen committees at the Bar Association.

In addition, she currently serves as a member of the Board of the Theodore Roosevelt Inn of Court, a member of the Nassau County Judicial Committee on Women in the Courts, a member of the Nassau County Committee on Equal Justice, and a member of the Nassau County Women's Bar Association.

Allison Canarick's Biography

After earning an undergraduate degree from NYU Allison Canarick began her professional career in Medicine when she earned her Physician Assistant degree from Touro College and was certified to practice medicine. Once licensed by New York State she practiced Internal and Family Medicine in private practice and was house staff in a hospital for several years.

In the wake of the tragic events of September 11, 2001 Allison went to work for the New York City Office of Chief Medical Examiner (NYC OCME) as a Medicolegal Investigator (MLI). As such she worked recovery at Ground Zero from October 2001, overseeing and assisting in the recovery of remains as well as examining remains recovered from the debris. She worked long hours at Ground Zero until she stood in the honor guard during the closing ceremony in May of 2002.

Subsequently, Allison continued to practice Forensic Medicine as an MLI for the NYC OCME investigating death in New York City for approximately eight more years. In 2009 an injury on the job left her unable to work, but presented the opportunity for Allison to pursue another passion, the law. Allison took the LSAT, applied, was admitted to and began Hofstra Law School in 2010.

Through law school Allison interned in Landlord Tenant Court, was an Editor of the ACTEC Journal and a member of the Community and Economic Development Clinic. She graduated in 2013 Cum Laude, one month after giving birth to her second child.

In 2018 after a delay to tend to family matters, for the first time Allison sat for and passed the New York State Bar Exam. In November of 2019 she was admitted to the New York State Bar.

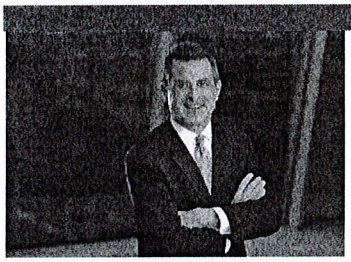
Early March 2020 while just beginning the practice of law and being involved in the Theodore Roosevelt Inn of Court, Covid 19 caused Allison to become a full time home schooling mom. Her law career lays ahead of her.

Matthew Flanagan is a 1989 graduate of Fordham University and received a Juris Doctorate degree from St. John's University School of Law in 1992. He is a skilled litigator with extensive trial and appellate experience in the area of legal malpractice defense, professional liability and general litigation. He has successfully argued numerous appeals in the Appellate Divisions for the First, Second and Third Departments, and New York's highest court: the Court of Appeals.

Mr. Flanagan has been named annually to the New York *Super Lawyers* list as one of the top attorneys in the New York Metropolitan area since 2012, and has been awarded a rating of AV Preeminent™ by Martindale-Hubbell. The Rating is the Highest Possible Rating in both Legal Ability and Ethical Standards, and was awarded following a Peer Review Rating Process, which included surveys of judges and other attorneys. He has also been named annually as one of the top professional liability and legal malpractice defense attorneys on Long Island by LexisNexis Martindale-Hubbell, and has been given an AVVO rating of "Superb" (10.0 out of 10.0).

Mr. Flanagan is admitted to practice before the Courts of the State of New York, the United States District Courts for the Southern and Eastern Districts of New York, and the United States Court of Appeals for the Second Circuit. He is a member of the American Bar Association, New York State Bar Association, the Nassau County Bar Association and the Theodore Roosevelt American Inn of Court.

Mr. Flanagan is a frequent lecturer regarding legal malpractice prevention and defense, and ethics and professional liability.



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WZMP
Weinberg Zareh Malkin Price LLP

Omid Zareh

Mr. Zareh is a founding member of Weinberg Zareh Malkin Price LLP.

His practice focuses on executives and companies in corporate planning and all phases of complex, commercial litigation. He advises in varied areas of law including attorney professional responsibility, partnership break-ups, technology, real property, and contractual and corporate disputes. His clients range from law firms, entrepreneurs, start-up companies, established financial companies, and alcohol manufacturers.

Mr. Zareh is a member of the bars of New York State and New Jersey, as well as the Federal Circuit. He is a member of the Grievance Committee and the Ethics Committee, and the former Chair of the Ethics Committee of the Nassau County Bar Association. He is a former Vice President of the NYU Law Alumni Association, and has participated in a number of community and professional organizations, and often lectures about the law. Mr. Zareh currently serves as a board member of different organizations, including real estate holding companies. He also is a member of the Nassau Academy of Law Advisory Board.

While attending New York University Law School, Mr. Zareh was the Legal Theory Editor of the Review of Law and Social Change.

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Professor John Q. Barrett

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John Q. Barrett is the Benjamin N. Cardozo Professor of Law at St. John's University in New York City, where he teaches Constitutional Law, Criminal Procedure, and Legal History.

He also is Elizabeth S. Lenna Fellow and a Board member at the Robert H. Jackson Center in Jamestown, New York.

Professor Barrett is a renowned teacher, writer, commentator, and lecturer on law and history topics, in the United States and internationally.

He is writing a biography of U.S. Supreme Court Justice and Nuremberg prosecutor Robert H. Jackson (1892-1954). It will include the first inside account of Jackson's service following World War II, by appointment of President Truman, as the chief prosecutor of the principal surviving Nazi leaders.

Professor Barrett discovered, edited, and published Justice Jackson's now-acclaimed memoir THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT, which is both F.D.R. biography and Jackson autobiography.

Professor Barrett also is author of numerous articles and chapters, including on Justice Jackson and Nuremberg.

Professor Barrett's regular "Jackson List" emails—hundreds are archived at **thejacksonlist.com**—reach well over 100,000 readers, including lawyers, judges, teachers, and students, around the world.

Before joining the St. John's faculty, Barrett was Counselor to Inspector General Michael R. Bromwich in the U.S. Department of Justice from 1994-1995. From 1988-1993, Barrett was Associate Counsel in the Office of Iran-Contra Independent Counsel Lawrence E. Walsh. From 1986-1988, Barrett was a law clerk to Judge A. Leon Higginbotham, Jr., of the U.S. Court of Appeals for the Third Circuit.

Professor Barrett serves on the board of trustees of the Franklin D. Roosevelt Presidential Library and Museum. He is a trustee emeritus of the Historical Society of the New York Courts, chaired the NYC Bar Association's Legal History Committee, and served on the International Expert Advisory Council of the International Nuremberg Principles Academy in Nuremberg, Germany.

He is a graduate of Georgetown University and Harvard Law School.

JAMIE S. BERNSTEIN

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EDUCATION

Maurice A. Deane School of Law at Hofstra University, Hempstead, NY
Juris Doctor Candidate, May 2025

School of International and Public Affairs at Columbia University, New York, NY
Master of Public Administration, May 2008
Concentration: International Economic Policy Management
GPA: 3.80

School of Computer Science and Information Systems at Pace University, New York, NY
Master of Science in Information Systems, June 2000
GPA: 3.87

State University of New York at Buffalo, Buffalo, NY
Bachelor of Arts, Anthropology, February 1997

PROFESSIONAL EXPERIENCE

Federal Reserve Bank of New York, New York, NY
Officer, Information Security, June 2012 – Present
Lead insider risk management, cross functional team consisting of legal counsel, law enforcement, human resources and information security. Responsible for information security and insider threat components of employee investigations, potentially leading up to referral to outside law enforcement for prosecution. Manage cyber security incident response team including computer forensics unit. Represent Federal Reserve Bank of New York Information Security on Joint Threat Mitigation Initiative with Bank of England and Bank of Canada.

Manager and Senior Engineer, Network Services, December 1996 – June 2012
Led design team responsible for building and implementing networking technology for the Federal Reserve Bank, including critical business areas such as Markets and FedWire. Managed engineering and operations for network and telephony services, with a team of 24x7 operators (2008-2012). Senior member of multi-district team responsible for establishing network security standards across Federal Reserve System.

VOLUNTEER EXPERIENCE

Merrick Fire Department, Merrick, NY
Firefighter / Paramedic, 2001 – 2012
Provided advanced life support-level care to patients suffering from illness or traumatic injury. Firefighter in engine company #2, involved in response to structure fires, vehicle fires and accidents, and other emergency situations within Merrick and surrounding communities.

Girl Scouts of Nassau County, Merrick, NY
Troop Leader, 2008-2021
Leader of GSNC Troop 2039, continued with scouts from first grade through their graduation from high school. Served in additional role as mentor to new troop leaders in the Merrick Service Unit (local Girl Scout organization).

CERTIFICATIONS

International Information System Security Certification Consortium (ISC)^2
Certified Information Systems Security Professional (CISSP), 2012 – Present
Safe and Secure Online volunteer. Teach cyber safety and privacy to school age children using curriculum provided by SSO organization.

INTERESTS

United States presidential history; cybersecurity education

KRYSTLE A. FITZPATRICK

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EDUCATION

Maurice A. Deane School of Law at Hofstra University, Hempstead, NY
Juris Doctor Candidate, May 2025
GPA: 3.86
Honors: Merit Scholarship for Incoming Students
Activities: Black Law Student Association, Business Law Society, Phi Alpha Delta (PAD), Dean's Student Advisory Council

SUNY College at Old Westbury, Old Westbury, NY
Bachelor of Arts, *magna cum laude*, Industrial & Labor Relations, December 2020
GPA: 3.89
Honors: Tau Sigma National Honor Society

Nassau Community College, Hempstead, NY
Associate of Applied Science, *summa cum laude*, Paralegal Studies, June 2015
GPA: 3.92
Honors: Lambda Epsilon Chi Honor Society

EXPERIENCE

The Hallen Construction Co., Inc., Plainview, NY
Contracts & Management Systems Coordinator, October 2015 – Present
Implement and oversee the company's safety programs and safety management programs. Monitor all risk and insurance exposures. Draft subcontract agreements. Manage safety and health related claims. Communicate workplace safety statistics to internal and external stakeholders. Cultivate and advance a strong safety culture among employees.

Kozeny, McCubbin & Katz, LLP, Melville, NY
Foreclosure Specialist, May 2015 – October 2015
Completed pre-foreclosure processes, including reviewing titles and mortgage documents. Prepared assignments of mortgage. Served as liaison to bank clients to obtain necessary documents for foreclosure proceedings. Filed mortgages and assignments with New York State County offices.

TD Bank, Bethpage, NY
Teller Service Manager, January 2009 – May 2015
Coached and trained staff in operations, system changes and sales opportunities. Served as a customer service representative. Managed the store budget and maintained store's supply inventory. Performed cash handling transactions, such as customer deposits, withdrawals, and payments.

INTERESTS

Calligraphy and lettering, baking

2017 WL 4517131 (U.S.) (Oral Argument)
Supreme Court of the United States.

Beverly R. GILL, et al., Appellants,
v.
William WHITFORD, et al., Appellees.

No. 16-1161.
October 3, 2017.

Oral Argument

Appearances:
Misha Tseytlin, Solicitor General, Madison, Wisconsin; on behalf of the Appellants.Erin E. Murphy, Washington, D.C., for Wisconsin State Senate, et al., as amici curiae.Paul M. Smith, Washington, D.C.; on behalf of the Appellees.

***1** The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

CONTENTS

***3** PROCEEDINGS

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 16-1161, Gill versus Whitford.

Mr. Tseytlin?

ORAL ARGUMENT OF MISHA TSEYTLIN ON BEHALF OF APPELLANTS

MR. TSEYTLIN: Mr. Chief Justice, and may it please the Court:

This Court has never uncovered judicially manageable standards for determining when politicians have acted too politically in drawing district lines. Plaintiff's social science metrics composed of statewide vote to seat ratios and hypothetical projections do not solve any of these problems.

Instead, they would merely shift districting from elected public officials to federal courts, who would decide the fate of maps based upon battles of the experts.

Now, as a threshold matter, this Court should hold that federal courts lack jurisdiction to entertain statewide political gerrymandering challenges, leaving for another ***4** day the question of district-specific gerrymandering challenges.

JUSTICE KENNEDY: I -- I think it's true that there's no case that directly helps Respondents very strongly on the standing issue. You have a -- a strong argument there.

But suppose the Court -- and you just have to assume, we won't know exactly the parameters of it -- decided that this is a First Amendment issue, not an equal protection issue.

Would that change the calculus so that, if you're in one part of the state, you have a First Amendment interest in having your party strong or the other party weak?

MR. TSEYTLIN: No, it wouldn't, Your Honor. And I think the reason for that is, even if it's a First Amendment issue, it's still grounded in the right to vote.

And in our country's single district election system, folks only vote in their own district. For example, you might have some vague interest in the party that you associate with having more members in Congress, for example, like a Wisconsin Republican might want ***5** more Texas Republicans in Congress.

But no one would say that you have a First Amendment or a first -- Fourteenth Amendment right in that sort of circumstance to challenge some Texas law that you would, for example, argue led to less Republicans from Texas coming to the Congress.

CHIEF JUSTICE ROBERTS: Well, but I -- I think the argument is pretty straightforward which you, in your district, have a right of association and you want to exercise that right of association with other people elsewhere in the state.

And if you can't challenge the districting throughout the state, then your claim seems to be -- there's no way for to you to raise your claim.

JUSTICE KENNEDY: And this of course -- and this of course confines it to the state and eliminates the problem of out-of-state, as the way the Chief Justice stated the hypothetical.

MR. TSEYTLIN: Well, Your Honor, I don't think it would solve the interstate problem because, of course, the structural ***6** relationship of, for example, Mr. --

JUSTICE KENNEDY: Let's -- let's assume that it does.

(Laughter.)

MR. TSEYTLIN: Well -- well, Your Honor, I still think that this Court should be very careful about enacting that kind of doctrine.

As we know, race and politics are often correlated in this country, so political gerrymandering claims and racially gerrymandering claims, even if they're ultimately grounded in a different constitutional amendment, will often be raised together.

And it cannot be -- possibly be the case that, if there's a showing that the map drawer turned on the racial screen, the person is limited to a single district claim.

But if that same map drawer turned on the political screen, then the plaintiff would get access to the holy grail of a statewide claim based on --

JUSTICE SOTOMAYOR: I'm not --

JUSTICE GINSBURG: On the question of ***7** -- of race, some years ago, this Court dealt with what the -- the so-called “max-Black” plan, said it was a deliberate attempt by the legislature to make as many African American districts as possible.

This bears a certain resemblance because the effort here, intentionally, was to create as many Republican districts. So is max-Republican, it -- doesn't it have the same problem that “max-Black” did?

MR. TSEYTLIN: Well, Your Honor, that turns to the issue of justiciability, and I do not think that raises the same problems because, of course, politics is not a suspect classification like race.

And I think the easiest way to see this is to take a look at a chart that Plaintiff's own expert created, and that's available on Supplemental Appendix 235. This is plain -- Plaintiff's expert studied maps from 30 years, and he identified the 17 worst of the worst maps. What is so striking about that list of 17 is that 10 were neutral draws.

There were court-drawn maps, commission-drawn maps, bipartisan drawn maps, ***8** including the immediately prior Wisconsin drawn map. And I think the Court should learn two lessons from this list of 17, 10 of which were neutral.

The first lesson is that partisan symmetry is simply not a neutral districting criteria. It is not a neutral method of drawing districts. For if it were, all of these commissions would not be drawing partisan asymmetry maps.

The second lesson that this Court should learn from that -- from that list is that Plaintiffs are asking this Court to launch a redistricting revolution based upon their social science metrics.

JUSTICE ALITO: Before you get too deeply into the merits, which I -- I assume you'll want to do in a minute, can I just ask you a question about standing along the lines of those asked by my colleagues?

Suppose that it was alleged that town officials in someplace in northern Wisconsin where the Republicans predominate were discriminating against the Democratic candidate for a legislative district by, let's say, not ***9** allowing that candidate's signs to be put up along the roadsides, but allowing the Republican signs to be put up along the roadsides, or they were pressuring town -- let's just leave it at that.

They're discriminating with respect to these signs. Now, who would have standing to raise a First Amendment challenge to that? Would it be just the candidate in that district or maybe voters in that district? Or could a -- a Democratic voter in, let's say, Milwaukee have standing to raise that First Amendment argument?

MR. TSEYTLIN: I would certainly think, Your Honor, the candidate would have standing, and I -- I'm not so sure about the voters in the district, but probably.

But certainly, voters in Milwaukee who don't vote for that candidate, they're not eligible to vote for that candidate any more than someone in California is eligible to vote for that candidate.

And I think we see this from --

CHIEF JUSTICE ROBERTS: Wait. I'm sorry. Certainly, voters in Milwaukee -- you ***10** left out the -- would not have standing?

MR. TSEYTLIN: Would not have standing.

And I -- I think we see this from the testimony of -- of the lead plaintiff, who is the only plaintiff that testified in this case.

He was asked, during his testimony, what harm does Act 43 put on you, given that you live in a Democratic-dominated district in Madison under any possible map.

Well, he said, I want to be able to campaign for a majority in assembly, which shows that his injury has nothing to do with him as a voter. It's just a generalized interest in more Wisconsinites -- more Wisconsin Democrats being elected, which someone in Wisconsin can have or someone outside of Wisconsin --

JUSTICE GINSBURG: May I --

JUSTICE KENNEDY: I think we're anxious to get to the merits, but one more thing on the sign. Suppose the sign in the southern part of the state had talked about an issue which was very important to the people in Milwaukee.

***11** MR. TSEYTLIN: I think that one could frame a hypothetical where, if it was some sort of a home rule thing, where Milwaukee's right to have certain height buildings was affected, you could have a no longer generalized interest, but we don't have anything like that here.

JUSTICE BREYER: All right. So can I do this? Because I think the hard issue in this case is are there standards manageable by a court, not by some group of social science political ex -- you know, computer experts. I understand that, and I am quite sympathetic to that.

So let me spend exactly 30 seconds, if I can, giving you, as you've read all these briefs, I have too, this is -- this is where I am at the moment -- not that I'm for this, react to this as you wish, and if you wish to say nothing, say nothing, and it's for everybody because it's a little complicated.

When I read all that social science stuff and the computer stuff, I said, well, what -- is there a way of reducing it to something that's manageable?

***12** So I'd have step one, the judge says, was there one party control of the redistricting? If the answer to that is no, say there was a bipartisan commission, end of case. Okay?

Step two, is there partisan asymmetry? In other words, does the map treat the political parties differently? And a good evidence of that is a party that got 48 percent of the vote got a majority of the legislature.

Other evidence of that is what they call the EG, which is not quite so complicated as the opposition makes it think. Okay? In other words, you look to see.

Question 3, is -- is there going to be persistent asymmetry over a range of votes? That is to say one party, A, gets 48 percent, 49 percent, 50 percent, 51, that's sort of the S-curve shows you that, you know, whether there is or is not. And there has to be some.

And if there is, you say is this an extreme outlier in respect to asymmetry? And there we have Eric Lander's brief, okay? You know that one.

And -- and we look through thousands ***13** and thousands of maps, and somebody did it with real maps and said how bad is this compared to, you know, the worst in the country.

And then, if all those -- the -- the test flunks all those things, you say is there any justification, was there any other motive, was there any other justification?

Now, I suspect that that's manageable. I'm not positive. And so I throw it out there as my effort to take the technicalities and turn them into possibly manageable questions for a response from anyone insofar as you wish to respond, and if you wish to say, I wish to say nothing, that's okay with me.

(Laughter.)

MR. TSEYTLIN: Thank you, Your Honor. I'd like to talk about the third and fourth aspects of that because I think those are -- I've already talked about the second a little bit.

But with regard to the third, which is persistence, that is exactly the kind of conjectural, hypothetical state of affairs inquiry that was submitted to this Court in LULAC in Professor King's amicus brief because, ***14** of course, as your suggestion -- suggested steps recognize, a single election doesn't mean much. A single election, you could have an EG for any particular reason.

So you would have federal courts engaging in battles of the hypothetical experts deciding, well, what would it be under this map or that map? So I think that's a non-starter for that reason.

Now, with regard to extremity, this was an arg --

JUSTICE KAGAN: Well, if I could just stop you there for a second, because I was under the impression that legislators are capable of doing this actually pretty easily now.

You know, the world of voting technology has changed a great deal, and when legislatures think about drawing these maps, they're not only thinking about the next election, they're thinking often -- not always -- but often about the election after that and the election after that and the election after that, and they do sensitivity testing, and they use other methods in order to ***15** ensure that certain results will obtain not only in the next one but eight years down the road.

And it seems to me that, just as legislatures do that, in order to entrench majorities -- or minorities, as the case may be -- in order to entrench a party in power, so, too, those same techniques, which have become extremely sophisticated, can be used to evaluate what they're doing.

MR. TSEYTLIN: Well, Your Honor, legislatures don't have to worry about judicial manageability standards. Legislatures don't have to worry about false positives, false negatives. Legislatures don't have to worry about conjecture. They can --

JUSTICE KAGAN: What -- what I'm suggesting is that this is not kind of hypothetical, airy-fairy, we guess, and then we guess again. I mean, this is pretty scientific by this point.

MR. TSEYTLIN: Well, Your Honor, they're just estimates. They're not all scientific. And let me give you one example from the record --

***16** JUSTICE SOTOMAYOR: I'm sorry. They're -- they're estimates where you haven't put any social scientist to say that the estimate's wrong. You've poked holes, but every single social science metric points in the same direction.

So there are five of them. Your map drawer is one of them, by the way, the person who actually drew these maps, and what we know is that they started out with the court plan, they created three or four different maps, they weren't partisan enough. They created three or four more maps, they weren't partisan enough.

And they finally got to the final map, after maybe 10 different tries of making it more partisan, and they achieved a map that was the most partisan on the S-curve.

And it worked. It worked better than they even expected. So the estimate wasn't wrong. The estimate was pretty right.

So, if it's the most extreme map they could make, why isn't that enough to prove --

MR. TSEYTLIN: Well, Your Honor, I think --

JUSTICE SOTOYMAYOR: -- partisan ***17** asymmetry and unconstitutional gerrymandering?

MR. TSEYTLIN: Well, Your Honor, I think the facts in this case, which is what you were discussing, are significantly less troubling than the facts in the cases that this Court has previously faced, for example, Bandemer and Vieth, and that's for two reasons. One, the map drawers here complied fastidiously with traditional districting principles, which was not true in Bandemer and Vieth.

JUSTICE SOTOMAYOR: But they kept going back to fix the map to make it more gerrymandered. That's undisputed. The people involved in the process had traditional maps that complied with traditional criteria and then went back and threw out those maps and created more -- some that were more partisan.

MR. TSEYTLIN: That's correct, Your Honor. And, of course, there were computers used in --

JUSTICE SOTOMAYOR: So why didn't they take one of the earlier maps?

MR. TSEYTLIN: Because there was no constitutional requirement that they do so. They complied with all state law.

***18** JUSTICE SOTOMAYOR: That's the point.

MR. TSEYTLIN: And they complied with all traditional districting principles.

JUSTICE ALITO: Can I take you back to -- to Justice Kagan's question about the legislators' use of these techniques? Are all the techniques that are used by politicians in order to try to maximize their chances of electoral success scientific? I think they rely a lot on polls, don't they? How scientific have they proven to be?

MR. TSEYTLIN: Of course, Your Honor. Legislatures can very much rest on conjecture, whereas courts cannot. If I could reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Murphy.

ORAL ARGUMENT OF ERIN E. MURPHY FOR WISCONSIN STATE SENATE, AS AMICUS CURIAE

MS. MURPHY: Mr. Chief Justice, and may it please the Court:

Plaintiffs have not identified a workable standard for determining when the inherently political task of districting ***19** becomes too political for the Constitution to tolerate.

Indeed, the only thing Plaintiffs have added to the mix since LULAC is a wasted votes test that identifies court-drawn maps as enduring partisan gerrymanders and conveniently favors their own political party.

JUSTICE KENNEDY: You've probably considered the hypo many times. Suppose a state constitution or a state statute says all districts shall be designed as closely as possible to conform with traditional principles, but the overriding concern is to increase -- have a maximum number of votes for party X or party Y. What result?

MS. MURPHY: I think if -- if you have something that says the ultimate principle that we're going to follow is abandon all other criteria in favor of partisan advantage, at least you're closer at that point --

JUSTICE GINSBURG: I don't think -- I don't think that was the question. It was it satisfies all the traditional criteria, contiguous, but it was a deliberate attempt to maximize the number of seats that Republicans ***20** would hold.

JUSTICE KENNEDY: This is mandated by the state constitution.

MS. MURPHY: I don't think that in a world where the legislature is required to and is, in fact, complying with a number of other metrics and is as one of those things taking into account partisan advantage, that you've proven a constitutional violation.

JUSTICE ALITO: It's not a -- that's not a manageable standard. It's not a manageable standard that you cannot have a law that says draw maps to favor one party or the other.

MS. MURPHY: If it's --

JUSTICE ALITO: That seems like a perfectly manageable standard.

MS. MURPHY: If it's on --

JUSTICE ALITO: You cannot have that.

MS. MURPHY: -- the face of the statute, I think you have a different scenario because at least at that point, you know the intent. You know there's no debate to have about the intent of what the legislature is doing and if they are intentionally drawing for ***21** one purpose or other purposes.

JUSTICE KAGAN: Well, there are plenty areas of law, Ms. Murphy, where we look at intent beyond the face of a statute. And, you know, sometimes that's harder than other times. We understand it can be difficult. We understand in other cases it can be easy. But we do it all over the place in our law. We don't -- we don't say, oh, if it's not on the face of the statute, we're never going to look at it.

So, if your answer to Justice Alito is, well, on the face of the statute, that's certainly a manageable standard, I guess I would ask why not if it's not on the face of the statute? But you absolutely -- you know, but you have good evidence that there was the intent here, and you have good evidence that the intent led to a certain kind of effect, which was to entrench a party in power.

MS. MURPHY: I think what differentiates this from a lot of other contexts is that here we have opinion after opinion from this Court, dissenting opinions, concurring opinions, plurality opinions, what ***22** have you, saying that considering politics in districting is not in and of itself inherently unconstitutional.

JUSTICE GORSUCH: Ms. Murphy --

MS. MURPHY: So just finding the intent isn't a problem.

JUSTICE KAGAN: But there is a difference --

JUSTICE GORSUCH: I'd like to go back to Justice Breyer's question. It would be helpful to get an answer for me on that. What criteria would a state need to know in order to avoid having every district and every case and every election subject to litigation? Because the -- the standards given in -- in the lower court here was, well, a little bit of partisan symmetry problem, a little bit of an efficiency gap problem, not a real set of criteria.

And here, you know, is it 7 percent, how durable, how many elections would we need? How much data would we have to gather? Walk us through Justice Breyer's question and provide some answers, if you -- if you would.

MS. MURPHY: Sure. So I think some of the problems with the criteria that have been ***23** suggested, in particular with the tests that focus on these symmetry metrics, is that so far the metrics that we have, I mean, they identify false positives roughly 50 percent of the time.

And I don't know how a legislature is supposed to comply with criteria that can't differentiate between a court-drawn map and a map drawn for partisan advantage. So, when you start with this partisan symmetry concept, you automatically have the basic problem that you have to have some way to decide what is the appropriate partisan asymmetry.

JUSTICE GORSUCH: Okay. But what are the questions -- you know, I need two years or two cycles worth of data. I need an S curve of a certain shape and size. I need an efficiency gap of something. What are the numbers, what are the criteria we'd have to fill in as a constitutional matter in order for a state to be able to administer this?

MS. MURPHY: Well, I mean, with all due respect, I -- I -- I'm not convinced that there are manageable criteria for the courts to be putting on legislatures for how to go about this process. And I certainly don't think that ***24** anyone in this case has identified that.

JUSTICE GORSUCH: But if you could try to answer --

MS. MURPHY: But I would suggest that, you know, one of the starting points for me would have to be that traditional districting criteria should matter in the analysis.

If you have a legislature that has started by saying we're going to comply with everything that we're supposed to do, not only as a legal matter, but also all of these practical constraints, we're going to draw districts that comply --

JUSTICE GINSBURG: Ms. Murphy, because -- because your time is running out, I would like to ask you what's really behind all of this. The precious right to vote, if you can stack a legislature in this way, what incentive is there for a voter to exercise his vote? Whether it's a Democratic district or a Republican district, the result -- using this map, the result is preordained in most of the districts.

Isn't that -- what becomes of the precious right to vote? Would we have that ***25** result when the individual citizen says: I have no choice, I'm in this district, and we know how this district is going to come out? I mean, that's something that this society should be concerned about.

MS. MURPHY: Well, a -- a couple of responses to that, Your Honor. First of all, it's inherent in our districting scheme that there are plenty of people who are always going to be voting in districts where they know what the result is going to be. And that has nothing to do with partisan

gerrymandering; it has to do with the geography of politics and the fact that some of us just live in districts where --

JUSTICE GINSBURG: Some of us, but --

MS. MURPHY: -- we know that our vote will come out one way or another.

JUSTICE GINSBURG: In Wisconsin, before this plan, was it the case that when it was something like 49 out of 99 districts were uncontested, nobody -- the election was -- wasn't contested because the one party or the other was going to win.

MS. MURPHY: Well, I -- I don't think ***26** you can quite draw that conclusion from the fact there's uncontested races. I mean, the reality is that political parties have to make decisions about where to put their resources, and they're going to have to do that for reasons that, again, have nothing to do with districting for partisan advantage. They have to do with the fact that drawing districts is always going to reflect political calculations and it's always going to be driven by communities of interest, and communities of interest sometimes feel very strongly about one political party rather than another.

JUSTICE KENNEDY: I have to say that I don't think you ever answered the question: If the state has a law or a constitutional amendment that's saying all legitimate factors must be used in a way to favor party X or party Y, is that lawful?

MS. MURPHY: I think it's -- on the face of the Constitution as a requirement the district must -- the legislature must comply with, then that could be your instance of a -- a problem that can be actually solved by the Constitution, but it's quite different to me ***27** when you have a facially neutral districting matter --

JUSTICE KENNEDY: Is that an equal protection violation or a First Amendment violation?

MS. MURPHY: Well, it's a little hard to say at this point because, you know, it really just hasn't been fully explored, this concept of how you would come at all of this from a First Amendment perspective. I think this comes back to really the standing question --

JUSTICE KENNEDY: Well, you said there's a Constitution -- is it equal protection?

MS. MURPHY: I think the question -- I mean, it would be who has standing to bring their --

JUSTICE KENNEDY: Well, assume standing. I'd like an answer to the question.

MS. MURPHY: Yes. It would be an unconstitutional if it was on the face of it, and I think that that would be better thought of probably as an equal protection violation, but you could think of it just as well, I ***28** think, as a First Amendment violation in the sense that it is viewpoint discrimination against the individuals who the legislation is saying you have to specifically draw the maps in a way to injure, but, again, I --

JUSTICE SOTOMAYOR: Could you tell me what the value is to democracy from political gerrymandering? How -- how does that help our system of government?

MS. MURPHY: Sure. Well, I would point to --

JUSTICE SOTOMAYOR: You -- you almost concede that it doesn't when you say if a state filed -- has a constitutional amendment or has a law that says you must comply with traditional criteria, but you must also politically gerrymander, you're saying that might be unconstitutional?

MS. MURPHY: It might be, but I don't think that necessarily means that districting for partisan advantage has no positive values. I would point you to, for instance, Justice Breyer's dissenting opinion in Vieth which has an extensive discussion of how it can actually do good things for our system to have districts ***29** drawn in a way that makes it easier for voters to understand who they are account -- who the legislature is. It produces values in terms of accountability that are valuable so that the people understand who isn't and who is in power.

JUSTICE SOTOMAYOR: I really don't understand how any of that -- what that means. I mean, it -- it's okay to stack the decks so that for 10 years or an indefinite period of time one party, even though it gets a minority of votes, can't get a minor -- gets a minority of votes, can get the majority of seats?

MS. MURPHY: With all due respect, you know, I would certainly dispute the premise that the decks are stacked here. At the end of the day, what matters is how people vote in elections and that's what's going to determine the outcomes, as it has in Wisconsin where the Republicans have won majorities because they've actually won the majority of the vote in most of the elections over the past four years. Thank you, Your Honor

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

***30** Mr. Smith.

ORAL ARGUMENT OF PAUL M. SMITH ON BEHALF OF APPELLEES

MR. SMITH: Mr. Chief Justice, and may it please the Court:

What the state is asking for here is a free pass to continue using an assembly map that is so extreme that it effectively nullifies democracy.

As this case illustrates, it's now possible even in a 50/50 state like Wisconsin to draw a district map that is so reliably and extremely biased that it effectively decides in advance who's going to control the legislative body for the entire decade.

CHIEF JUSTICE ROBERTS: Maybe we can just talk briefly about the standing issue.

It is a little arresting to have a rule that we establish that when your claim is racial gerrymandering, it has to be limited to your district, you can't complain about racial gerrymandering elsewhere in the state, but here, if the claim is going to be political gerrymandering, you can raise claims about whole statewide issues even if there is no ***31** argument that you're gerrymandered, like the first plaintiff who votes in Madison, his vote isn't diluted in any way, and yet he is able to complain about voting anywhere in the state.

MR. SMITH: Well, Mr. Chief Justice, I think that standing has to follow from the nature of the injury and that follows from the nature of the constitutional violation.

A racial gerrymandering claim, a Shaw v. Reno claim, is an attack on a particular district for being drawn with excessive focus on race. In that situation, the injury has to be localized to the place where that district is.

Partial -- partisan gerrymandering has the same word in it, but it's an entirely different kind of injury because it involves dilution of votes. Racial gerrymandering is analytically distinct from any dilution case.

JUSTICE ALITO: I don't understand --

CHIEF JUSTICE ROBERTS: What about -- what about the sign hypothetical? You know, you're up in far north of Wisconsin and somebody is -- is taking down the signs for the one candidate in the far south.

***32** That affects that individual's -- the strength of his vote for the state-wide purposes. Is he really have standing to complain about that?

MR. SMITH: Well, Your Honor, I think you could decide that while it might have some de minimis effect on the interest of any Democrat attempting to carry out that group's political agenda, that it's sufficiently de minimis that you wouldn't want to give standing to people outside the directly affected area.

JUSTICE ALITO: Why -- why is it de minimis? It seems to me it's exactly the same thing. If you have a system, let's extend it to many towns that are controlled by the Republicans and they're taking down all the Democratic signs. And if that's an effective strategy, it will mean fewer members of the legislature are Democrats and, therefore, the interests of the Democratic voter in Milwaukee or Madison will be impaired. It seems like exactly the same thing.

MR. SMITH: Well, Your Honor, if you had a systematic effort in a lot of places by members of one party to prevent the other party ***33** from campaigning effectively, I think that anybody in the Democratic Party in the state would have standing.

JUSTICE ALITO: All right. Well, on the -- let's -- let's look at the race issue.

So you have a state where there you have an African American voter in -- in a -- in one part of the state who wants to complain that districts in another part of the state are -- are packed or cracked and, as a result of that, there are going to be fewer African Americans in the legislature than there should be.

And that's going to impair that person's interests, including, I would suppose, their right of association. What -- what is the difference between those two situations?

MR. SMITH: Well, Your Honor, that's a Section 2 vote dilution claim, and I think that the law appropriately limits standing in that situation to people who live in the region of the state where there's an absence of an additional minority district.

You wouldn't want to assume that some African American from a different part of the ***34** state has a collective interest with people over here in this part of the state just because of race. That's just stereotyping. But with party, people join the party to -- to work together to achieve a collective end. So you're not --

CHIEF JUSTICE ROBERTS: Well, but that's equally stereotyping. Sometimes people vote for a wide variety of reasons. Maybe the candidate, although he's of a different party, is a -- is a friend,

is a neighbor. Maybe they think it's a good idea to have the representatives from their district to balance out what they view would be necessary -- likely candidates from other districts.

MR. SMITH: Maybe they do --

CHIEF JUSTICE ROBERTS: I don't think it's any more -- any less stereotypical to say that people are going to vote for parties because they support everything the party does statewide.

MR. SMITH: Well, but to have standing, I think you'd want to find plaintiffs who do that, Your Honor. And certainly the plaintiffs we have here are thorough going ***35** supporters of the disfavored party. Their party has been punished by the law of the State of Wisconsin. And I think that the -- the standing issue ought to be satisfied by the description of what our claim is, which comes right out of Justice Kennedy's concurrence in Vieth where -- this is on page 86-A of the jurisdictional statement, The White Appendix.

It's just a two-sentence description of our claim: “First Amendment concerns arise where a state enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.”

So the group is -- is the targeted people, those are the people who have the injury, the injury to their First Amendment interests, and anybody in the group has -- ought -- should be able to -- to bring a First Amendment argument saying --

JUSTICE KAGAN: Mr. Smith.

***36** CHIEF JUSTICE ROBERTS: Mr. Smith -- do you have standing? Well, Justice Kagan?

JUSTICE KAGAN: In a one-person one-vote case, does one person in an overpopulated district have standing to challenge not only that district, those district lines, but the entire state map?

MR. SMITH: That is true. That is the way that it's been handled ever since the Reynolds case.

JUSTICE KAGAN: And why is that, and does it -- is it an analogy to this case?

MR. SMITH: Well, it's certainly a helpful analogy. It's not exactly the same because they have to live in an overpopulated district rather than an underpopulated district.

But those are the people in -- who suffer vote dilution because they're living in the overpopulated districts. And the Court has said not only does that person have standing to challenge their own district but also to challenge the entire map and make all of the districts closer in population. That's just the way that's been handled since the '60s.

***37** CHIEF JUSTICE ROBERTS: Mr. Smith, I'm going to follow an example of one of my colleagues and lay out for you as concisely as I can what -- what is the main problem for me and give you an opportunity to address it.

I would think if these -- if the claim is allowed to proceed, there will naturally be a lot of these claims raised around the country. Politics is a very important driving force and those claims will be raised.

And every one of them will come here for a decision on the merits. These cases are not within our discretionary jurisdiction. They're the mandatory jurisdiction. We will have to decide in every case whether the Democrats win or the Republicans win. So it's going to be a problem here across the board.

And if you're the intelligent man on the street and the Court issues a decision, and let's say, okay, the Democrats win, and that person will say: "Well, why did the Democrats win?" And the answer is going to be because EG was greater than 7 percent, where EG is the sigma of party X wasted votes minus the sigma of party Y wasted votes over the sigma of party ***38** X votes plus party Y votes.

And the intelligent man on the street is going to say that's a bunch of baloney. It must be because the Supreme Court preferred the Democrats over the Republicans. And that's going to come out one case after another as these cases are brought in every state.

And that is going to cause very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.

MR. SMITH: Your Honor --

CHIEF JUSTICE ROBERTS: It is just not, it seems, a palatable answer to say the ruling was based on the fact that EG was greater than 7 percent. That doesn't sound like language in the Constitution.

MR. SMITH: Your Honor, first thing I would say in response to that is that those challenges are already being brought. Partisan gerrymandered maps get challenged -- they get challenged in other ways, under the one person, one vote doctrine, under the racial gerrymandering doctrine, under Section 2. And -- and so you're getting those cases. Most of ***39** the -- the statewide redistricting maps in this country are challenged every 10 years in some way or another.

What -- what would make the system work better is if people could bring a challenge to what they actually think is wrong with the map, which is that it's anti-democratic, it decides in advance that one party is going to control the state government for 10 years and maybe for 20 years because they can replicate it at the end of the 10 years and do it again.

That is the real problem. And I think what -- what the Court needs to know is it's -- this is a cusp of a really serious, more serious problem as gerrymandering becomes more sophisticated with computers and data analytics and a -- and an electorate that is very polarized and more predictable than it's ever been before. If you let this go, if you say this is -- we're not going to have a judicial remedy for this problem, in 2020, you're going to have a festival of copycat gerrymandering the likes of which this country has never seen.

And it may be that you can protect the ***40** Court from seeming political, but the country is going to lose faith in democracy big time because voters are going to be like -- everywhere are going to be like the voters in Wisconsin and, no, it really doesn't matter whether I vote.

JUSTICE ALITO: Well, Mr. Smith --

CHIEF JUSTICE ROBERTS: No, but you're going to take these -- the whole point is you're taking these issues away from democracy and you're throwing them into the courts pursuant to, and it may be simply my educational background, but I can only describe as sociological gobbledygook.

MR. SMITH: Your Honor, this is -- this is not complicated. It is a measure of how unfair the map is. How much burden can the party --

JUSTICE BREYER: Can you say this?

Look, don't agree with me just because it sounds favorable, because he won't in two minutes. Can you answer the Chief Justice's question and say the reason they lost is because if party A wins a majority of votes, party A controls the legislature. That seems ***41** fair.

And if party A loses a majority of votes, it still controls the legislature. That doesn't seem fair. And can we say that without going into what I agree is pretty good gobbledygook?

(Laughter.)

CHIEF JUSTICE ROBERTS: And if you need a convenient label for that approach, you can call it proportional representation, which has never been accepted as a political principle in the history of this country.

MR. SMITH: Your Honor, we are not arguing for proportional representation. We are arguing for partisan symmetry, a map which within rough bounds at least treats the two parties relatively equal in terms of their ability to translate votes into seats. That's --

CHIEF JUSTICE ROBERTS: That sounds exactly like proportional representation to me.

MR. SMITH: Proportional representation is when you give the same percentage of seats as they have in percentage of votes. That's what proportional ***42** representation means. And our -- our claim simply doesn't remotely do that. It says if party A at 54 percent gets 58 percent of the seats, party B when it gets 54 percent ought to get 58 percent of the seats. That's symmetry.

That's what the political scientists say is the right way to think about a map that does not distort the outcome and put a thumb on the scale. Now what --

JUSTICE ALITO: Mr. Smith, can I just say something -- ask you a question about the political science? I mean, I -- gerrymandering is distasteful. But if we are going to impose a standard on the courts, it has to be something that's manageable and it has to be something that's sufficiently concrete so that the public reaction to decisions is not going to be the one that the Chief Justice mentioned, that this three-judge court decided this, that -- this way because two of the three were appointed by a Republican president or two of the three were appointed by a Democratic president.

Now, it's been 30 years since Bandemer, and before then and since then, ***43** judges, scholars, legal scholars, political scientists have been looking for a manageable standard. All right.

In 2014, a young researcher publishes a paper, Eric McGhee publishes a paper, in which he says that the measures that were previously -- the leading measures previously, symmetry and responsiveness, are inadequate. But I have discovered the key. I have discovered the Rosetta stone and it's -- it is the efficiency gap.

And then a year later you bring this suit and you say: There it is, that is the constitutional standard. It's been finally -- after 200 years, it's been finally discovered in this paper by a young researcher, who concludes in the end -- this is the end of his paper -- after saying symmetry and responsiveness have shown to be -- looked to be inappropriate, “The measure I have offered here, relative wasted votes, is arguably” -- arguably -- “a more valid and flexible measure of -- of partisan -- of partisan gerrymandering.”

Now, is this -- is this the time for ***44** us to jump into this? Has there been a great body of scholarship that has tested this efficiency gap? It's full of questions.

Mr. McGhee's own amicus brief outlines numerous unanswered questions with -- with this theory.

What do you do in -- in elections that are not contested? Well, then you have to -- you have to make two guesses. How many people would have voted for the winning candidate if it had been a contested election? How many people would have voted for the losing candidate if it had been a contested election?

One of the judges in the court below asks: Why do you calculate EG by map, by subtracting from the votes obtained by the winner, 50 percent of the votes, instead of the votes obtained by the runner up? And Mr. McGhee says: Well, I have an answer to this, and I have a forthcoming paper and I'll answer it in the forthcoming paper.

(Laughter.)

JUSTICE ALITO: And there are all of these questions. This is -- 2017 is the time to jump into this? That's a question.

MR. SMITH: Is there a question there, ***45** Your Honor?

JUSTICE ALITO: Yeah, there is a question there. There are about 10 of them.

(Laughter.)

MR. SMITH: I would say this if I might, Justice Alito. In Vieth, the Court appropriately laid down a challenge and said if you want us to do this, you've got to give us a lot more than you've given us. You've got to give us two things, a substantive definition of fairness and a way to measure it so we can limit judicial intervention to the really serious cases, and so we won't have the Court entering into the political fray all the time, but we'll have standards that say you go this far, we're going to go -- we're going to go after you, but in the meantime, anything less serious than that, we're going to leave to the political branches.

And so the social scientists stepped up and said we have three different ways to calculate asymmetry, not just one: the median-mean measure; the partisan bias measure, where you're equalizing to 50/50; and the -- the efficiency gap. And in this case, they all ***46** come to the exact same conclusion that this is one of the most extreme gerrymanders ever drawn in -- in living memory of the United States, one of the five worst out of the 230 maps that Professor Jackman studied.

And so there is no -- there's no question here about this being the -- maximizing one party control as far as they could go. As Justice Sotomayor was saying, they pushed the limits and pushed the limits and pushed the limits. And it --

JUSTICE KAGAN: Mr. Smith, may I -- I'm sorry. Please.

MR. SMITH: Please go ahead, Your Honor.

JUSTICE KAGAN: I -- I think that this symmetry idea is both an intuitive and an attractive principle. So, if the first question was do you have a substantive principle, I actually think you do.

The second question is, is there ways -- are there ways to make sure that not every district is subject to challenge as violating that principle? And so I'd like to hear you talk about that.

***47** How is it that we are not going to create a world in which in every district somebody can come in and say: A-ha, there's been a violation of partisan symmetry; we're entitled to a redrawn map?

What's the threshold? Where do you draw the line?

MR. SMITH: Well, the --

JUSTICE KAGAN: Because this -- this -- it seems to me that this map goes over pretty much every line you can name.

MR. SMITH: That's true.

JUSTICE KAGAN: But where do you draw the line in another case and another case?

MR. SMITH: Well, Justice Kagan, the great virtue of these three different measures, none of which were presented to the Court in Vieth when I argued the Vieth case -- and I didn't do a very good job -- is that they each allow you to assign a number to each gerrymander and that allows you to compare them across the country and back in history. And, therefore, it is possible to draw a line.

Now, in addition to just measuring the degree of asymmetry, the other thing that's ***48** important to do is to measure the likelihood of durability of that asymmetry. And you do that with the sensitivity testing so you make sure you don't have the kind of map that, with a small swing of voting over the next decade, is going to flip over, as the map in Pennsylvania in Vieth actually did. That -- if we had the right tests, the ones that I'm now presenting to you, we wouldn't have won that case in -- in 2004.

But this map is never going to flip over. The evidence is unequivocal that the Democrats would have to have an earthquake of unprecedented proportions to even have a chance to get up to 50 votes out of 99.

CHIEF JUSTICE ROBERTS: All of those predictions -- I mean, Bandemer predicted the Democrats would never be able to attain a majority. It was 50/50 the next election, and they got a majority the one after that. You already mentioned Vieth. It was five days, right, after the District Court said, oh, the -- I forget who it was -- Republicans are never going to get elected. And they won every single race. Predicting on the basis of the ***49** statistics that are before us has been a very hazardous enterprise.

MR. SMITH: The technique of sensitivity testing, which was done by the Defendants' expert in the -- in the process of drawing the map to make sure that they were drawing a permanent, non-flippable gerrymander, and then done again by the experts for the Plaintiffs in this case in court and tested by the court, is a -- a method by which you identify one thing about the map: Does it have a lot of swing districts in it, a lot of competitive districts in it? Because if it does, you can have a map that looks very biased in one year when all those districts go one way, but it might flip over. That was Bandemer. That was Vieth.

That is not this case. They spent their entire time in that -- those four months in that locked room doing two things, trying to maximize the amount of bias and eliminating systematically competitive districts, reducing it down to something less than 10 when it had been up around 20, and then even though those 10, they tinkered with it and tinkered with it ***50** to make sure that even of that 10, they thought they could get at least seven. They ended up getting eight and then eventually all 10.

CHIEF JUSTICE ROBERTS: Mr. Smith, I'm --

JUSTICE KAGAN: So are you suggesting that we should be looking for outliers or are you suggesting that we should be trying to filter out all manner of partisan consideration, or is it someplace in between?

MR. SMITH: Your Honor, the word “outlier” is probably an appropriate one. Certainly, we don't think -- and we've followed the lead of this Court in Justice Kennedy's concurrence and other decisions of this Court -- that all partisanship is unconstitutional.

What you need is a method by which the extreme gerrymander, the one that is fundamentally anti-democratic and is going to last for the full decade, can be identified and -- and held unconstitutional. And that -- that's the only thing we're asking you to do here.

JUSTICE GORSUCH: So, Mr. Smith, what is the formula that achieves that? Because the ***51** court below didn't rely on efficiency gap entirely. It looked also at the partisan symmetry test. It reminds me a little bit of my steak rub. I like some turmeric, I like a few other little ingredients, but I'm not going to tell you how much of each.

And so what's this Court supposed to do? A pinch of this, a pinch of that? Or are we supposed to actually specify it's going to be the Chief Justice's formula of the efficiency gap of 7 percent for the country? Is that what you're asking us to do? What is it that you want us to constitutionalize?

MR. SMITH: Well, Your Honor, the first thing I want to make clear is -- is that symmetry is what's being measured by the efficiency gap, by the other two tests that I mentioned. Symmetry is the underlying substantive --

JUSTICE GORSUCH: Well, but there are different tests for measuring symmetry --

MR. SMITH: Right.

JUSTICE GORSUCH: -- right?

MR. SMITH: Right. There are.

JUSTICE GORSUCH: There is the test ***52** you previously proposed. Now there is the efficiency gap test. And the Court relied on both and said a little bit -- a pinch this and a pinch of that --

MR. SMITH: Right.

JUSTICE GORSUCH: -- and we're not telling you how much of each. So --

MR. SMITH: Well, I think it's fair --

JUSTICE GORSUCH: -- so that doesn't seem very fair to the states to me, to -- to -- to know how to -- what they're supposed to do to avoid the kind of litigation we're talking about. As I understand the efficiency gap test itself, and tell me if I'm wrong, that it would yield about a third of all the districts in the country winding up in court.

MR. SMITH: Not true. Not true.

JUSTICE GORSUCH: Now, that's what the other side says. So tell me where that's wrong and tell me what test you'd have this Court adopt.

MR. SMITH: Well, first of all, I -- I would go with the -- the screens that Justice Breyer mentioned, the first one being it has to be a one-party state. That one-third figure ***53** they keep throwing around ignores the fact that a number of those maps were drawn either by commissions or by courts or by divided legislatures.

And so they get -- those all get taken off the table from the very beginning. If you have a one-party state, you then have to measure whether it's unusually asymmetrical, pretty extreme, and we --

JUSTICE GORSUCH: How? I am still stuck on Justice Breyer's question.

MR. SMITH: You can use the -- you can use any of those three tests that were all applied here.

JUSTICE GORSUCH: Any of them?

MR. SMITH: Yes.

JUSTICE GORSUCH: Any -- any of the three?

MR. SMITH: And if they don't -- I -- I would suggest you apply all of them, and --

JUSTICE GORSUCH: All of them?

MR. SMITH: -- if they disagree, that would -- that would tell you maybe this isn't the right case to be holding something unconstitutional. That might be a fly in the ***54** ointment. But the court below did not set the

JUSTICE ALITO: Excuse me. Isn't it true that --

MR. SMITH: -- the line -- I'm sorry.

JUSTICE ALITO: Just on that, isn't it true that you could -- you can get very high levels of -- very high EG based on factors that have nothing to do with gerrymandering? The -- the political geography can lead to it; protection of incumbents, which has been said to be a legitimate factor, can lead to a high EG; compliance with the Voting Rights Act can affect that?

MR. SMITH: Certainly, there are various factors that -- that -- other than partisan bias that can lead you to draw a map that does not have a zero EG.

In our test, with the intents requirement, the effects requirement, and the justification requirement, all of those problems are taken care of either at the intent stage or at the justification stage.

JUSTICE ALITO: How are they taken care of at the justification stage? The ***55** proposal is to run many -- you know, millions of -- of alternative maps to see whether using some traditional districting requirements, you can produce a map that has a lower -- a lower EG. But my understanding is that when that's done, those maps do not take into account either incumbent protection or compliance with the Voting Rights Act, both of which can have a very big effect. It's just one of the dozens of uncertainties about this whole process.

MR. SMITH: Actually, they do -- they do take into account the Voting Rights Act. The Chen study that was discussed in one of the amicus briefs and is discussed somewhat in the merits briefs here, where they -- he produced 200 randomly generated maps of Wisconsin using all the state's traditional criteria, he started with the minority districts that were already drawn by the state in Act 43 and kept those in place.

And so then he generated -- randomly generated maps, and he found that the degree of bias created by the political geography in Wisconsin is minute, modest, a little bit, something -- just like what the District Court ***56** found, maybe 1 or 2 percent, not even remotely like what they have in the map. And so --

JUSTICE KAGAN: Would it be fair to require plaintiffs to provide those maps, many, many of them, so that one can tell whether the actual map is an outlier?

MR. SMITH: Well, I think in -- in the cases going forward after this -- these technologies are there, they will be in the record in almost every case. It has become the state of the art.

Whether it ought to be something that the plaintiffs have to produce as part of their initial case, I'd have to think about it. It certainly could be done that way.

There are -- as the Lander brief and the -- and a couple of other briefs and -- and the -- the political geographers' brief all show, people who have developed a capacity for generating random maps that teach you a lot of lessons about the effects of neutral criteria -- of where people live and allow you to say that has nothing to do with the degree of bias that we have here. And I think it will become a part of how these cases are decided at the ***57** justification stage. It may also become evidence of intent or of -- of how severe the effects are.

It can be useful in a whole variety of ways. Now that, again, social science has stepped up to the challenge.

JUSTICE KAGAN: So, for an example, that becomes a way to filter out the effects of geography from the effects of partisan advantage?

MR. SMITH: Yes, Your Honor. I would say that at the remedy stage, if they -- if they come back with a remedy map that matches the sort of neutral geography, even if it's somewhat favorable to the -- the party that's in charge, that should be okay. They don't have to go to zero just to -- at the remedy stage, but they have to come up with something much less extreme than their intentional gerrymandering, one that basically makes democracy no longer function because, basically, gerrymanders now are not your father's gerrymander. These are going to be really serious incursions on democracy if this Court doesn't do something. And this is really ***58** the last opportunity before we see this huge festival of new extreme gerrymanders all done along the model of Wisconsin but probably even more serious.

I -- I would commend the political scientists' brief, which talk about the revolution in data analytics that has happened since this map was drawn. You're going to see people coming in and -- and slicing and dicing a very polarized electorate to the point where one -- one-party control will be guaranteed. That's going to become the norm. Indeed, in any one-party state, if you don't do it that way, they're going to say, you know, that's malpractice. Why aren't you doing what Wisconsin did?

JUSTICE GINSBURG: Mr. Smith, will you clarify what you mean by one-party state? Here, we know that the maps were drawn by the Republicans and every -- everybody else was excluded, even some Republicans were excluded.

But suppose the legislature has a Republican majority, but there are Democrats, say it's 60/40, 40 percent Democrat, and the redistricting is done by the legislature. Does ***59** -- does that count? Would you count that as one party?

MR. SMITH: I do, Your Honor. I think if there's a majority, one party has a majority in both houses of the legislature and the governorship, the fact that there -- there are some representatives of the other party in a minority status would not negate the possibility that the thing was --

JUSTICE GORSUCH: Mr. Smith, is that a -- is that a republican form of government claim?

MR. SMITH: I think it's a First Amendment claim and an equal protection claim. I -- I'm not going to try to revive the republican form of government clause at this late stage of --

JUSTICE GORSUCH: Isn't that -- isn't that exactly what you're trying to do, though?

MR. SMITH: No.

JUSTICE GORSUCH: You're saying it's a one-party rule and that would violate a republican form of government guarantee. Wouldn't that be the more specific constitutional provision to look to, rather ***60** than the generic equal protection clause?

MR. SMITH: Well, I --

JUSTICE GORSUCH: For that matter, maybe we can just for a second talk about the arcane matter, the Constitution.

And where exactly do we get authority to revise state legislative lines? When -- when the Constitution authorizes the federal government to step in on state -- state legislative matters, it's pretty clear. If you look at the Fifteenth Amendment, you look at the Nineteenth Amendment, the Twenty-Sixth Amendment, and even the Fourteenth Amendment, Section 2, says Congress has the power, when state legislators don't provide the right to vote equally, to dilute congressional representation. Aren't those all textual indications in the Constitution itself that maybe we ought to be cautious about stepping in here?

MR. SMITH: Well, I don't think there's anything unusual about using the First Amendment and the Fourteenth Amendment to regulate the abusive management of state elections by state government. That's what the ***61** Court has been doing.

JUSTICE GINSBURG: Where did one-person/one-vote come from?

MR. SMITH: That's what Reynolds versus Sims and Baker versus Carr did and a number of other cases that have followed along since. And the fact that Congress could conceivably regulate this problem under the Fourteenth Amendment does not mean that the Court should not.

There's a number of cases, the term limits case, Cook versus Gralike, where Congress could have used the elections clause to fix a problem, but the Court said, well, in the absence of Congressional action, we're -- we're going to regulate an abusive, a misuse of the power to run federal elections, and in this case, it's state elections, you'd have to rely on, Congress would have to rely on Section 5 of the Fourteenth Amendment, and maybe they could in theory, but this is a problem which --

JUSTICE GORSUCH: Do you see any impediment to Congress acting in this this area?

MR. SMITH: Other than the fact that ***62** politicians are never going to fix gerrymandering. They like gerrymandering.

(Laughter.)

MR. SMITH: This is -- the problem in this area is if you don't do it, it's locked up. The voters of Wisconsin can't get it on the ballot without the legislature's consent.

And that's true in most of the states that don't have commissions now.

And so you have -- we're here telling you you are the only institution in the United States that can do -- that can solve this problem just as democracy is about to get worse because of the way gerrymandering is getting so much worse.

JUSTICE ALITO: You -- you paint a very dire picture about gerrymandering and its effects, but I was struck by something in the seminal article by your expert, Mr. McGhee, and he says there, "I show that the effects of party control on bias are small and decay rapidly, suggesting that redistricting is at best a blunt tool for promoting partisan interests."

So he was wrong in that. He's right ***63** with the EG. That's the Rosetta Stone, but he's wrong in that.

MR. SMITH: Your Honor, I'd have to see what that sentence is saying in context.

I'm quite confident Mr. McGhee does not think that redistricting is not a -- is a non-problem or that --

JUSTICE ALITO: Well, that's what he said.

MR. SMITH: -- or that gerrymandering is a non-problem. Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Smith.

Mr. Tseytlin, you have five minutes remaining.

REBUTTAL ARGUMENT BY MISHA TSEYTLIN ON BEHALF OF APPELLANTS

MR. TSEYTLIN: I'd like to begin by answering Justice Kennedy's question.

A facially discriminatory law in a state would violate the First Amendment because it would stigmatize that party. This case -- this Court's cases could not be clearer that when you have neutral lines -- neutrally, facially neutral lines, the question is not of ***64** partisan intent, because there will always be partisan intent.

The question is have the Plaintiffs presented a -- a burden on representational rights based upon a limited, precise, judicially amenable standard. There has been nothing new presented to this Court.

Basically, what the Plaintiffs have done here is they've taken Professor King's amicus brief from LULAC, they have taken the exact same central concept, partisan asymmetry, and they've recycled it here. There is nothing new before this Court.

Second, we've heard something about the various tests that they're now proposing. There was only one test that was subjected to adversarial scrutiny in this case, in a four-day trial. That efficiency gap test proved so fatally flawed that the District Court rejected it as the test and Plaintiffs abandoned it as the primary test on appeal.

And then my final point about the scare tactics, about what will happen next. Plaintiff's expert did a comprehensive study from 1972 at the -- when the Baker ***65** redistricting had happened, to 2014. And he -- and you can look at that study. The chart on that study is on Supplemental Appendix 227.

It shows that the asymmetry was worse, was worse in 1972 than in 2014. You're always going to have scare tactics. You're always going to have partisan intent.

We have not had any advancement in terms of what has been presented to this Court since LULAC, where this Court properly criticized partisan asymmetry as not a neutral standard that has uniform acceptance.

And we are asking for those reasons for this Court to reverse the District Court. Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:03 a.m., the hearing was concluded.)

2022 WL 120950
Supreme Court of the United States.

Joseph R. BIDEN, Jr., President of the United States, et al., Applicants
v.
MISSOURI, et al.
Xavier Becerra, Secretary of Health and Human Services, et al., Applicants
v.
Louisiana, et al.

Nos. 21A240 and 21A241
|
January 13, 2022

Synopsis

Background: In first action, several States brought action against President and other federal defendants, challenging Centers for Medicare and Medicaid Services' (CMS) interim final rule imposing COVID-19 vaccination mandate applicable to staff of healthcare facilities participating in Medicare and Medicaid. The United States District Court for the Eastern District of Missouri, Matthew T. Schelp, J., 2021 WL 5564501, granted States' motion for preliminary injunction, and denied, 2021 WL 5631736, defendants' motion for stay pending appeal. In second action, several States brought action against the Secretary of Health and Human Services and other federal defendants challenging same CMS interim final rule. The United States District Court for the Western District of Louisiana, Terry A. Doughty, J., 2021 WL 5609846, granted nationwide preliminary injunction, and denied defendants' motion for stay pending appeal. The United States Court of Appeals for the Fifth Circuit, 20 F.4th 260, granted in part and denied in part defendants' motion for stay pending appeal. In both cases, the federal government filed applications to stay preliminary injunctions.

Holdings: The Supreme Court held that:

Secretary of Health and Human Services did not exceed his statutory authority in issuing rule;

rule was not arbitrary and capricious;

Secretary had requisite good cause to forgo notice-and-comment procedures;

Secretary was not required to consult with appropriate State agencies on participation conditions before issuing rule; and

rule did not violate statutory directive that federal officials may not exercise any supervision or control over manner in which medical services are provided or over selection or tenure of any officer or employee of any participating facility.

Applications granted.

Justice Thomas filed dissenting opinion, in which Justices Alito, Gorsuch, and Barrett joined.

Justice Alito filed dissenting opinion, in which Justices Thomas, Gorsuch, and Barrett joined.

Procedural Posture(s): Motion for Stay.

West Codenotes

Negative Treatment Reconsidered

42 C.F.R. §§ 416.51(c), 418.60(d), 441.151(c), 460.74(d), 482.42(g), 483.80(d)(3)(v), (i), 483.430(f), 483.460, 484.70(d), 485.58, 485.70(n), 485.640(f), 485.725(f), 485.904(c), 486.525(c), 491.8(d), 494.30(b)

ON APPLICATIONS FOR STAYS

Opinion

Per Curiam.

***1** The Secretary of Health and Human Services administers the Medicare and Medicaid programs, which provide health insurance for millions of elderly, disabled, and low-income Americans. In November 2021, the Secretary announced that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff—unless exempt for medical or religious reasons—are vaccinated against COVID–19. 86 Fed. Reg. 61555 (2021). Two District Courts enjoined enforcement of the rule, and the Government now asks us to stay those injunctions. Agreeing that it is entitled to such relief, we grant the applications.

I

A

The Medicare program provides health insurance to individuals 65 and older, as well as those with specified disabilities. The Medicaid program does the same for those with low incomes. Both Medicare and Medicaid are administered by the Secretary of Health and Human Services, who has general statutory authority to promulgate regulations "as may be necessary to the efficient administration of the functions with which [he] is charged." 42 U. S. C. § 1302(a).

One such function—perhaps the most basic, given the Department's core mission—is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety. Such providers include hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities, and more. To that end, Congress authorized the Secretary to promulgate, as a condition of a facility's participation in the programs, such "requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." 42 U. S. C. § 1395x(e)(9) (hospitals); see, *e.g.*, §§ 1395x(cc)(2)(J) (outpatient rehabilitation facilities), 1395i–3(d)(4)(B) (skilled nursing facilities), 1395k(a)(2)(F) (i) (ambulatory surgical centers); see also §§ 1396r(d)(4)(B), 1396d(*l*)(1), 1396d(*o*) (corresponding provisions in Medicaid Act).

Relying on these authorities, the Secretary has established long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds. See, *e.g.*, 42 CFR pt. 482 (2020) (hospitals); 42 CFR pt. 483 (long-term care facilities); 42 CFR §§ 416.25–416.54 (ambulatory surgical centers). Such conditions have long included a requirement that certain providers maintain and enforce an "infection prevention and control program designed ... to help prevent the development and transmission of communicable diseases and infections." § 483.80 (long-term care facilities); see, *e.g.*, §§ 482.42(a) (hospitals), 416.51(b) (ambulatory surgical centers), 485.725 (facilities that provide outpatient physical therapy and speech-language pathology services).

B

On November 5, 2021, the Secretary issued an interim final rule amending the existing conditions of participation in Medicare and Medicaid to add a new requirement—that facilities ensure that their covered staff are vaccinated against COVID–19. 86 Fed. Reg. 61561, 61616–61627. The rule requires providers to offer medical and religious exemptions, and does not cover staff who telework full-time. *Id.*, at 61571–61572. A facility's failure to comply may lead to monetary penalties, denial

of payment for new admissions, and ultimately termination of participation in the programs. *Id.*, at 61574.

***2** The Secretary issued the rule after finding that vaccination of healthcare workers against COVID–19 was "necessary for the health and safety of individuals to whom care and services are furnished." *Id.*, at 61561. In many facilities, 35% or more of staff remain unvaccinated, *id.*, at 61559, and those staff, the Secretary explained, pose a serious threat to the health and safety of patients. That determination was based on data showing that the COVID–19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely when healthcare workers are unvaccinated. *Id.*, at 61558–61561, 61567–61568, 61585–61586. He also explained that, because Medicare and Medicaid patients are often elderly, disabled, or otherwise in poor health, transmission of COVID–19 to such patients is particularly dangerous. *Id.*, at 61566, 61609. In addition to the threat posed by infacility transmission itself, the Secretary also found that "fear of exposure" to the virus "from unvaccinated health care staff can lead patients to themselves forgo seeking medically necessary care," creating a further "ris[k] to patient health and safety." *Id.*, at 61588. He further noted that staffing shortages caused by COVID–19-related exposures or illness has disrupted patient care. *Id.*, at 61559.

The Secretary issued the rule as an interim final rule, rather than through the typical notice-and-comment procedures, after finding "good cause" that it should be made effective immediately. *Id.*, at 61583–61586; see 5 U. S. C. § 553(b)(B). That good cause was, in short, the Secretary's belief that any "further delay" would endanger patient health and safety given the spread of the Delta variant and the upcoming winter season. 86 Fed. Reg. 61583–61586.

C

Shortly after the interim rule's announcement, two groups of States—one led by Louisiana and one by Missouri—filed separate actions challenging the rule. The U. S. District Courts for the Western District of Louisiana and the Eastern District of Missouri each found the rule defective and entered preliminary injunctions against its enforcement. *Louisiana v. Becerra*, —— F.Supp.3d ——, 2021 WL 5609846 (Nov. 30, 2021); *Missouri v. Biden*, —— F.Supp.3d ——, 2021 WL 5564501 (Nov. 29, 2021). In each case, the Government moved for a stay of the injunction from the relevant Court of Appeals. In *Louisiana*, the Fifth Circuit denied the Government's motion. 20 F.4th 260 (2021). In *Missouri*, the Eighth Circuit did so as well. See Order in No. 21–3725 (Dec. 13, 2021). The Government filed applications asking us to stay both District Courts' preliminary injunctions, and we heard expedited argument on its requests.

II

A

First, we agree with the Government that the Secretary's rule falls within the authorities that Congress has conferred upon him.

Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." 42 U. S. C. § 1395x(e)(9). * COVID–19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease. The Secretary of Health and Human Services determined that a COVID–19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients. 86 Fed. Reg. 61557–61558. He accordingly concluded that a vaccine mandate is "necessary to promote and protect patient health and safety" in the face of the ongoing pandemic. *Id.*, at 61613.

***3** The rule thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the "very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID–19." *Florida v. Department of Health and Human Servs.*, 19 F.4th 1271, 1288 (CA11 2021).

The States and Justice THOMAS offer a narrower view of the various authorities at issue, contending that the seemingly broad language cited above authorizes the Secretary to impose no more than a list of bureaucratic rules regarding the technical administration of Medicare and Medicaid. But the longstanding practice of Health and Human Services in implementing the relevant statutory authorities tells a different story. As noted above, healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare, not simply sound accounting. Such requirements govern in detail, for instance, the amount of time after admission or surgery within which a hospital patient must be examined and by whom, 42 CFR § 482.22(c)(5), the procurement, transportation, and transplantation of human kidneys, livers, hearts, lungs, and pancreases, § 482.45, the tasks that may be delegated by a physician to a physician assistant or nurse practitioner, § 483.30(e), and, most pertinent here, the programs that hospitals must implement to govern the "surveillance, prevention, and control of ... infectious diseases," § 482.42.

Moreover, the Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves. See, *e.g.*, §§ 482.42(c) (2)(iv) (requiring training of "hospital personnel and staff " on "infection prevention and control guidelines"), 483.60(a)(1)(ii) (qualified dieticians must have completed at least 900 hours of supervised practice), 482.26(b)–(c) (specifying personnel authorized to use radiologic equipment). And the Secretary has always justified these sorts of requirements by citing his authorities to protect patient health and safety. See, *e.g.*, §§ 482.1(a)(1)(ii), 483.1(a)(1)(ii), 416.1(a)(1). As these examples illustrate, the Secretary's role in administering Medicare and Medicaid goes far beyond that of a mere bookkeeper.

Indeed, respondents do not contest the validity of this longstanding litany of health-related participation conditions. When asked at oral argument whether the Secretary could, using the very same statutory authorities at issue here, require hospital employees to wear gloves, sterilize instruments, wash their hands in a certain way and at certain intervals, and the like, Missouri answered yes: "[T]he Secretary certainly has authority to implement all kinds of infection control measures at these facilities." Tr. of Oral Arg. 57–58. Of course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control. But he has never had to address an infection problem of this scale and scope before. In any event, there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what he does.

And his response is not a surprising one. Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella. CDC, State Healthcare Worker and Patient Vaccination Laws (Feb. 28, 2018), https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html. As the Secretary explained, these pre-existing state requirements are a major reason the agency has not previously adopted vaccine mandates as a condition of participation. 86 Fed. Reg. 61567–61568.

***4** All this is perhaps why healthcare workers and public-health organizations overwhelmingly support the Secretary's rule. See *id.*, at 61565–61566; see also Brief for American Medical Assn. et al. as *Amici Curiae*; Brief for American Public Health Assn. et al. as *Amici Curiae*; Brief for Secretaries of Health and Human Services et al. as *Amici Curiae*. Indeed, their support suggests that a vaccination requirement under these circumstances is a straightforward and predictable example of the "health and safety" regulations that Congress has authorized the Secretary to impose.

We accordingly conclude that the Secretary did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID–19.

B

We also disagree with respondents' remaining contentions in support of the injunctions entered below. First, the interim rule is not arbitrary and capricious. Given the rulemaking record, it cannot be maintained that the Secretary failed to "examine the relevant data and articulate a satisfactory explanation for" his decisions to (1) impose the vaccine mandate instead of a testing mandate; (2) require vaccination of employees with "natural immunity" from prior COVID–19 illness; and (3) depart from the agency's prior approach of merely encouraging vaccination. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); see 86 Fed. Reg. 61583, 61559–61561, 61614. Nor is it the case that the Secretary "entirely failed to consider" that the rule might cause staffing shortages, including in rural areas. *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856; see 86 Fed. Reg. 61566, 61569, 61607–61609. As to the additional flaws the District Courts found in the Secretary's analysis, particularly concerning the nature of the data relied upon, the role of courts in reviewing arbitrary and capricious challenges is to "simply ensur[e] that the agency has acted within a zone of reasonableness." *FCC* v. *Prometheus Radio Project*, 592 U. S. ——, ——, 141 S.Ct. 1150, 1158, 209 L.Ed.2d 287 (2021).

Other statutory objections to the rule fare no better. First, Justice ALITO takes issue with the Secretary's finding of good cause to delay notice and comment. But the Secretary's finding that accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID–19 infections, hospitalizations, and deaths, 86 Fed. Reg. 61584–61586, constitutes the "something specific," *post*, at —— (dissenting opinion), required to forgo notice and comment. And we cannot say that in this instance the two months the agency took to prepare a 73-page rule constitutes "delay" inconsistent with the Secretary's finding of good cause. Second, we agree with the Secretary that he was not required to "consult with appropriate State agencies," 42 U. S. C. § 1395z, in advance of issuing the interim rule. Consistent with the existence of the good cause exception, which was properly invoked here, consultation during the deferred notice-and-comment period is permissible. We similarly concur with the Secretary that he need not prepare a regulatory impact analysis discussing a rule's effect on small rural hospitals when he acts through an interim final rule; that requirement applies only where the Secretary proceeds on the basis of a "notice of proposed rulemaking," § 1302(b)(1), followed by a "final version of [the] rule," § 1302(b)(2). Lastly, the rule does not run afoul of the directive in § 1395 that federal officials may not "exercise any supervision or control over the ... manner in which medical services are provided, or over the selection [or] tenure ... of any officer or employee of " any facility. That reading of section 1395 would mean that nearly every condition of participation the Secretary has long insisted upon is unlawful.

* * *

***5** The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have. Because the latter principle governs in these cases, the applications for a stay presented to Justice ALITO and Justice KAVANAUGH and by them referred to the Court are granted.

The District Court for the Eastern District of Missouri's November 29, 2021, order granting a preliminary injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Eighth Circuit and the disposition of the Government's petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

The District Court for the Western District of Louisiana's November 30, 2021, order granting a preliminary injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Fifth Circuit and the disposition of the Government's petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

It is so ordered.

Justice THOMAS, with whom Justice ALITO, Justice GORSUCH, and Justice BARRETT join, dissenting.

Two months ago, the Department of Health and Human Services (HHS), acting through the Centers for Medicare and Medicaid Services (CMS), issued an omnibus rule mandating that medical facilities nationwide order their employees, volunteers, contractors, and other workers to receive a COVID–19 vaccine. Covered employers must fire noncompliant workers or risk fines and termination of their Medicare and Medicaid provider agreements. As a result, the Government has effectively mandated vaccination for 10 million healthcare workers.

Two District Courts preliminarily enjoined enforcement of the omnibus rule, and the Government now requests an emergency stay of those injunctions pending appeal. Because the Government has not made a strong showing that it has statutory authority to issue the rule, I too would deny a stay.

To obtain a stay, the Government must show that there is (1) a reasonable probability that we would grant certiorari; (2) a fair prospect that we would reverse the judgments below; and (3) a likelihood that irreparable harm will result from denying a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010) (*per curiam*). Because there is no real dispute that this case merits our review, our decision turns primarily on whether the Government can make a "strong showing" that it is likely to succeed on the merits. *Nken v. Holder*, 556 U.S. 418, 426, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). In my view, the Government has not made such a showing here.

The Government begins by invoking two statutory provisions that generally grant CMS authority to promulgate rules to implement Medicare and Medicaid. The first authorizes CMS to "publish such rules and regulations ... as may be necessary to the efficient administration of the [agency's] functions." 42 U. S. C. § 1302(a). The second authorizes CMS to "prescribe such regulations as may be necessary to carry out the administration of the insurance programs" under the Medicare Act. § 1395hh(a)(1).

***6** The Government has not established that either provision empowers it to impose a vaccine mandate. Rules carrying out the "administration" of Medicare and Medicaid are those that serve "the practical management and direction" of those programs. Black's Law Dictionary 58 (3d ed. 1933). Such rules are "necessary" to "administration" if they bear "an actual and discernible nexus" to the programs' practical management. *Merck & Co., Inc. v. United States Dept. of Health and Human Servs.*, 962 F.3d 531, 537–538 (CADC 2020) (internal quotation marks omitted). Here, the omnibus rule compels millions of healthcare workers to undergo an unwanted medical procedure that "cannot be removed at the end of the shift," *In re MCP No. 165*, 20 F.4th 264, 268 (CA6 2021) (Sutton, C. J., dissenting from denial of initial hearing en banc). To the extent the rule has any connection to the management of Medicare and Medicaid, it is at most a "tangential" one. *Merck & Co., Inc.*, 962 F.3d at 538.

At oral argument, the Government largely conceded that § 1302(a) and § 1395hh(a)(1) alone do not authorize the omnibus rule. See Tr. of Oral Arg. 7, 10. Instead, it fell back on a constellation of statutory provisions that each concern one of the 15 types of medical facilities that the rule covers. See 86 Fed. Reg. 61567 (2021). Several of those provisions contain language indicating that CMS may regulate those facilities in the interest of "health and safety." In the Government's view, that language authorizes CMS to adopt any "requirements that [CMS] deems necessary to ensure patient health and safety," including a vaccine mandate applicable to all facility types. Application in No. 21A240, p. 19. The majority, too, treats these scattered provisions as a singular (and unqualified) delegation to the Secretary to adopt health and safety regulations.

The Government has not made a strong showing that this agglomeration of statutes authorizes any such rule. To start, 5 of the 15 facility-specific statutes do not authorize CMS to impose "health

and safety" regulations at all. See 42 U. S. C. §§ 1396d(d)(1), (h)(1)(B)(i), 1395rr(b)(1)(A), 1395x(iii)(3)(D)(i)(IV), 1395i–4(e). These provisions cannot support an argument based on statutory text they lack. Perhaps that is why the Government only weakly defends them as a basis for its authority. See Tr. of Oral Arg. 25–28.

Next, the Government identifies eight definitional provisions describing, for example, what makes a hospital a "hospital." These define covered facilities as those that comply with a variety of conditions, including "such other requirements as the Secretary finds necessary in the interest of ... health and safety." § 1395x(e)(9); see also §§ 1395x(dd)(2)(G), (*o*)(6), (ff)(3)(B)(iv), (cc)(2)(J), (p)(4)(A)(v), (aa)(2)(K), 1395k(a)(2)(F)(i). The Government similarly invokes a saving clause for "health and safety" regulations applicable to "all-inclusive care" programs for the elderly, see §§ 1395eee(f)(4), 1396u–4(f)(4), and a requirement that long-term nursing facilities "establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment ... to help prevent the development and transmission of disease," § 1395i–3(d)(3).

The Government has not made a strong showing that this hodgepodge of provisions authorizes a nationwide vaccine mandate. We presume that Congress does not hide "fundamental details of a regulatory scheme in vague or ancillary provisions." *Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Yet here, the Government proposes to find virtually unlimited vaccination power, over millions of healthcare workers, in definitional provisions, a saving clause, and a provision regarding long-term care facilities' sanitation procedures. The Government has not explained why Congress would have used these ancillary provisions to house what can only be characterized as a "fundamental detail" of the statutory scheme. Had Congress wanted to grant CMS power to impose a vaccine mandate across all facility types, it would have done what it has done elsewhere—specifically authorize one. See 22 U. S. C. § 2504(e) (authorizing mandate for "such immunization ... as necessary and appropriate" for Peace Corps volunteers).

***7** Nonetheless, even if I were to accept that Congress could have hidden vaccine-mandate power in statutory definitions, the language in these "health and safety" provisions does not suggest that Congress did so. Take, for example, 42 U. S. C. § 1395x(e), which defines "hospital" for certain purposes. Three subsections define hospitals as providers of specific patient services, see §§ 1395x(e)(1), (4), (5), and five describe administrative requirements that a facility must meet to qualify as a covered hospital, see §§ 1395x(e)(2)–(3), (6)–(8). The final subsection then provides that a "hospital" must also "mee[t] *such other* requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." § 1395x(e)(9) (emphasis added).

Contrary to the Government's position, this kind of catchall provision does not authorize every regulation related to "health and safety." As with all statutory language, context must inform the scope of the provision. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 408, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (THOMAS, J., concurring in part and dissenting in part) (citing *Neal v. Clark*, 95 U.S. 704, 708, 24 L.Ed. 586 (1878)). "[W]here, as here, a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Epic Systems Corp.* v. *Lewis*, 584 U. S. ——, ——, 138 S.Ct. 1612, 1625, 200 L.Ed.2d 889 (2018) (internal quotation marks omitted). That presumption is particularly forceful where the statutory catchall refers to "such other" requirements, signaling that the subjects that come before delimit any residual authority. See *ibid.* Here, in § 1395x(e), none of the myriad subsections preceding the "health and safety" subsection suggests that the Government can order hospitals to require virtually all hospital personnel to be vaccinated. Rather, these subsections show that HHS' residual authority embraces only administrative requirements like those that precede it—including "provid[ing] 24-hour nursing service," "maintain[ing] clinical records on all patients," or having "bylaws in effect." §§ 1395x(e)(2), (3), (5). A requirement that all healthcare workers be vaccinated is plainly different in kind. The same reasoning applies to almost all of the Government's proposed facility-specific statutes. See §§ 1395x(aa)(2), (dd)(2), (*o*)(6); see also §§ 1395x(ff)(3)(B), (p)(4)(A), (cc)(2), 1395eee, 1396u–4(f)(4).

Only one facility-specific provision is arguably different. It regulates long-term care facilities and mandates an "infection control program" among its "health and safety" provisions. § 1395i–3(d)(3). But that infection-control provision focuses on sanitizing the facilities' "environment," not its personnel. *Ibid.* In any event, even if this statutory language justified a vaccine mandate in long-term care facilities, it could not sustain the omnibus rule. Neither the "infection control" language nor a reasonable analog appears in any of the other facility-specific provisions. Basic interpretive principles would thus suggest that CMS lacks vaccine-mandating authority with respect to the other types of facilities. See *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). And, of course, the omnibus rule cannot rest on the long-term care provision alone. By CMS' own estimate, long-term care facilities employ only 10% of the 10 million healthcare workers that the rule covers. 86 Fed. Reg. 61603. Put simply, the oblique reference to "infection control" in the definitional provision for long-term care facilities cannot authorize an omnibus vaccine mandate covering *every* type of facility that falls within CMS' purview.

***8** For its part, the Court does not rely on the Government's proffered statutory provisions. Instead, it asserts that CMS possesses broad vaccine-mandating authority by pointing to a handful of CMS regulations. To begin, the Court does not explain why the bare existence of these

regulations is evidence of what Congress empowered the agency to do. Relying on them appears to put the cart before the horse.

Regardless, these regulations provide scant support for the sweeping power the Government now claims. For example, CMS regulations that mandate the number of hours a dietician must practice under supervision, *ante*, at —— (citing 42 CFR § 483.60 (2020)), or that prescribe "the tasks that may be delegated ... to a physician assistant or nurse practitioner," *ante,* at —— (citing § 483.30(e)), cannot support a vaccine mandate for healthcare personnel.

The Court also invokes a regulation requiring hospitals to implement programs that "govern the 'surveillance, prevention, and control of ... infectious diseases,' " *ante,* at —— (quoting § 482.42), as well as a few regulations that require "infection and prevention control programs" at some (but apparently not all) facility types. See *ante*, at —— (citing, *inter alia*, § 482.42). But many of these infection-control regulations, like the infection-control program set out at 42 U. S. C. § 1395i–3(d)(3), are far afield from immunization. See, *e.g.*, 42 CFR §§ 485.725(b)–(e) (specifying requirements for "aseptic techniques," "housekeeping services," "[l]inens," and "[p]est control"). And insofar as they do touch on immunization, they require only that facilities *offer* their *residents* the opportunity to obtain a vaccine, along with "the opportunity to refuse" it. § 483.80(d)(1). These regulations are not precedents for CMS' newfound authority *mandating* that all *employees* be vaccinated.

Finally, our precedents confirm that the Government has failed to make a strong showing on the merits. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ——, ——, 141 S.Ct. 2485, 2489, 210 L.Ed.2d 856 (2021) (*per curiam*) (internal quotation marks omitted). And we expect Congress to use "exceedingly clear language if it wishes to significantly alter the balance between state and federal power." *Ibid.* (internal quotation marks omitted). The omnibus rule is undoubtedly significant—it requires millions of healthcare workers to choose between losing their livelihoods and acquiescing to a vaccine they have rejected for months. Vaccine mandates also fall squarely within a State's police power, see *Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed. 194 (1922), and, until now, only rarely have been a tool of the Federal Government. If Congress had wanted to grant CMS authority to impose a nationwide vaccine mandate, and consequently alter the state-federal balance, it would have said so clearly. It did not.

* * *

These cases are not about the efficacy or importance of COVID–19 vaccines. They are only about whether CMS has the statutory authority to force healthcare workers, by coercing their employers, to undergo a medical procedure they do not want and cannot undo. Because the Government has not made a strong showing that Congress gave CMS that broad authority, I would deny the stays pending appeal. I respectfully dissent.

Justice ALITO, with whom Justice THOMAS, Justice GORSUCH, and Justice BARRETT join, dissenting.

***9** I join Justice THOMAS's dissent because I do not think that the Federal Government is likely to be able to show that Congress has authorized the unprecedented step of compelling over 10,000,000 healthcare workers to be vaccinated on pain of being fired. The support for the argument that the Federal Government possesses such authority is so obscure that the main argument now pressed by the Government—that the authority is conferred by a hodgepodge of scattered provisions—was not prominently set out by the Government until its reply brief in this Court. Before concluding that the Federal Government possesses this authority, we should demand stronger statutory proof than has been mustered to date.

But even if the Federal Government has the authority to require the vaccination of healthcare workers, it did not have the authority to impose that requirement in the way it did. Under our Constitution, the authority to make laws that impose obligations on the American people is conferred on Congress, whose Members are elected by the people. Elected representatives solicit the views of their constituents, listen to their complaints and requests, and make a great effort to accommodate their concerns. Today, however, most federal law is not made by Congress. It comes in the form of rules issued by unelected administrators. In order to give individuals and entities who may be seriously impacted by agency rules at least some opportunity to make their views heard and to have them given serious consideration, Congress has clearly required that agencies comply with basic procedural safeguards. Except in rare cases, an agency must provide public notice of proposed rules, 5 U. S. C. § 553(b); the public must be given the opportunity to comment on those proposals, § 553(c); and if the agency issues the rule, it must address concerns raised during the notice-and-comment process. *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (CA2 1977); see also *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). The rule may then be challenged in court, and the court may declare the rule unlawful if these procedures have not been followed.

In these cases, the relevant agency did none of those things, and the Court rewards this extraordinary departure from ordinary principles of administrative procedure. Although today's ruling means only that the Federal Government is likely to be able to show that this departure is

lawful, not that it actually is so, this ruling has an importance that extends beyond the confines of these cases. It may have a lasting effect on Executive Branch behavior.

Because of the importance of notice-and-comment rulemaking, an agency must show "good cause" if it wishes to skip that process. 5 U. S. C. § 553(b)(3)(B). Although this Court has never precisely defined what an agency must do to demonstrate good cause, federal courts have consistently held that exceptions to notice-and-comment must be " 'narrowly construed and only reluctantly countenanced.' " *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (CADC 2012) (quoting *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (CADC 2001)); see also C. Koch & R. Murphy, Good Cause for Avoiding Procedures, 1 Admin. L. & Prac. § 4:13 (3d ed. 2021).

The agency that issued the mandate at issue here, *i.e.*, the Centers for Medicare and Medicaid Services (CMS), admits it did not comply with the commonsense measure of seeking public input before placing binding rules on millions of people, but it claims that "[t]he data showing the vital importance of vaccination" indicate that it "cannot delay taking this action." 86 Fed. Reg. 61555, 61583 (2021). But CMS's generalized justification cannot alone establish good cause to dispense with Congress's clear procedural safeguards. An agency seeking to show good cause must "point to something specific that illustrates a particular harm that will be caused by the delay required for notice and comment." *United States v. Brewer*, 766 F.3d 884, 890 (CA8 2014) (internal quotation marks omitted).

***10** Although CMS argues that an emergency justifies swift action, both District Courts below held that CMS fatally undercut that justification with its own repeated delays. The vaccines that CMS now claims are vital had been widely available 10 months before CMS's mandate, and millions of healthcare workers had already been vaccinated before the agency took action. President Biden announced the CMS mandate on September 9, 2021, nearly two months before the agency released the rule on November 5, and the mandate itself delayed the compliance deadline further by another month until December 6. 86 Fed. Reg. 61555; *id.*, at 61573 (making implementation of the vaccine mandate begin "30 days after publication" and completed "60 days after publication"). This is hardly swift.

CMS argues that its delay, "even if true," does not provide a "reason to block a rule" that it claims will protect patient health. Application in No. 21A241, p. 36. It claims that its departure from ordinary procedure after extraordinary delay should be excused because nobody can show they were prejudiced by the lack of a comment period before the rule took effect. But it is CMS's affirmative burden to show it has good cause, not respondents' burden to prove the negative. *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (CA10 1987). Congress placed procedural safeguards on executive rulemaking so agencies would consider "important aspect[s] of the problem[s]" they seek to address before restricting the liberty of the people they regulate.

State Farm, 463 U.S. at 43, 103 S.Ct. 2856. Because CMS chose to circumvent notice-and-comment, States that run Medicaid facilities, as well as other regulated parties, had no opportunity to present evidence refuting or contradicting CMS's justifications before the rule bound them. And because CMS acknowledged its own "uncertainty" and the "rapidly changing nature of the current pandemic," 86 Fed. Reg. 61589, it should have been *more* receptive to feedback, not less. "[A]n utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 96 (CADC 2002).

Today's decision will ripple through administrative agencies' future decisionmaking. The Executive Branch already touches nearly every aspect of Americans' lives. In concluding that CMS had good cause to avoid notice-and-comment rulemaking, the Court shifts the presumption against compliance with procedural strictures from the unelected agency to the people they regulate. Neither CMS nor the Court articulates a limiting principle for why, after an unexplained and unjustified delay, an agency can regulate first and listen later, and then put more than 10 million healthcare workers to the choice of their jobs or an irreversible medical treatment.

Therefore, I respectfully dissent.

All Citations

--- S.Ct. ----, 2022 WL 120950, 22 Cal. Daily Op. Serv. 562

Footnotes

* While this provision pertains only to hospitals, the Secretary has similar statutory powers with respect to most other categories of healthcare facilities covered by the interim rule. See *supra*, at ——. Justice THOMAS points out that for five such kinds of facilities, the relevant statute does not contain express "health and safety" language. *Post*, at —— (dissenting opinion). But employees at these facilities—which include end-stage renal disease clinics and home infusion therapy suppliers—represent less than 3% of the workers covered by the rule. See Tr. of Oral Arg. 25. And even with respect to them, the pertinent statutory language may be read as incorporating the "health and safety" authorities applicable to the other 97%. See, *e.g.*, 42 U. S. C. § 1396d(d)(1). We see no reason to let the infusion-clinic tail wag the hospital dog, especially because the rule has an express severability provision. 86 Fed. Reg. 61560.

7 N.Y.3d 510, 859 N.E.2d 459, 825 N.Y.S.2d
653, 2006 N.Y. Slip Op. 07517, 35 A.L.R.6th 735

**1 Catholic Charities of the Diocese of Albany et al., Appellants
v
Gregory V. Serio, as Superintendent of Insurance, Respondent.

Court of Appeals of New York
110, 3
Argued September 6, 2006
Decided October 19, 2006

CITE TITLE AS: Catholic Charities of Diocese of Albany v Serio

SUMMARY

Appeal, on constitutional and other grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered January 12, 2006. The Appellate Division, with two Justices dissenting, affirmed an order of the Supreme Court, Albany County (Dan Lamont, J.), which had granted defendant's cross motion for summary judgment dismissing the complaint and denied plaintiff's motion for a preliminary injunction as moot.

Catholic Charities of Diocese of Albany v Serio, 28 AD3d 115, affirmed.

HEADNOTES

Constitutional Law
Freedom of Religion
Mandated Insurance Coverage for Contraceptives--"Religious Employer" Exception--Free Exercise

(1) The Women's Health and Wellness Act (WHWA) (L 2002, ch 554), which requires that an employer health insurance contract that provides coverage for prescription drugs include coverage for the cost of contraceptives, does not violate the Free Exercise Clause of the First Amendment

to the United States Constitution to the extent that its exemption from contraceptive coverage for "religious employers" (*see* Insurance Law § 3221 [*l*] [16] [A]; § 4303 [cc] [1]) does not extend to plaintiffs, faith-based social service organizations. The burden on plaintiffs' religious exercise is the incidental result of a neutral law of general applicability. Religious beliefs were not the "target" of the WHWA, and it was not that law's "object" to interfere with plaintiffs' or anyone's exercise of religion. The object of the WHWA was to make broader health insurance coverage available to women, to improve women's health and to eliminate disparities between men and women in the cost of health care.

Constitutional Law
Freedom of Religion
Mandated Insurance Coverage for Contraceptives--"Religious Employer" Exception--Free Exercise--Hybrid Rights Exception

(2) The Women's Health and Wellness Act (WHWA) (L 2002, ch 554), which requires that an employer health insurance contract that provides coverage for prescription drugs include coverage for the cost of contraceptives, does not violate the Free Exercise Clause of the First Amendment to the United States Constitution to the extent that its exemption from contraceptive coverage for "religious employers" (*see* Insurance Law § 3221 [*l*] [16] [A]; § 4303 [cc] [1]) does not extend to plaintiffs, faith-based social service organizations. The "hybrid rights" exception, pursuant to which the First Amendment has been ***511** held to bar application of a neutral, generally applicable law to religiously motivated action where there is a challenge to free exercise in conjunction with other constitutional protections, was inapplicable here. Plaintiffs' claim that the challenged legislation interfered with their rights of free speech and association was insubstantial. The legislation does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like; nor does it compel them to associate, or prohibit them from associating, with anyone. While it does burden plaintiffs' exercise of religion, that alone does not call the validity of a generally applicable and neutral statute into question.

Constitutional Law
Freedom of Religion
Mandated Insurance Coverage for Contraceptives--"Religious Employer" Exception--Free Exercise--Doctrine of Church Autonomy

(3) The Women's Health and Wellness Act (WHWA) (L 2002, ch 554), which requires that an employer health insurance contract that provides coverage for prescription drugs include coverage

for the cost of contraceptives, does not violate the Free Exercise Clause of the First Amendment to the United States Constitution to the extent that its exemption from contraceptive coverage for "religious employers" (*see* Insurance Law § 3221 [*l*] [16] [A]; § 4303 [cc] [1]) does not extend to plaintiffs, faith-based social service organizations. The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability which, as here, does not target religious beliefs as such. The doctrine of church autonomy, which prevents states from interfering in matters of internal church governance or determining ecclesiastical questions, was not applicable here since church autonomy was not at issue. The Legislature has not attempted through the WHWA to lend its power to one or the other side in controversies over authority or dogma. The WHWA merely regulates one aspect of the relationships between plaintiffs and their employees.

Constitutional Law
Freedom of Religion
Mandated Insurance Coverage for Contraceptives--"Religious Employer" Exception--Free Exercise--"Ministerial Exception"

(4) The Women's Health and Wellness Act (WHWA) (L 2002, ch 554), which requires that an employer health insurance contract that provides coverage for prescription drugs include coverage for the cost of contraceptives, does not violate the Free Exercise Clause of the First Amendment to the United States Constitution to the extent that its exemption from contraceptive coverage for "religious employers" (*see* Insurance Law § 3221 [*l*] [16] [A]; § 4303 [cc] [1]) does not extend to plaintiffs, faith-based social service organizations. The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability which, as here, does not target religious beliefs as such. The "ministerial exception," which exempts religious institutions from complying with title VII of the Civil Rights Act with respect to their ministers, was inapplicable. The existence of a limited exemption for ministers from antidiscrimination laws does not translate into an absolute right for a religiously-affiliated employer to structure all aspects of its relationship with its employees in conformity with church teachings.

Constitutional Law
Freedom of Religion
Mandated Insurance Coverage for Contraceptives--"Religious Employer" Exception--State Free Exercise Clause

(5) The Women's Health and Wellness Act (WHWA) (L 2002, ch 554), which requires that an employer health insurance contract that provides coverage ***512** for prescription drugs include coverage for the cost of contraceptives, does not violate the Free Exercise Clause of the New York Constitution (art I, § 3) to the extent that its exemption from contraceptive coverage for "religious employers" (*see* Insurance Law § 3221 [*l*] [16] [A]; § 4303 [cc] [1]) does not extend to plaintiffs, faith-based social service organizations. Where the State has not set out to burden religious exercise, but seeks only to advance, in a neutral way, a legitimate object of legislation, the New York Free Exercise Clause does not require the State to demonstrate a "compelling" interest in response to every claim by a religious believer to an exemption from the law. The WHWA does not literally compel plaintiffs to purchase contraceptive coverage for their employees, in violation of their religious beliefs. Moreover, when, as here, a religious organization chooses to hire employees who do not share its religious beliefs, it must, to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit. Finally, in view of the State's substantial interest in fostering equality between the sexes and in providing women with better health care, the legislation at issue did not constitute an unreasonable interference with plaintiffs' exercise of their religion.

Constitutional Law
Establishment of Religion
Mandated Insurance Coverage for Contraceptives--"Religious Employer" Exception

(6) The Women's Health and Wellness Act (WHWA) (L 2002, ch 554), which requires that an employer health insurance contract that provides coverage for prescription drugs include coverage for the cost of contraceptives, does not violate the Establishment Clause of the First Amendment to the United States Constitution to the extent that its exemption from contraceptive coverage for "religious employers" (*see* Insurance Law § 3221 [*l*] [16] [A]; § 4303 [cc] [1]) does not extend to plaintiffs, faith-based social service organizations. Although in another case the Establishment Clause was violated by a statute designed to exempt from certain regulatory requirements all religious faiths except a disfavored one, here the WHWA was not designed to favor or disfavor any particular religion. Legislative accommodation to religious believers is a long-standing practice consistent with First Amendment principles. A legislative decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause.

RESEARCH REFERENCES

Am Jur 2d, Constitutional Law §§ 415, 416, 420, 421, 424–427, 430, 431, 438, 444; Am Jur 2d, Insurance § 553; Am Jur 2d, Religious Societies § 1.

McKinney's, Insurance Law § 3221 (*l*) (16) (A); § 4303 (cc) (1); NY Const, art I, § 3.

NY Jur 2d, Constitutional Law §§ 246–248, 251; NY Jur 2d, Insurance §§ 216, 1417–1419, 2232, 2233, 2243; NY Jur 2d, Religious Organizations §§ 4–6.

ANNOTATION REFERENCE

See ALR Index under Birth Control; Freedom of Religion; Health and Accident Insurance.

***513 FIND SIMILAR CASES ON WESTLAW**

Database: NY-ORCS

Query: relig! & contracep! & health /4 insur!

POINTS OF COUNSEL

Tobin & Dempf LLP, Albany (*Michael L. Costello* and *Brian R. Haak* of counsel), and *Williams & Connolly LLP,* Washington, D.C. (*Kevin T. Baine* of counsel), for appellants.
I. The Women's Health and Wellness Act violates the free exercise provision of the New York Constitution. (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos,* 483 US 327; *Matter of Rivera v Smith,* 63 NY2d 501; *Matter of Brown v McGinnis,* 10 NY2d 531; *People v Barber,* 289 NY 378; *City of Boerne v Flores,* 521 US 507; *La Rocca v Lane,* 37 NY2d 575; *Sherbert v Verner,* 374 US 398; *Matter of Holy Spirit Assn. for Unification of World Christianity v Rosenfeld,* 91 AD2d 190; *People ex rel. DeMauro v Gavin,* 92 NY2d 963; *People v Woodruff,* 26 AD2d 236, 21 NY2d 848.) II. The Women's Health and Wellness Act violates the Free Exercise Clause of the United States Constitution. (*Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *United States v Lee,* 455 US 252; *University of Great Falls v National Labor Relations Bd.,* 278 F3d 1335; *Mitchell v Helms,* 530 US 793; *Larson v Valente,* 456 US 228; *Cantwell v Connecticut,* 310 US 296; *Boy Scouts of America v Dale,* 530 US 640; *Espinosa v Rusk,* 634 F2d 477, 456 US 951; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos,* 483 US 327; *Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevich,* 426 US 696.) III. The Women's Health and Wellness Act violates the Establishment Clause of the United States Constitution. (*Larson v Valente,* 456 US 228; *Epperson v Arkansas,* 393 US

97; *Zorach v Clauson,* 343 US 306; *Everson v Board of Ed. of Ewing,* 330 US 1; *Grumet v Pataki,* 93 NY2d 677; *Church of Lukumi Babalu Aye, Inc. v Hialeah,* 508 US 520; *Agostini v Felton,* 521 US 203; *Matter of Holy Spirit Assn. for Unification of World Christianity v Tax Commn. of City of N.Y.,* 55 NY2d 512; *University of Great Falls v National Labor Relations Bd.,* 278 F3d 1335; *Mitchell v Helms,* 530 US 793.)

Eliot Spitzer, Attorney General, New York City (*Shaifali Puri, Caitlin J. Halligan, Daniel Smirlock* and *Lisa Landau* of counsel), for respondent.

I. The challenged provisions of the Women's Health and Wellness Act do not violate plaintiffs' free exercise rights under the New York Constitution. (*People v Woodruff,* ***514** 26 AD2d 236; *People ex rel. DeMauro v Gavin,* 92 NY2d 963; *La Rocca v Lane,* 37 NY2d 575; *Matter of Rivera v Smith,* 63 NY2d 501; *Matter of Rourke v New York State Dept. of Correctional Servs.,* 201 AD2d 179; *Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *Matter of Miller,* 252 AD2d 156; *McGann v Incorporated Vil. of Old Westbury,* 256 AD2d 556; *New York State Club Assn. v City of New York,* 69 NY2d 211, 487 US 1; *In re Union Pac. R.R. Empl. Practices Litig.,* 378 F Supp 2d 1139.) II. The Women's Health and Wellness Act does not violate plaintiffs' free exercise rights under the Federal Constitution. (*Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *Church of Lukumi Babalu Aye, Inc. v Hialeah,* 508 US 520; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos,* 483 US 327; *Cutter v Wilkinson,* 544 US 709; *United States v Lee,* 455 US 252; *Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevich,* 426 US 696; *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church of North America,* 344 US 94; *Jones v Wolf,* 443 US 595; *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am.,* 62 NY2d 110; *Presbyterian Church in U. S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 US 440.) III. The challenged provisions of the Women's Health and Wellness Act do not violate the plaintiffs' Establishment Clause rights. (*Epperson v Arkansas,* 393 US 97; *Larson v Valente,* 456 US 228; *Walz v Tax Comm'n of City of New York,* 397 US 664; *Agostini v Felton,* 521 US 203; *Lemon v Kurtzman,* 403 US 602; *Matter of Klein [Hartnett],* 78 NY2d 662; *Braunfeld v Brown,* 366 US 599; *Hernandez v Commissioner of Internal Revenue,* 490 US 680; *Bowen v Kendrick,* 487 US 589; *Matter of Holy Spirit Assn. for Unification of World Christianity v Tax Commn. of City of N.Y.,* 55 NY2d 512.)

Marc D. Stern, New York City, for American Jewish Congress and another, amici curiae.

I. The Court needs to set a standard for applying New York Constitution, article I, § 3. (*Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *People ex rel. DeMauro v Gavin,* 92 NY2d 963; *People v Woodruff,* 26 AD2d 236, 21 NY2d 848; *In re Grand Jury Empaneling of Special Grand Jury,* 171 F3d 826; *Smilow v United States,* 465 F2d 802,

409 US 944; *Lightman v Flaum,* 97 NY2d 128; *Matter of New York State Empl. Relations Bd. v Christ the King Regional High School,* 90 NY2d 244; *Ware v Valley Stream High School Dist.,* 75 NY2d 114; *Wisconsin v Yoder,* 406 US 205; *Matter of Fosmire v Nicoleau,* 75 NY2d 218.) II. The standardless ***515** balancing applied by the court below is an inappropriate test for protecting religious liberty under New York Constitution, article I, § 3. (*Ware v Valley Stream High School Dist.,* 75 NY2d 114; *People ex rel. DeMauro v Gavin,* 92 NY2d 963; *People v Woodruff,* 26 AD2d 236; *Vieth v Jubelirer,* 541 US 267; *Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *Board of Ed. of Kiryas Joel Village School Dist. v Grumet,* 512 US 687; *Carey v Piphus,* 435 US 247; *Lyng v Northwest Indian Cemetery Protective Assn.*, 485 US 439; *Sherbert v Verner*, 374 US 398.) III. The Court needs to assert a separate state standard under New York Constitution, article I, § 3. (*Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *Church of Lukumi Babalu Aye, Inc. v Hialeah,* 508 US 520; *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am.,* 62 NY2d 110; *Matter of Foy Prods. v Graves,* 253 App Div 475; *O'Neill v Oakgrove Constr.,* 71 NY2d 521; *Matter of Patchogue-Medford Congress of Teachers v Board of Educ. of Patchogue-Medford Union Free School Dist.,* 70 NY2d 57; *Courtroom Tel. Network LLC v State of New York,* 5 NY3d 222; *People v Jacobs,* 6 NY3d 188; *Immuno AG. v Moor-Jankowski,* 77 NY2d 235; *Sherbert v Verner,* 374 US 398.) IV. Strict scrutiny is not inevitably fatal. (*Valley Forge Christian College v Americans United for Separation of Church & State, Inc.,* 454 US 464; *Sherbert v Verner,* 374 US 398; *Lyng v Northwest Indian Cemetery Protective Assn.,* 485 US 439; *Grutter v Bollinger,* 539 US 306.) V. The Women's Health and Wellness Act protects the peace and safety of the state. (*Cornell Univ. v Bagnardi,* 66 NY2d 603.)

Elisabeth Ryden Benjamin, New York City, *Galen Leigh Sherwin*, *Arthur N. Heisenberg, Julie Sternberg* and *Diana Kasdan* for New York Civil Liberties Union and another, amici curiae.

I. The Women's Health and Wellness Act does not violate appellants' free exercise rights under the New York Constitution. (*People v Barber,* 289 NY 378; *Matter of Rivera v Smith,* 63 NY2d 501; *People v Pierson,* 176 NY 201; *Williams v Bright,* 230 AD2d 548; *La Rocca v Lane,* 37 NY2d 575; *People v Woodruff,* 26 AD2d 236, 21 NY2d 848; *Matter of Brown v McGinnis,* 10 NY2d 531; *People ex rel. DeMauro v Gavin,* 92 NY2d 963; *Sherbert v Verner,* 374 US 398; *Matter of Watson,* 171 NY 256.) II. The Women's Health and Wellness Act does not violate appellants' free exercise rights under the Federal Constitution. (*Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *Church of Lukumi Babalu Aye, Inc. v Hialeah,* 508 US 520; *DeMarco v Holy Cross High School,* 4 F3d 166; *Catholic* ***516** *High School Assn. of Archdiocese of N.Y. v Culvert,* 753 F2d 1161; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos,* 483 US 327; *Dole v Shenandoah Baptist*

Church, 899 F2d 1389; *Gillette v United States,* 401 US 437; *Roemer v Board of Public Works of Md.,* 426 US 736; *Hunt v McNair,* 413 US 734; *Tilton v Richardson,* 403 US 672.) III. The Women's Health and Wellness Act does not violate the Establishment Clause of the Federal Constitution. (*Matter of Germenis v Coughlin,* 232 AD2d 738; *Matter of Lewis v Allen,* 11 AD2d 447, 14 NY2d 867; *McGowan v Maryland,* 366 US 420; *Equal Empl. Opportunity Commn. v Tree of Life Christian Schools,* 751 F Supp 700; *Bowen v Kendrick,* 487 US 589; *Gillette v United States,* 401 US 437; *Graham v Commissioner of Internal Revenue Serv.,* 822 F2d 844; *Bob Jones Univ. v United States,* 461 US 574; *Larson v Valente,* 456 US 228; *Kong v Scully,* 341 F3d 1132.)

Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C. (*A. Stephen Hut, Jr., Kimberly A. Parker* and *Ilona R. Cohen* of counsel), for American College of Obstetricians and Gynecologists, New York District, and others, amici curiae.

I. Access to contraception is essential to the basic health care of New York women and their children. II. Access to prescription contraception allows more New York women and their children to benefit from contraception and provides additional health advantages. III. The Women's Health and Wellness Act's prescription contraceptive coverage provision is necessary to ensure that New York women have adequate access to the wide range of contraceptive methods. IV. The Women's Health and Wellness Act furthers a compelling state interest and does not violate the Free Exercise Clause of either the Federal or New York State Constitution. (*Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *Church of Lukumi Babalu Aye, Inc. v Hialeah,* 508 US 520; *United States v Lee,* 455 US 252; *People v Woodruff,* 26 AD2d 236; *Matter of Miller,* 252 AD2d 156; *Matter of Sampson,* 37 AD2d 668; *Prince v Massachusetts,* 321 US 158; *People ex rel. Fish v Sandstrom,* 279 NY 523.)

Wingate, Kearney & Cullen, Brooklyn (*Kevin M. Kearney* of counsel), *Mark E. Chopko*, Washington, D.C., and *Michael F. Moses* for Becket Fund for Religious Liberty and others, amici curiae.

I. This case has grave implications for all religious denominations. II. Forcing appellants to pay for insurance coverage for contraceptives in their own workplaces violates the First Amendment to the United States Constitution. (*Lemon v Kurtzman,* ***517** 403 US 602; *Illinois ex rel. McCollum v Board of Ed. of School Dist. No. 71, Champaign Cty.,* 333 US 203; *Everson v Board of Ed. of Ewing,* 330 US 1; *Larkin v Grendel's Den, Inc.,* 459 US 116; *Gonzalez v Roman Catholic Archbishop of Manila,* 280 US 1; *City of Boerne v Flores,* 521 US 507; *Prince v Massachusetts,* 321 US 158; *Walz v Tax Comm'n of City of New York,* 397 US 664; *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church of North America,* 344 US 94; *Presbyterian Church in U. S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 US 440.) III. The statutory exemption is neither constitutional nor rationally related to a legitimate

government objective. (*Lemon v Kurtzman,* 403 US 602; *University of Great Falls v National Labor Relations Bd.,* 278 F3d 1335; *National Labor Relations Bd. v Catholic Bishop of Chicago,* 559 F2d 1112, 440 US 490; *Mitchell v Helms,* 530 US 793; *United States v Ballard,* 322 US 78; *Locke v Davey,* 540 US 712; *Larson v Valente,* 456 US 228; *Church of Lukumi Babalu Aye, Inc. v Hialeah,* 508 US 520; *Wilson v National Labor Relations Bd.,* 920 F2d 1282.) IV. The contraceptive mandate is per se unconstitutional; in the alternative, the mandate is not the most restrictive means of furthering a compelling state interest. (*Lemon v Kurtzman,* 403 US 602; *Church of Scientology Flag Serv. Org., Inc. v Clearwater,* 2 F3d 1514; *Larson v Valente,* 456 US 228; *Equal Empl. Opportunity Commn. v Roman Catholic Diocese of Raleigh, N.C.,* 213 F3d 795; *Combs v Central Tex. Annual Conference of United Methodist Church,* 173 F3d 343; *Equal Empl. Opportunity Commn. v Catholic Univ. of Am.,* 83 F3d 455; *Gellington v Christian M.E. Church, Inc.,* 203 F3d 1299; *Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos,* 483 US 327; *Hall v Baptist Mem. Health Care Corp.,* 215 F3d 618.)

Planned Parenthood Federation of America, Inc., New York City (*Eve C. Gartner* and *Jennifer Sandman* of counsel), for American Jewish Committee and others, amici curiae.

I. The Appellate Division correctly ruled that the Legislature enacted the Women's Health and Wellness Act to ensure gender equity in prescription coverage in New York State. II. The Appellate Division correctly ruled that New York State has a compelling interest in prohibiting the sex discrimination caused by contraceptive exclusions. (*In re Union Pac. R.R. Empl. Practices Litig.,* 378 F Supp 2d 1139; *Erickson v Bartell Drug Co.,* 141 F Supp 2d 1266; *Equal Empl. Opportunity Commn. v United Parcel Serv., Inc.,* 141 F Supp 2d 1216; *Cooley v DaimlerChrysler,* ***518** 281 F Supp 2d 979; *California Fed. Sav. & Loan Assn. v Guerra,* 758 F2d 390, 479 US 272; *Saks v Franklin Covey Co.,* 316 F3d 337; *Matter of Beame v DeLeon,* 87 NY2d 289; *Lawrence v Texas,* 539 US 558; *Eisenstadt v Baird,* 405 US 438; *Griswold v Connecticut,* 381 US 479.)

Winston & Strawn LLP, New York City and Washington, D.C. (*Piero A. Tozzi, Gene C. Schaerr* and *Steffen N. Johnson* of counsel), for Campus Crusade for Christ, Inc., and another, amici curiae.

The contraceptive mandate violates article I, § 3 of the New York State Constitution and should be declared unconstitutional. (*Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872; *Lightman v Flaum,* 278 AD2d 373, 97 NY2d 128; *Matter of New York State Empl. Relations Bd. v Christ the King Regional High School,* 90 NY2d 244; *Matter of Miller,* 252 AD2d 156; *People v Alvarez,* 70 NY2d 375; *People v P.J. Video,* 68 NY2d 296; *City of Boerne v Flores,* 521 US 507; *People v Barber,* 289 NY 378; *People v Scott,* 79 NY2d 474; *O'Neill v Oakgrove Constr.,* 71 NY2d 521.)

OPINION OF THE COURT

R.S. Smith, J.

Plaintiffs challenge the validity of legislation requiring health insurance policies that provide coverage for prescription drugs to include coverage for contraception. Plaintiffs assert that the provisions they challenge violate their rights under the religion clauses of the ****2** federal and state constitutions. We hold that the legislation, as applied to these plaintiffs, is valid.

THE CHALLENGED LEGISLATION

In 2002, the Legislature enacted what is known as the "Women's Health and Wellness Act" (WHWA), mandating expanded health insurance coverage for a variety of services needed by women, including mammography, cervical cytology and bone density screening (L 2002, ch 554). At issue here are provisions of the WHWA requiring that an employer health insurance contract "which provides coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices" (Insurance Law § 3221 [*l*] [16]; § 4303 [cc]).

The legislative history makes clear that the WHWA in general, and the provisions relating to contraception in particular, were designed to advance both women's health and the equal treatment of men and women. The Legislature was provided with extensive information showing the need for the legislation.

***519** For example, the Legislature had before it a study showing that women paid 68% more than men in out-of-pocket expenses for health care, and that the cost of reproductive health services was a primary reason for the discrepancy. The American College of Obstetricians and Gynecologists advised the Legislature that better access to contraception would mean fewer abortions and unplanned pregnancies, and that the ability to time and space pregnancies was important to women's health. These conclusions are supported by studies contained in the record of this litigation, showing among other things that unintended pregnancies are often associated with delayed prenatal care; that such conditions as diabetes, hypertension, arthritis and coronary artery disease can be aggravated by pregnancy; that children born from unintended pregnancies are at risk of low birth weight and developmental problems; and that there are 3 million unintended pregnancies in the United States each year, of which approximately half end in abortion.

At the heart of this case is the statute's exemption for "religious employers." Such an employer may request an insurance contract "without coverage for . . . contraceptive methods that are contrary to the religious employer's religious tenets" (Insurance Law § 3221 [*l*] [16] [A]; § 4303 [cc] [1]). Where a religious employer invokes the exemption, the insurer must offer coverage for contraception to individual employees, who may purchase it at their own expense "at the prevailing

small group community rate" (Insurance Law § 3221 [*l*] [16] [B] [i]; § 4303 [cc] [2] [A]). A "religious employer," as defined in the statute, is:

> "an entity for which each of the following is true: ****3**
>
> "(a) The inculcation of religious values is the purpose of the entity.
>
> "(b) The entity primarily employs persons who share the religious tenets of the entity.
>
> "(c) The entity serves primarily persons who share the religious tenets of the entity.
>
> "(d) The entity is a nonprofit organization as described in Section 6033 (a) (2) (A) i or iii, of the Internal Revenue Code of 1986, as amended." (Insurance Law § 3221 [*l*] [16] [A] [1]; *see* § 4303 [cc] [1] [A] [i]-[iv].)

***520** Plaintiffs say that this definition is unconstitutionally narrow.

The Legislature debated the scope of the "religious employer" exemption intensely before the WHWA was passed. A broader exemption was proposed, one that would have been available to any "group or entity . . . supervised or controlled by or in connection with a religious organization or denominational group or entity" (2001 NY Senate Bill S 3, § 14). Supporters of this version of the exemption argued, as do plaintiffs here, that religious organizations should not be forced to violate the commands of their faith. Those favoring a narrower exemption asserted that the broader one would deprive tens of thousands of women employed by church-affiliated organizations of contraceptive coverage. Their view prevailed.

THIS ACTION

Plaintiffs are 10 faith-based social service organizations that object to the contraceptive coverage mandate in the WHWA. Eight plaintiffs are affiliated in some way with the Roman Catholic Church: of these, three are large entities that provide a variety of social services, including immigrant resettlement programs, affordable housing programs, job development services, and domestic violence shelters; three primarily operate health care facilities, such as hospice centers, nursing homes and rehabilitative care facilities; and two operate schools. The other two plaintiffs are affiliated with the Baptist Bible Fellowship International: one of them offers a variety of social services to the public, including prison ministry, crisis pregnancy centers, job placement and homeless services; the other operates a K-12 school and provides day-care, preschool and youth services.

None of the plaintiffs qualifies as a "religious employer" under the WHWA. This is essentially because plaintiffs are not, or are not only, churches ministering to the faithful, but are providers

of social and educational services. Each of the plaintiffs asserts that its purpose is **4 not, or is not only, the inculcation of religious values; most of the plaintiffs acknowledge that they employ many people not of their faiths; all of the plaintiffs serve people not of their faiths; and only three of the plaintiffs are exempt from filing tax returns under Internal Revenue Code (26 USC) § 6033 (a) (2) (A) (i) or (iii) (now § 6033 [a] [3] [A] [i] or [iii]), provisions applicable to churches and religious orders.

Plaintiffs believe contraception to be sinful, and assert that the challenged provisions of the WHWA compel them to violate *521 their religious tenets by financing conduct that they condemn. The sincerity of their beliefs, and the centrality of those beliefs to their faiths, are not in dispute.

Contending that they are constitutionally entitled to be exempt from the provisions of the WHWA providing for coverage of contraceptives, plaintiffs brought this action against the Superintendent of Insurance, seeking a declaration that these portions of the WHWA are invalid, and an injunction against their enforcement. The complaint asserts broadly that the challenged provisions are unconstitutional, but plaintiffs do not argue that they are unenforceable as to employers having no religious objections to contraception; in substance, plaintiffs challenge the legislation as applied to them. Supreme Court rejected the challenge, and granted summary judgment dismissing plaintiffs' complaint and declaring the legislation valid. The Appellate Division affirmed, with two Justices dissenting. We now affirm.

DISCUSSION

Plaintiffs argue that the provisions of the WHWA requiring coverage of contraception violate the Free Exercise clauses of the New York and United States constitutions, and the Establishment Clause of the United States Constitution. Plaintiffs' strongest claim is under the New York Free Exercise Clause, but our analysis of that claim may be clearer if we discuss the federal Free Exercise Clause first.

I

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." By virtue of the Fourteenth Amendment, this provision is binding on the states as well as the federal government (*Cantwell v Connecticut*, 310 US 296, 303 [1940]).

The United States Supreme Court's decision in *Employment Div., Dept. of Human Resources of Ore. v Smith* (494 US 872 [1990]) bars plaintiffs' federal free exercise claim. In *Smith*, the Court interpreted its First Amendment decisions as holding "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability

on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)' " (*id.* at 879, quoting ***522** *United States v Lee*, 455 US 252, 263 n 3 [1982, Stevens, J., concurring]). The Court ****5** held that where a prohibition on the exercise of religion "is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended" (494 US at 878).

(1) By that test, the First Amendment has not been offended here. The burden on plaintiffs' religious exercise is the incidental result of a "neutral law of general applicability," one requiring health insurance policies that include coverage for prescription drugs to include coverage for contraception. A "neutral" law, the Supreme Court has explained, is one that does not "target [ ] religious beliefs as such" or have as its "object . . . to infringe upon or restrict practices because of their religious motivation" (*Church of Lukumi Babalu Aye, Inc. v Hialeah*, 508 US 520, 533 [1993]). Religious beliefs were not the "target" of the WHWA, and it was plainly not that law's "object" to interfere with plaintiffs' or anyone's exercise of religion. Its object was to make broader health insurance coverage available to women and, by that means, both to improve women's health and to eliminate disparities between men and women in the cost of health care.

The fact that some religious organizations--in general, churches and religious orders that limit their activities to inculcating religious values in people of their own faith--are exempt from the WHWA's provisions on contraception does not, as plaintiffs claim, demonstrate that these provisions are not "neutral." The neutral purpose of the challenged portions of the WHWA--to make contraceptive coverage broadly available to New York women--is not altered because the Legislature chose to exempt some religious institutions and not others. To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions--and thus to restrict, rather than promote, freedom of religion. As the California Supreme Court explained, in a decision upholding a statute nearly identical to the WHWA:

> "The high court has never prohibited statutory references to religion for the purpose of accommodating religious practice. To the contrary, the court has repeatedly indicated that 'it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations ***523** to define and carry out their religious missions' " (*Catholic Charities of Sacramento, Inc. v Superior Ct.*, 32 Cal 4th 527, 551, 85 P3d 67, 83 [2004], quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos*, 483 US 327, 335 [1987]).

(2) Nor can plaintiffs escape the force of the Supreme Court's decision in *Smith* by ****6** relying on the so-called "hybrid rights" exception. The notion of "hybrid rights" is derived from a dictum in which the *Smith* court distinguished certain of its previous cases by saying:

> "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents . . . to direct the education of their children" (494 US at 881 [citations omitted]).

Assuming that the above language does create an exception to the general rule of *Smith*, the exception does not apply here, for this is not a case that involves free exercise "in conjunction with other constitutional protections." Plaintiffs claim that the challenged legislation interferes with their rights of free speech and association, but the claim is insubstantial. The legislation does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like; nor does it compel them to associate, or prohibit them from associating, with anyone (*see Rumsfeld v Forum for Academic and Institutional Rights, Inc.*, 547 US 47,---, 126 S Ct 1297, 1309-1313 [2006]). It does burden their exercise of religion--but that alone, under *Smith*, cannot call the validity of a generally applicable and neutral statute into question.

(3) Plaintiffs also suggest that an exception to the holding of *Smith* can be derived from the doctrine of church autonomy, which prevents states from interfering in matters of internal church governance (*Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevich*, 426 US 696, 709-710 [1976]; *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church of North America*, 344 US 94, 107-108 [1952]) or determining ecclesiastical questions (***524** *Presbyterian Church in U. S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 US 440, 447 [1969]). But church autonomy is not at issue in this case. The Legislature has not attempted through the WHWA to "lend its power to one or the other side in controversies over religious authority or dogma" (*Employment Div. v Smith*, 494 US at 877, citing *Presbyterian Church*, 393 US at 445-452, *Kedroff*, 344 US at 95-119, and *Serbian Eastern Orthodox Diocese*, 426 US at 708-725). The WHWA merely regulates one aspect of the relationship between plaintiffs and their employees.

(4) Relying on the church autonomy cases, some lower federal courts have recognized a "ministerial exception" which exempts religious institutions from complying with title VII of the Civil Rights Act with respect to their ministers (*see e.g. Equal Empl. Opportunity Commn. v Roman Catholic Diocese of Raleigh, N.C.*, 213 F3d 795, 800 [4th Cir 2000]; *Alicea-Hernandez v Catholic Bishop of Chicago*, 320 F3d 698, 702-703 [7th Cir 2003]). But the ministerial exception has no bearing here; this case does not ****7** involve the right of a church to determine who it will employ to carry out its religious mission. The existence of a limited exemption for ministers from antidiscrimination laws does not translate into an absolute right for a religiously-affiliated employer to structure all aspects of its relationship with its employees in conformity with church

teachings. The ministerial exception has been applied only to employment discrimination claims, and only to "ministers," broadly defined. This case involves neither.

In short, no exception to *Smith* is applicable in this case. *Smith* is an insuperable obstacle to plaintiffs' federal free exercise claim.

II

Article I, § 3 of the New York Constitution provides:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

***525** **[5]** In interpreting our Free Exercise Clause we have not applied, and we do not now adopt, the inflexible rule of *Smith* that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute. Rather, we have held that when the State imposes "an incidental burden on the right to free exercise of religion" we must consider the interest advanced by the legislation that imposes the burden, and that "[t]he respective interests must be balanced to determine whether the incidental burdening is justified" (*La Rocca v Lane*, 37 NY2d 575, 583 [1975], citing *People v Woodruff*, 26 AD2d 236, 238 [1966], *affd* 21 NY2d 848 [1968]). We have never discussed, however, how the balancing is to be performed. Specifically, we have not said how much, if any, deference we will give to the judgments of the Legislature when the result of those judgments is to burden the exercise of religion. We now hold that substantial deference is due the Legislature, and that the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom. This test, while more protective of religious exercise than the rule of *Smith*, is less so than the rule stated (though not always applied) in a number of other federal and state cases.

Before *Smith*, the leading United States Supreme Court case involving burdens imposed on religious exercise by generally applicable laws was *Sherbert v Verner*, in which the Court held that justification of "any incidental burden on the free ****8** exercise of . . . religion" requires "a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate' " (374 US 398, 403 [1963], quoting *NAACP v Button*, 371 US 415, 438 [1963]). This test has been characterized as "strict scrutiny" (*e.g.*, *Catholic Charities of Sacramento*, 32 Cal 4th at 548, 85 P3d at 81), and it might be thought that few laws would pass the test. However, after upholding a claim of free exercise against a neutral and generally applicable statute in

Wisconsin v Yoder (406 US 205 [1972]), the Supreme Court "rejected every claim for a free exercise exemption to come before it" for 18 years (McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1417 [1990]). During that period, many thought the Court's claim to be applying strict scrutiny--a claim finally abandoned when *Smith* was decided in 1990--less than convincing (*e.g.*, *United States v Lee*, 455 US 252, 262-263 [1982, Stevens, J., concurring]).

***526** Since *Smith*, a number of state courts have interpreted their states' constitutions to call for the application of strict scrutiny (*e.g.*, *Smith v Fair Empl. & Hous. Commn.*, 12 Cal 4th 1143, 913 P2d 909 [1996]; *Swanner v Anchorage Equal Rights Commn.*, 874 P2d 274 [Alaska 1994]; *Attorney Gen. v Desilets*, 418 Mass 316, 636 NE2d 233 [1994]). Often, however, as in the California and Alaska cases just cited, the courts rejected claims to religious exemptions, and it is questionable whether the scrutiny applied by those courts is really as strict as their statement of the rule implies. Justice Brown of the California Supreme Court, dissenting in *Catholic Charities of Sacramento* (32 Cal 4th at 583, 85 P3d at 105), remarked:

> "Strict scrutiny is not what it once was. Described in the past as 'strict in theory and fatal in fact' (Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection* (1972) 86 Harv. L. Rev. 1, 8), it has mellowed in recent decades . . . .
>
> "If recent precedent is any guide, a state's interest is compelling if the state says it is."

The apparent reluctance of some courts to pay more than lip service to "strict scrutiny" may be an implicit recognition of what we now explicitly decide: Strict scrutiny is not the right approach to constitutionally-based claims for religious exemptions. Where the State has not set out to burden religious exercise, but seeks only to advance, in a neutral way, a legitimate object of legislation, we do not read the New York Free Exercise Clause to require the State to demonstrate a "compelling" interest in response to every claim by a religious believer to an exemption from the law; such a rule of constitutional law would give too little respect to ****9** legislative prerogatives, and would create too great an obstacle to efficient government. Rather, the principle stated by the United States Supreme Court in *Smith*--that citizens are not excused by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets--should be the usual, though not the invariable, rule. The burden of showing that an interference with religious practice is unreasonable, and therefore requires an exemption from the statute, must be on the person claiming the exemption.

The burden, however, should not be impossible to overcome. As Professor (now Judge) McConnell has pointed out, a rule ***527** that the Constitution never requires a religious exemption from generally applicable laws could lead to results plainly inconsistent with basic ideas of religious freedom:

> "Under the no-exemptions view . . . religious believers and institutions cannot challenge facially neutral legislation, no matter what effect it may have on their ability or freedom to practice their religious faith. Thus, a requirement that all witnesses must testify to facts within their knowledge bearing on a criminal prosecution . . . if applied without exception, could abrogate the confidentiality of the confessional. Similarly, a general prohibition of alcohol consumption could make the Christian sacrament of communion illegal, uniform regulation of meat preparation could put kosher slaughterhouses out of business, and prohibitions of discrimination on the basis of sex or marital status could end the male celibate priesthood." (*The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev at 1418-1419.)

We find these hypothetical laws to be well beyond the bounds of constitutional acceptability. And we by no means exclude the possibility that, even in much less extreme cases, parties claiming an exemption from generally applicable and neutral laws will be able to show that the State has interfered unreasonably with their right to practice their religion. We conclude, however, that plaintiffs here fall short of making such a showing.

The burden the WHWA places on plaintiffs' religious practices is a serious one, but the WHWA does not literally *compel* them to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives. Plaintiffs are not required by law to purchase prescription drug coverage at all. They assert, unquestionably in good faith, that they feel obliged to do so because, as religious institutions, they must provide just wages and benefits to their employees. But it is surely not impossible, though it may be expensive or difficult, to ****10** compensate employees adequately without including prescription drugs in their group health care policies.

It is also important, in our view, that many of plaintiffs' employees do not share their religious beliefs. (Most of the plaintiffs allege that they hire many people of other faiths; no ***528** plaintiff has presented evidence that it does not do so.) The employment relationship is a frequent subject of legislation, and when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit. This would be a more difficult case if plaintiffs had chosen to hire only people who share their belief in the sinfulness of contraception.

Finally, we must weigh against plaintiffs' interest in adhering to the tenets of their faith the State's substantial interest in fostering equality between the sexes, and in providing women with better health care. The Legislature had extensive evidence before it that the absence of contraceptive coverage for many women was seriously interfering with both of these important goals. The Legislature decided that to grant the broad religious exemption that plaintiffs seek would leave too many women outside the statute, a decision entitled to deference from the courts. Of course, the

Legislature might well have made another choice, but we cannot say the choice the Legislature made has been shown to be an unreasonable interference with plaintiffs' exercise of their religion. The Legislature's choice is therefore not unconstitutional.

III

(6) Plaintiffs' final claim is that the challenged sections of the WHWA violate the Establishment Clause of the Federal Constitution. We find this claim to be without merit.

The claim rests essentially on a misreading of a single United States Supreme Court case, *Larson v Valente* (456 US 228 [1982]). *Larson* held that the Establishment Clause was violated by a statute designed to exempt from certain regulatory requirements all religious faiths except a disfavored one, the Unification Church. The Court found the statute to violate the Establishment Clause's "clearest command": "that one religious denomination cannot be officially preferred over another" (*id.* at 244). Nothing of the kind has happened in this case. It cannot be convincingly argued that the WHWA was designed to favor or disfavor Catholics, Baptists or any other religion. The statute is, as we explained above, generally applicable and neutral between religions.

Plaintiffs contend that the legislation is invalid under *Larson* because it distinguishes between religious organizations that are exempt from the contraception requirements and those that ***529** are not. But this kind of distinction--not between denominations, but between religious organizations based on the nature of their activities--is not what *Larson* ****11** condemns. Plaintiffs' theory would call into question any limitations placed by the Legislature on the scope of any religious exemption--and thus would discourage the Legislature from creating any such exemptions at all. But, as we pointed out above, legislative accommodation to religious believers is a long-standing practice completely consistent with First Amendment principles. A legislative decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause.

IV

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Ciparick, Rosenblatt, Graffeo and Read concur; Judge Pigott taking no part.

Order affirmed, with costs.

End of Document

104 S.Ct. 2778
Supreme Court of the United States

CHEVRON, U.S.A., INC., Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.
AMERICAN IRON AND STEEL INSTITUTE, et al., Petitioners,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.
William D. RUCKELSHAUS, Administrator,
Environmental Protection Agency, Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., et al. *

Nos. 82-1005, 82-1247 and 82-1591.
|
Argued Feb. 29, 1984.
|
Decided June 25, 1984.

Synopsis
Rehearing Denied Aug. 16, 1984.

See 468 U.S. 1227, 105 S.Ct. 28, 29.

Petition was filed for review of order of the Environmental Protection Agency. The Court of Appeals, 685 F.2d 718, vacated regulations, and certiorari was granted. The Supreme Court, Justice Stevens, held that Environmental Protection Agency regulation allowing states to treat all pollution-emitting devices within same industrial grouping as though they were encased within single "bubble" was based on permissible construction of term "stationary source" in Clean Air Act Amendments.

Reversed.

Syllabus [a1]

The Clean Air Act Amendments of 1977 impose certain requirements on States ****2779** that have not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation, including the requirement that such "nonattainment" States establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for such sources unless stringent conditions are met. EPA regulations promulgated in 1981 to implement the permit requirement allow a State to adopt a plantwide definition of the term "stationary source," under which an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant, thus allowing a State to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble." Respondents filed a petition for review in the Court of Appeals, which set aside the regulations embodying the "bubble concept" as contrary to law. Although recognizing that the amended Clean Air Act does not explicitly define what Congress envisioned as a "stationary source" to which the permit program should apply, and that the issue was not squarely addressed in the legislative history, the court concluded that, in view of the purpose of the nonattainment program to improve rather than merely maintain air quality, a plantwide definition was "inappropriate," while stating it was mandatory in programs designed to maintain existing air quality.

Held: The EPA's plantwide definition is a permissible construction of the statutory term "stationary source." Pp. 2781–2793.

(a) With regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the ***838** agency's answer is based on a permissible construction of the statute. Pp. 2781–2783.

(b) Examination of the legislation and its history supports the Court of Appeals' conclusion that Congress did not have a specific intention as to the applicability of the "bubble concept" in these cases. Pp. 2783–2786.

(c) The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas plainly discloses that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality. Pp. 2786–2787.

(d) Prior to the 1977 Amendments, the EPA had used a plantwide definition of the term "source," but in 1980 the EPA ultimately adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals here, precluding use of the "bubble concept" in nonattainment States' programs designed to enhance air quality. However, when a new administration took office 1981, the EPA, in promulgating the regulations involved here, reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the plantwide definition in nonattainment areas. Pp. 2787–2790.

(e) Parsing the general terms in the text of the amended Clean Air Act—particularly the provisions of §§ 302(j) and 111(a)(3) pertaining to the definition of "source"—does not reveal any actual intent of Congress as to the issue in these cases. To the extent any congressional "intent" can be discerned from the statutory language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the EPA's power to regulate particular sources in order to effectuate the policies of the Clean Air Act. Similarly, the legislative history is consistent with the ****2780** view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments. The plantwide definition is fully consistent with the policy of allowing reasonable economic growth, and the EPA has advanced a reasonable explanation for its conclusion that the regulations serve environmental objectives as well. The fact that the EPA has from time to time changed its interpretation of the term "source" does not lead to the conclusion that no deference should be accorded the EPA's interpretation of the statute. An agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Policy arguments concerning the "bubble concept" should be addressed to legislators or administrators, not to judges. The EPA's interpretation of the statute here represents a reasonable accommodation of manifestly competing interests and is entitled to deference. Pp. 2790–2793.

222 U.S.App.D.C. 268, 685 F.2d 718 (1982), reversed.

Attorneys and Law Firms

Deputy Solicitor General Bator argued the cause for petitioners in all cases. With him on the briefs for petitioner in No. 82-1591 were *Solicitor General Lee, Acting Assistant Attorney General Habicht, Deputy Assistant Attorney General Walker, Mark I. Levy, Anne S. Almy, William F. Pedersen,* and *Charles S. Carter. Michael H. Salinsky* and *Kevin M. Fong* filed briefs for petitioner in No. 82-1005. *Robert A. Emmett, David Ferber, Stark Ritchie, Theodore L. Garrett, Patricia A. Barald, Louis E. Tosi, William L. Patberg, Charles F. Lettow,* and *Barton C. Green* filed briefs for petitioners in No. 82-1247.

***839** *David D. Doniger* argued the cause and filed a brief for respondents.†>>>

† Briefs of *amici curiae* urging reversal were filed for the American Gas Association by *John A. Myler;* for the Mid-America Legal Foundation by *John M. Cannon, Susan W. Wanat,* and *Ann P. Sheldon;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Robin L. Rivett.*

A brief of *amici curiae* urging affirmance was filed for the Commonwealth of Pennsylvania et al. by *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Thomas Y. Au, Duane Woodard,* Attorney General of Colorado, *Richard L. Griffith,* Assistant Attorney General, *Joseph I. Lieberman,* Attorney General of Connecticut, *Robert A. Whitehead, Jr.,* Assistant Attorney General, *James S. Tierney,* Attorney General of Maine, *Robert Abrams,* Attorney General of New York, *Marcia J. Cleveland* and *Mary L. Lyndon,* Assistant Attorneys General, *Irwin I. Kimmelman,* Attorney General of New Jersey, *John J. Easton, Jr.,* Attorney General of Vermont, *Merideth Wright,* Assistant Attorney General, *Bronson C. La Follette,* Attorney General of Wisconsin, and *Maryann Sumi,* Assistant Attorney General.

James D. English, Mary-Win O'Brien, and *Bernard Kleiman* filed a brief for the United Steelworkers of America, AFL-CIO-CLC, as *amicus curiae.*

Opinion

Justice STEVENS delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, Pub.L. 95–95, 91 Stat. 685, Congress enacted certain requirements applicable ***840** to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. [1] The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source." [2] Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October ***841** 14, 1981. 46 Fed.Reg. 50766. Respondents [3] filed a timely petition

for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. § 7607(b)(1).[4] The Court of Appeals **2781 set aside the regulations. Natural Resources Defense Council, Inc. v. Gorsuch, 222 U.S.App.D.C. 268, 685 F.2d 718 (1982).

The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source, to which the permit program ... should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." Id., at 273, 685 F.2d, at 723. In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." Id., at 276, n. 39, 685 F.2d, at 726, n. 39.[5] Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs,[6] the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. Id., at 276, 685 F.2d, at 726. Since the purpose of the permit *842 program —its "raison d'être," in the court's view—was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. Ibid. It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, 461 U.S. 956, 103 S.Ct. 2427, 77 L.Ed.2d 1314 (1983), and we now reverse.

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals.[7] Nevertheless, since this Court reviews judgments, not opinions,[8] we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

II

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, *843 as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9] If, however, **2782 the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute,[10] as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[11]

"The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation ***844** of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [12] Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. [13]

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, [14] and the principle of deference to administrative interpretations.

"has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full ****2783** understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190 [63 S.Ct. 997, 87 L.Ed. 1344]; Labor Board v. Hearst Publications, Inc., 322 U.S. 111 [64 S.Ct. 851, 88 L.Ed. 1170]; ***845** Republic Aviation Corp. v. Labor Board, 324 U.S. 793 [65 S.Ct. 982, 89 L.Ed. 1372]; Securities & Exchange Comm'n v. Chenery Corp., [332] 322 U.S. 194 [67 S.Ct. 1575, 91 L.Ed. 1995]; Labor Board v. Seven–Up Bottling Co., 344 U.S. 344 [73 S.Ct. 287, 97 L.Ed. 377].
"... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." United States v. Shimer, 367 U.S. 374, 382, 383, 81 S.Ct. 1554, 1560, 1561, 6 L.Ed.2d 908 (1961).

Accord Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699–700, 104 S.Ct. 2694, 2700–2701, 81 L.Ed.2d 580 (1984).

In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble

concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.

III

In the 1950's and the 1960's Congress enacted a series of statutes designed to encourage and to assist the States in curtailing air pollution. See generally Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 63–64, 95 S.Ct. 1470, 1474–1475, 43 L.Ed.2d 731 (1975). The Clean Air Amendments of 1970, Pub.L. 91–604, 84 Stat. 1676, "sharply increased federal authority and responsibility ***846** in the continuing effort to combat air pollution," 421 U.S., at 64, 95 S.Ct., at 1474, but continued to assign "primary responsibility for assuring air quality" to the several States, 84 Stat. 1678. Section 109 of the 1970 Amendments directed the EPA to promulgate National Ambient Air Quality Standards (NAAQS's) [15] and § 110 directed the States to develop plans (SIP's) to implement the standards within specified deadlines. In addition, § 111 provided that major new sources of pollution would be required to conform to technology-based performance standards; the EPA was directed to publish a list of categories of sources of pollution and to establish new source performance standards (NSPS) for each. Section 111(e) prohibited the operation of any new source in violation of a performance standard.

Section 111(a) defined the terms that are to be used in setting and enforcing standards of performance for new stationary sources. It provided:
"For purposes of this section:

.....

"(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." 84 Stat. 1683.

****2784** In the 1970 Amendments that definition was not only applicable to the NSPS program required by § 111, but also was made applicable to a requirement of § 110 that each state implementation plan contain a procedure for reviewing the location of any proposed new source and preventing its construction if it would preclude the attainment or maintenance of national air quality standards. [16]

In due course, the EPA promulgated NAAQS's, approved SIP's, and adopted detailed regulations governing NSPS's ***847** for various categories of equipment. In one of its programs, the EPA used a plantwide definition of the term "stationary source." In 1974, it issued NSPS's for the nonferrous smelting industry that provided that the standards would not apply to the modification of major smelting units if their increased emissions were offset by reductions in other portions of the same plant. [17]

Nonattainment

The 1970 legislation provided for the attainment of primary NAAQS's by 1975. In many areas of the country, particularly the most industrialized States, the statutory goals were not attained. [18] In 1976, the 94th Congress was confronted with this fundamental problem, as well as many others respecting pollution control. As always in this area, the legislative struggle was basically between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes would retard industrial development with attendant social costs. The 94th Congress, confronting these competing interests, was unable to agree on what response was in the public interest: legislative proposals to deal with nonattainment failed to command the necessary consensus. [19]

In light of this situation, the EPA published an Emissions Offset Interpretative Ruling in December 1976, see 41 Fed.Reg. 55524, to "fill the gap," as respondents put it, until Congress acted. The Ruling stated that it was intended to ***848** address "the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources." Id., at 55524–55525. In general, the Ruling provided that "a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met." Id., at 55525. The Ruling gave primary emphasis to the rapid attainment of the statute's environmental goals. [20] Consistent with that emphasis, the construction of every new source in nonattainment areas had to meet the "lowest achievable emission rate" under the current state of the art for that type of facility. See Ibid. The 1976 Ruling did not, however, explicitly adopt or reject the "bubble concept." [21]

****2785** IV

The Clean Air Act Amendments of 1977 are a lengthy, detailed, technical, complex, and comprehensive response to a major social issue. A small portion of the statute—91 Stat. ***849** 745–751 (Part D of Title I of the amended Act, 42 U.S.C. §§ 7501–7508)—expressly deals with nonattainment areas. The focal point of this controversy is one phrase in that portion of the Amendments. [22]

Basically, the statute required each State in a nonattainment area to prepare and obtain approval of a new SIP by July 1, 1979. In the interim those States were required to comply with the EPA's interpretative Ruling of December 21, 1976. 91 Stat. 745. The deadline for attainment of the primary NAAQS's was extended until December 31, 1982, and in some cases until December 31, 1987, but the SIP's were required to contain a number of provisions designed to achieve the goals as expeditiously as possible. [23]

***850** Most significantly for our purposes, the statute provided that each plan shall "(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173...." Id., 747.

Before issuing a permit, § 173 requires (1) the state agency to determine that there will be sufficient emissions reductions in the region to offset the emissions from the new source and also to allow for reasonable further progress toward attainment, or that the increased emissions will not exceed an allowance for growth established pursuant to § 172(b)(5); (2) the applicant to certify that his other sources in the State are in compliance with the SIP, (3) the agency to determine that the applicable SIP is otherwise being implemented, and (4) the proposed source to comply with the lowest achievable emission rate (LAER). [24]

****2786** ***851** The 1977 Amendments contain no specific reference to the "bubble concept." Nor do they contain a specific definition of the term "stationary source," though they did not disturb the definition of "stationary source" contained in § 111(a)(3), applicable by the terms of the Act to the NSPS program. Section 302(j), however, defines the term "major stationary source" as follows:
"(j) Except as otherwise expressly provided, the terms 'major stationary source' and 'major emitting facility' mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator)." 91 Stat. 770.

V

The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the "bubble concept" or the question whether a plantwide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the

environmental interest in improving air quality. Indeed, the House Committee Report identified the economic interest as one of the "two main purposes" of this section of the bill. It stated:
"Section 117 of the bill, adopted during full committee markup establishes a new section 127 of the Clean Air Act. The section has two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow ***852** States greater flexibility for the former purpose than EPA's present interpretative regulations afford.

"The new provision allows States with nonattainment areas to pursue one of two options. First, the State may proceed under EPA's present 'tradeoff' or 'offset' ruling. The Administrator is authorized, moreover, to modify or amend that ruling in accordance with the intent and purposes of this section.

"The State's second option would be to revise its implementation plan in accordance with this new provision." H.R.Rep. No. 95–294, p. 211 (1977), U.S.Code Cong. & Admin.News 1977, pp. 1077, 1290. [25]

The portion of the Senate Committee Report dealing with nonattainment areas states generally that it was intended to "supersede the EPA administrative approach," and that expansion should be permitted if a State could "demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S.Rep. No. 95–127, ****2787** p. 55 ****2787** S.Rep. No. 95–127, p. 55 (1977). The Senate Report notes the value of "case-by-case review of each new or modified major source of pollution that seeks to locate in a region exceeding an ambient standard," explaining that such a review "requires matching reductions from existing sources against ***853** emissions expected from the new source in order to assure that introduction of the new source will not prevent attainment of the applicable standard by the statutory deadline." Ibid. This description of a case-by-case approach to plant additions, which emphasizes the net consequences of the construction or modification of a new source, as well as its impact on the overall achievement of the national standards, was not, however, addressed to the precise issue raised by these cases.

Senator Muskie made the following remarks:
"I should note that the test for determining whether a new or modified source is subject to the EPA interpretative regulation [the Offset Ruling]—and to the permit requirements of the revised implementation plans under the conference bill—is whether the source will emit a pollutant into an area which is exceeding a national ambient air quality standard for that pollutant—or precursor. Thus, a new source is still subject to such requirements as 'lowest achievable emission rate' even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.

"A source—including an existing facility ordered to convert to coal—is subject to all the nonattainment requirements as a modified source if it makes any physical change which increases the amount of any air pollutant for which the standards in the area are exceeded." 123 Cong.Rec. 26847 (1977).

VI

As previously noted, prior to the 1977 Amendments, the EPA had adhered to a plantwide definition of the term "source" under a NSPS program. After adoption of the 1977 Amendments, proposals for a plantwide definition were considered in at least three formal proceedings.

In January 1979, the EPA considered the question whether the same restriction on new construction in nonattainment areas that had been included in its December 1976 Ruling ***854** should be required in the revised SIP's that were scheduled to go into effect in July 1979. After noting that the 1976 Ruling was ambiguous on the question "whether a plant with a number of different processes and emission points would be considered a single source," 44 Fed.Reg. 3276 (1979), the EPA, in effect, provided a bifurcated answer to that question. In those areas that did not have a revised SIP in effect by July 1979, the EPA rejected the plantwide definition; on the other hand, it expressly concluded that the plantwide approach would be permissible in certain circumstances if authorized by an approved SIP. It stated:
"Where a state implementation plan is revised and implemented to satisfy the requirements of Part D, including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost." Ibid. [26]

****2788** ***855** In April, and again in September 1979, the EPA published additional comments in which it indicated that revised SIP's could adopt the plantwide definition of source in nonattainment areas in certain circumstances. See id., at 20372, 20379, 51924, 51951, 51958. On the latter occasion, the EPA made a formal rulemaking proposal that would have permitted the use of the "bubble concept" for new installations within a plant as well as for modifications of existing units. It explained:
" 'Bubble' Exemption: The use of offsets inside the same source is called the 'bubble.' EPA proposes use of the definition of 'source' (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

"i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

"ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of 'installation' as an identifiable piece of process equipment." [27]

***856** Significantly, the EPA expressly noted that the word "source" might be given a plantwide definition for some purposes and a narrower definition for other purposes. It wrote:
"Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. 'Building, structure, facility or installation' means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out." Id., at 51925. [28]

The EPA's summary of its proposed Ruling discloses a flexible rather than rigid definition of the term "source" to implement various policies and programs:
"In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:

"(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plant-wide bubble.

"(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

"In addition, for the restrictions on construction, EPA is proposing to define 'major modification' so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape ****2789** NSR ***857** regardless of whether they are within a major plant." Id., at 51934.

In August 1980, however, the EPA adopted a regulation that, in essence, applied the basic reasoning of the Court of Appeals in these cases. The EPA took particular note of the two then-recent Court of Appeals decisions, which had created the bright-line rule that the "bubble concept" should be employed in a program designed to maintain air quality but not in one designed to enhance air quality. Relying heavily on those cases, [29] EPA adopted a dual definition of "source" for

nonattainment areas that required a permit whenever a change in either the entire plant, or one of its components, would result in a significant increase in emissions even if the increase was completely offset by reductions elsewhere in the plant. The EPA expressed the opinion that this interpretation was "more consistent with congressional intent" than the plantwide definition because it "would bring in more sources or modifications for review," 45 Fed.Reg. 52697 (1980), but its primary legal analysis was predicated on the two Court of Appeals decisions.

In 1981 a new administration took office and initiated a "Government-wide reexamination of regulatory burdens and complexities." 46 Fed.Reg. 16281. In the context of that ***858** review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency "judgment as how to best carry out the Act." Ibid. It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition "can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and "can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones." Ibid. Moreover, the new definition "would simplify EPA's rules by using the same definition of 'source' for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency." Ibid. Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQS's as expeditiously as possible.[30] These conclusions were ****2790** expressed ***859** in a proposed rulemaking in August 1981 that was formally promulgated in October. See id., at 50766.

VII

In this Court respondents expressly reject the basic rationale of the Court of Appeals' decision. That court viewed the statutory definition of the term "source" as sufficiently flexible to cover either a plantwide definition, a narrower definition covering each unit within a plant, or a dual definition that could apply to both the entire "bubble" and its components. It interpreted the policies of the statute, however, to mandate the plantwide definition in programs designed to maintain clean air and to forbid it in programs designed to improve air quality. Respondents place a fundamentally different construction on the statute. They contend that the text of the Act requires the EPA to use a dual definition—if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source. They thus contend that the EPA rules adopted in 1980,

insofar as they apply to the maintenance of the quality of clean air, as well as the 1981 rules which apply to nonattainment areas, violate the statute. [31]

Statutory Language

The definition of the term "stationary source" in § 111(a)(3) refers to "any building, structure, facility, or installation" which emits air pollution. See supra, at 2784. This definition is applicable only to the NSPS program by the express terms of the statute; the text of the statute does not make this definition ***860** applicable to the permit program. Petitioners therefore maintain that there is no statutory language even relevant to ascertaining the meaning of stationary source in the permit program aside from § 302(j), which defines the term "major stationary source." See supra, at 2786. We disagree with petitioners on this point.

The definition in § 302(j) tells us what the word "major" means—a source must emit at least 100 tons of pollution to qualify—but it sheds virtually no light on the meaning of the term "stationary source." It does equate a source with a facility—a "major emitting facility" and a "major stationary source" are synonymous under § 302(j). The ordinary meaning of the term "facility" is some collection of integrated elements which has been designed and constructed to achieve some purpose. Moreover, it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts. Basically, however, the language of § 302(j) simply does not compel any given interpretation of the term "source."

Respondents recognize that, and hence point to § 111(a)(3). Although the definition in that section is not literally applicable to the permit program, it sheds as much light on the meaning of the word "source" as anything in the statute. [32] As respondents point out, use of the words "building, structure, facility, or installation," as the definition of source, could be read to impose the permit conditions on an individual building that is a part of a plant. [33] A "word may have a character of its own not to be submerged by its association." ***861** Russell Motor Car Co. v. United States, 261 U.S. 514, 519, 43 S.Ct. 428, 429, 67 L.Ed. 778 (1923). On the other hand, the meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may ****2791** indicate that the true meaning of the series is to convey a common idea. The language may reasonably be interpreted to impose the requirement on any discrete, but integrated, operation which pollutes. This gives meaning to all of the terms—a single building, not part of a larger operation, would be covered if it emits more than 100 tons of pollution, as would any facility, structure, or installation. Indeed, the language itself implies a "bubble concept" of sorts: each enumerated item would seem to be treated as if it were encased in a bubble. While respondents insist that each of these terms must be given a discrete meaning, they also argue that

§ 111(a)(3) defines "source" as that term is used in § 302(j). The latter section, however, equates a source with a facility, whereas the former defines "source" as a facility, among other items.

We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.[34] ***862** We know full well that this language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. The general remarks pointed to by respondents "were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire...." Jewell Ridge Coal Corp. v. Mine Workers, 325 U.S. 161, 168–169, 65 S.Ct. 1063, 1067–1068, 89 L.Ed. 1534 (1945). Respondents' argument based on the legislative history relies heavily on Senator Muskie's observation that a new source is subject to the LAER requirement.[35] But the full statement is ambiguous and like the text of § 173 itself, this comment does not tell us what a new source is, much less that it is to have an inflexible definition. We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

***863** More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns ****2792** —the allowance of reasonable economic growth—and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. See supra, at 2789–2790, and n. 29; see also supra, at 2788, n. 27. Indeed, its reasoning is supported by the public record developed in the rulemaking process,[36] as well as by certain private studies.[37]

Our review of the EPA's varying interpretations of the word "source"—both before and after the 1977 Amendments—convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact

that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations ***864** and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

Significantly, it was not the agency in 1980, but rather the Court of Appeals that read the statute inflexibly to command a plantwide definition for programs designed to maintain clean air and to forbid such a definition for programs designed to improve air quality. The distinction the court drew may well be a sensible one, but our labored review of the problem has surely disclosed that it is not a distinction that Congress ever articulated itself, or one that the EPA found in the statute before the courts began to review the legislative work product. We conclude that it was the Court of Appeals, rather than Congress or any of the decisionmakers who are authorized by Congress to administer this legislation, that was primarily responsible for the 1980 position taken by the agency.

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges. [38]

***865** In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing in ****2793** terests and is entitled to deference: the regulatory scheme is technical and complex, [39] the agency considered the matter in a detailed and reasoned fashion, [40] and the decision involves reconciling conflicting policies. [41] Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the ***866** agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches." TVA v. Hill, 437 U.S. 153, 195, 98 S.Ct. 2279, 2302, 57 L.Ed.2d 117 (1978).

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. "The Regulations which the Administrator has adopted provide what the agency could allowably view as ... [an] effective reconciliation of these twofold ends...." United States v. Shimer, 367 U.S., at 383, 81 S.Ct., at 1560.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice MARSHALL and Justice REHNQUIST took no part in the consideration or decision of these cases.

Justice O'CONNOR took no part in the decision of these cases.

All Citations

467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694, 21 ERC 1049, 14 Envtl. L. Rep. 20,507

Footnotes

* US Reports Title: Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 172(b)(6), 42 U.S.C. § 7502(b)(6), provides:
"The plan provisions required by subsection (a) shall—
.....
"(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirements)." 91 Stat. 747.

2 "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

3 National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

4 Petitioners, Chevron U.S.A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

5 The court remarked in this regard:
"We regret, of course, that Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs, and note that a further clarifying statutory directive would facilitate the work of the agency and of the court in their endeavors to serve the legislators' will." 222 U.S.App.D.C., at 276, n. 39, 685 F.2d, at 726, n. 39.

6 Alabama Power Co. v. Costle, 204 U.S.App.D.C. 51, 636 F.2d 323 (1979); ASARCO Inc. v. EPA, 188 U.S.App.D.C. 77, 578 F.2d 319 (1978).

7 Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clean Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment, and may rely on any ground that finds support in the record. See Ryerson v.

United States, 312 U.S. 405, 408, 61 S.Ct. 656, 658, 85 L.Ed. 917 (1941); LeTulle v. Scofield, 308 U.S. 415, 421, 60 S.Ct. 313, 316, 84 L.Ed. 355 (1940); Langnes v. Green, 282 U.S. 531, 533–539, 51 S.Ct. 243, 244–246, 75 L.Ed. 520 (1931).

8 E.g., Black v. Cutter Laboratories, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956); J.E. Riley Investment Co. v. Commissioner, 311 U.S. 55, 59, 61 S.Ct. 95, 97, 85 L.Ed. 36 (1940); Williams v. Norris, 12 Wheat. 117, 120, 6 L.Ed. 571 (1827); McClung v. Silliman, 6 Wheat. 598, 603, 5 L.Ed. 340 (1821).

9 The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, e.g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981); SEC v. Sloan, 436 U.S. 103, 117–118, 98 S.Ct. 1702, 1711–1712, 56 L.Ed.2d 148 (1978); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745–746, 93 S.Ct. 1773, 1784–1785, 36 L.Ed.2d 620 (1973); Volkswagenwerk v. FMC, 390 U.S. 261, 272, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968); NLRB v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965); FTC v. Colgate–Palmolive Co., 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369, 66 S.Ct. 637, 643, 90 L.Ed. 718 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16, 52 S.Ct. 275, 281, 76 L.Ed. 587 (1932); Webster v. Luther, 163 U.S. 331, 342, 16 S.Ct. 963, 967, 41 L.Ed. 179 (1896). 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.

10 See generally, R. Pound, The Spirit of the Common Law 174–175 (1921).

11 The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. FEC v. Democratic Senatorial Campaign Committee, 454 U.S., at 39, 102 S.Ct., at 46; Zenith Radio Corp. v. United States, 437 U.S. 443, 450, 98 S.Ct. 2441, 2445, 57 L.Ed.2d 337 (1978); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75, 95 S.Ct. 1470, 1479, 43 L.Ed.2d 731 (1975); Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946); McLaren v. Fleischer, 256 U.S. 477, 480–481, 41 S.Ct. 577, 577–578, 65 L.Ed. 1052 (1921).

12 See, e.g., United States v. Morton, 467 U.S. 822, 834, 104 S.Ct. 2769, 2776, 81 L.Ed.2d 680 (1984) Schweiker v. Gray Panthers, 453 U.S. 34, 44, 101 S.Ct. 2633, 2640, 69 L.Ed.2d 460 (1981); Batterton v. Francis, 432 U.S. 416, 424–426, 97 S.Ct. 2399, 2404–2406, 53

L.Ed.2d 448 (1977); American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 235–237, 57 S.Ct. 170, 172–173, 81 L.Ed. 142 (1936).

13 E.g., INS v. Jong Ha Wang, 450 U.S. 139, 144, 101 S.Ct. 1027, 1031, 67 L.Ed.2d 123 (1981); Train v. Natural Resources Defense Council, Inc., 421 U.S., at 87, 95 S.Ct., at 1485.

14 Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389, 104 S.Ct. 2472, 2479–2480, 81 L.Ed.2d 301 (1984); Blum v. Bacon, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982); Union Electric Co. v. EPA, 427 U.S. 246, 256, 96 S.Ct. 2518, 2525, 49 L.Ed.2d 474 (1976); Investment Company Institute v. Camp, 401 U.S. 617, 626–627, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971); Unemployment Compensation Comm'n v. Aragon, 329 U.S., at 153–154, 67 S.Ct., at 250–251; NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944); McLaren v. Fleischer, 256 U.S., at 480–481, 41 S.Ct., at 577–578; Webster v. Luther, 163 U.S., at 342, 16 S.Ct., at 967; Brown v. United States, 113 U.S. 568, 570–571, 5 S.Ct. 648, 649–650, 28 L.Ed. 1079 (1885); United States v. Moore, 95 U.S. 760, 763, 24 L.Ed. 588 (1878); Edwards' Lessee v. Darby, 12 Wheat. 206, 210, 6 L.Ed. 603 (1827).

15 Primary standards were defined as those whose attainment and maintenance were necessary to protect the public health, and secondary standards were intended to specify a level of air quality that would protect the public welfare.

16 See §§ 110(a)(2)(D) and 110(a)(4).

17 The Court of Appeals ultimately held that this plantwide approach was prohibited by the 1970 Act, see ASARCO Inc., 188 U.S.App.D.C., at 83–84, 578 F.2d, at 325–327. This decision was rendered after enactment of the 1977 Amendments, and hence the standard was in effect when Congress enacted the 1977 Amendments.

18 See Report of the National Commission on Air Quality, To Breathe Clean Air, 3.3–20 through 3.3–33 (1981).

19 Comprehensive bills did pass both Chambers of Congress; the Conference Report was rejected in the Senate. 122 Cong.Rec. 34375–34403, 34405–34418 (1976).

20 For example, it stated:

"Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health." 41 Fed.Reg. 55527 (1976).

21 In January 1979, the EPA noted that the 1976 Ruling was ambiguous concerning this issue: "A number of commenters indicated the need for a more explicit definition of 'source.' Some readers found that it was unclear under the 1976 Ruling whether a plant with a number of

different processes and emission points would be considered a single source. The changes set forth below define a source as 'any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control.' This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements." 44 Fed.Reg. 3276.

22 Specifically, the controversy in these cases involves the meaning of the term "major stationary sources" in § 172(b)(6) of the Act, 42 U.S.C. § 7502(b)(6). The meaning of the term "proposed source" in § 173(2) of the Act, 42 U.S.C. § 7503(2), is not at issue.

23 Thus, among other requirements, § 172(b) provided that the SIP's shall—

"(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

"(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under paragraph (1);

"(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area; ...

.....

"(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section." 91 Stat. 747.

Section 171(1) provided:

"(1) The term 'reasonable further progress' means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a)." Id., at 746.

24 Section 171(3) provides:

"(3) The term 'lowest achievable emission rate' means for any source, that rate of emissions which reflects—

"(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

"(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent. "In no event shall the application of this

term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance."

The LAER requirement is defined in terms that make it even more stringent than the applicable new source performance standard developed under § 111 of the Act, as amended by the 1970 statute.

25 During the floor debates Congressman Waxman remarked that the legislation struck

"a proper balance between environmental controls and economic growth in the dirty air areas of America.... There is no other single issue which more clearly poses the conflict between pollution control and new jobs. We have determined that neither need be compromised....

"This is a fair and balanced approach, which will not undermine our economic vitality, or impede achievement of our ultimate environmental objectives." 123 Cong.Rec. 27076 (1977).

The second "main purpose" of the provision—allowing the States "greater flexibility" than the EPA's interpretative Ruling—as well as the reference to the EPA's authority to amend its Ruling in accordance with the intent of the section, is entirely consistent with the view that Congress did not intend to freeze the definition of "source" contained in the existing regulation into a rigid statutory requirement.

26 In the same Ruling, the EPA added:

"The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions due by January 1979 must contain adopted measures assuring that reasonable further progress will be made. Furthermore, in most circumstances, the measures adopted by January 1979 must be sufficient to actually provide for attainment of the standards by the dates required under the Act, and in all circumstances measures adopted by 1982 must provide for attainment. See Section 172 of the Act and 43 FR 21673–21677 (May 19, 1978). Also, Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions." 44 Fed.Reg. 3277 (1979).

27 Id., at 51926. Later in that Ruling, the EPA added:

"However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. See 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment." Id., at 51933.

28 In its explanation of why the use of the "bubble concept" was especially appropriate in preventing significant deterioration (PSD) in clean air areas, the EPA stated: "In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity." Id., at 51932.

29 "The dual definition also is consistent with Alabama Power and ASARCO. Alabama Power held that EPA had broad discretion to define the constituent terms of 'source' so as best to effectuate the purposes of the statute. Different definitions of 'source' can therefore be used for different sections of the statute....

"Moreover, Alabama Power and ASARCO taken together suggest that there is a distinction between Clean Air Act programs designed to enhance air quality and those designed only to maintain air quality....

.....

"Promulgation of the dual definition follows the mandate of Alabama Power, which held that, while EPA could not define 'source' as a combination of sources, EPA had broad discretion to define 'building,' 'structure,' 'facility,' and 'installation' so as to best accomplish the purposes of the Act." 45 Fed.Reg. 52697 (1980).

30 It stated:

"5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.

"6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review.

"7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required." 46 Fed.Reg. 16281 (1981).

31 "What EPA may not do, however, is define all four terms to mean only plants. In the 1980 PSD rules, EPA did just that. EPA compounded the mistake in the 1981 rules here under review, in which it abandoned the dual definition." Brief for Respondents 29, n. 56.

32 We note that the EPA in fact adopted the language of that definition in its regulations under the permit program. 40 CFR §§ 51.18(j)(1)(i), (ii) (1983).

33 Since the regulations give the States the option to define an individual unit as a source, see 40 CFR § 51.18(j)(1) (1983), petitioners do not dispute that the terms can be read as respondents suggest.

34 The argument based on the text of § 173, which defines the permit requirements for nonattainment areas, is a classic example of circular reasoning. One of the permit requirements is that "the proposed source is required to comply with the lowest achievable

emission rate" (LAER). Although a State may submit a revised SIP that provides for the waiver of another requirement—the "offset condition"—the SIP may not provide for a waiver of the LAER condition for any proposed source. Respondents argue that the plantwide definition of the term "source" makes it unnecessary for newly constructed units within the plant to satisfy the LAER requirement if their emissions are offset by the reductions achieved by the retirement of older equipment. Thus, according to respondents, the plantwide definition allows what the statute explicitly prohibits—the waiver of the LAER requirement for the newly constructed units. But this argument proves nothing because the statute does not prohibit the waiver unless the proposed new unit is indeed subject to the permit program. If it is not, the statute does not impose the LAER requirement at all and there is no need to reach any waiver question. In other words, § 173 of the statute merely deals with the consequences of the definition of the term "source" and does not define the term.

35 See supra, at 2787. We note that Senator Muskie was not critical of the EPA's use of the "bubble concept" in one NSPS program prior to the 1977 amendments. See ibid.

36 See, for example, the statement of the New York State Department of Environmental Conservation, pointing out that denying a source owner flexibility in selecting options made it "simpler and cheaper to operate old, more polluting sources than to trade up...." App. 128–129.

37 "Economists have proposed that economic incentives be substituted for the cumbersome administrative-legal framework. The objective is to make the profit and cost incentives that work so well in the marketplace work for pollution control.... [The 'bubble' or 'netting' concept] is a first attempt in this direction. By giving a plant manager flexibility to find the places and processes within a plant that control emissions most cheaply, pollution control can be achieved more quickly and cheaply." L. Lave & G. Omenn, Cleaning Air: Reforming the Clean Air Act 28 (1981) (footnote omitted).

38 Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6) and in order to do so, it must satisfy the § 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less—but still more than 100 tons—the result should be no different simply because "it happens to be built not at a new site, but within a pre-existing plant." Brief for Respondents 4.

39 See e.g., Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist., 467 U.S., at 390, 104 S.Ct., at 2480 (1984).

40 See SEC v. Sloan, 436 U.S., at 117, 98 S.Ct., at 1711; Adamo Wrecking Co. v. United States, 434 U.S. 275, 287, n. 5, 98 S.Ct. 566, 574, n. 5, 54 L.Ed.2d 538 (1978); Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

41 See Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 699–700, 104 S.Ct. at 2700–2701; United States v. Shimer, 367 U.S. 374, 382, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961).

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139 S.Ct. 2551
Supreme Court of the United States.

DEPARTMENT OF COMMERCE, et al., Petitioners
v.
NEW YORK, et al.

No. 18-966
|
Argued April 23, 2019
|
Decided June 27, 2019

Synopsis

Background: States, District of Columbia, counties, cities, a group of mayors, and non-governmental organizations (NGO) brought actions challenging decision of Secretary of Commerce to reinstate in decennial census a question concerning citizenship status, asserting claims under the Enumeration Clause, the Equal Protection Clause, the Census Act, and the Administrative Procedure Act (APA). After consolidation of actions, the United States District Court for the Southern District of New York, Jesse M. Furman, J., 315 F.Supp.3d 766, dismissed the Enumeration Clause claim, and later, 333 F.Supp.3d 282, ordered Secretary's deposition, and after a bench trial, 351 F.Supp.3d 502, granted judgment to plaintiffs on their Census Act and APA claims, vacated Secretary's decision, enjoined Secretary from reinstating the citizenship question until legal errors were cured, and vacated as moot the order for Secretary's deposition. Government appealed to the United States Court of Appeals for the Second Circuit, but also petitioned the Supreme Court for writ of certiorari before judgment. The petition was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

Enumeration Clause allows citizenship question in census questionnaire;

Secretary's broad authority under Census Act did not preclude judicial review under APA;

Secretary's decision had evidentiary support;

Secretary did not violate Census Act;

district court's order for extra-record discovery was premature but ultimately was justified; but

Secretary's explanation for including citizenship question in census did not permit meaningful judicial review, warranting remand.

Affirmed in part, reversed in part, and remanded.

Justice Thomas filed an opinion concurring in part and dissenting in part, in which Justices Gorsuch and Kavanaugh joined.

Justice Breyer filed an opinion concurring in part and dissenting in part, in which Justices Ginsburg, Sotomayor, and Kagan joined.

Justice Alito filed an opinion concurring in part and dissenting in part.

Procedural Posture(s): Petition for Writ of Certiorari; Review of Administrative Decision.

***2556** *Syllabus* [*]

In order to apportion congressional representatives among the States, the Constitution requires an "Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct," Art. I, § 2, cl. 3; Amdt. 14, § 2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census "in such form and content as he may determine." 13 U. S. C. § 141(a). The Secretary is aided by the Census Bureau, a statistical agency in the Department of Commerce. The population count is also used to allocate federal funds to the States and to draw electoral districts. The census additionally serves as a means of collecting demographic information used for a variety of purposes. There have been 23 decennial censuses since 1790. All but one between 1820 and 2000 asked at least some of the population about their citizenship or place of birth. The question was asked of all households until 1950, and was asked of a fraction of the population on an alternative long-form questionnaire between 1960 and 2000. In 2010, the citizenship question was moved from the census to the American Community Survey, which is sent each year to a small sample of households.

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a citizenship question on the 2020 census questionnaire at the request of the Department of Justice (DOJ), which sought census block level citizenship data to use in enforcing the Voting Rights Act (VRA). The Secretary's memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action before he chose a fourth option that combined two of the proposed options: reinstate a citizenship question on the decennial census, and use administrative records from other agencies, *e.g.,* the Social Security Administration, to provide

additional citizenship data. The Secretary "carefully considered" the possibility that reinstating a citizenship question would depress the response rate, the long history of the citizenship question on the census, and several other factors before concluding that "the need for accurate citizenship data and the limited burden of the question" outweighed fears about a lower response rate.

Here, two separate suits filed in Federal District Court in New York were consolidated: one filed by a group States, counties, cities, and others, alleging that the Secretary's decision violated the Enumeration Clause and the requirements of the Administrative Procedure Act; the other filed by non-governmental organizations, adding an equal protection claim. The District Court dismissed the Enumeration Clause claim but allowed the other claims to proceed. In June 2018, the Government submitted the Commerce Department's "administrative record"—materials that Secretary Ross considered in making his decision—including DOJ's letter requesting reinstatement of the citizenship question. Shortly thereafter, at DOJ's urging, the Government supplemented the record with a new memo from the Secretary, which stated that he had begun considering the addition of a citizenship question in early 2017 and had asked whether DOJ would formally request its inclusion. Arguing that the supplemental memo indicated that the record was incomplete, respondents asked the District Court to compel the Government to complete the administrative record. The court granted that request, and the parties jointly stipulated to the inclusion of additional materials that confirmed that the Secretary and his staff began exploring reinstatement of a citizenship question shortly after his 2017 confirmation, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to make the request. The court also authorized discovery outside the administrative record, including compelling a deposition of Secretary Ross, which this Court stayed pending further review. After a bench trial, the District Court determined that respondents had standing to sue. On the merits, it ruled that the Secretary's action was arbitrary and capricious, based on a pretextual rationale, and violated the Census Act, and held that respondents had failed to show an equal protection violation.

Held:

1. At least some respondents have Article III standing. For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737. The District Court concluded that the evidence at trial established a sufficient likelihood that reinstating a citizenship question would result in noncitizen households responding to the census at lower rates than other groups, which would cause them to be undercounted and lead to many of the injuries respondents asserted—diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources. For purposes of standing, these findings of fact were not so suspect as to be clearly erroneous. Several state respondents have shown that if noncitizen households are undercounted by as little as 2%,

they will lose out on federal funds that are distributed on the basis of state population. That is a sufficiently concrete and imminent injury to satisfy Article III, and there is no dispute that a ruling in favor of respondents would redress that harm. Pp. 2564 – 2566.

2. The Enumeration Clause permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. That conclusion follows from Congress's broad authority over the census, as informed by long and consistent historical practice that "has been open, widespread, and unchallenged since the early days of the Republic." *NLRB v. Noel Canning*, 573 U.S. 513, 572, 134 S.Ct. 2550, 189 L.Ed.2d 538 (Scalia, J., concurring in judgment). Pp. 2566 – 2567.

3. The Secretary's decision is reviewable under the Administrative Procedure Act. The APA instructs reviewing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706(2)(A), but it makes review unavailable "to the extent that" the agency action is "committed to agency discretion by law," § 701(a)(2). The Census Act confers broad authority on the Secretary, but it does not leave his discretion unbounded. The § 701(a)(2) exception is generally limited to "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,' " *Lincoln v. Vigil*, 508 U.S. 182, 191, 113 S.Ct. 2024, 124 L.Ed.2d 101. The taking of the census is not one of those areas. Nor is the statute drawn so that it furnishes no meaningful standard by which to judge the Secretary's action, which is amenable to review for compliance with several Census Act provisions according to the general requirements of reasoned agency decisionmaking. Because this is not a case in which there is "no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136, the Secretary's decision is subject to judicial review. Pp. 2567 – 2569.

4. The Secretary's decision was supported by the evidence before him. He examined the Bureau's analysis of various ways to collect improved citizenship data and explained why he thought the best course was to both reinstate a citizenship question and use citizenship data from administrative records to fill in the gaps. He then weighed the value of obtaining more complete and accurate citizenship data against the uncertain risk that reinstating a citizenship question would result in a materially lower response rate, and explained why he thought the benefits of his approach outweighed the risk. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census. Pp. 2569 – 2571.

5. The District Court also erred in ruling that the Secretary violated two particular provisions of the Census Act, § 6(c) and § 141(f). Section 6's first two subsections authorize the Secretary to acquire administrative records from other federal agencies and state and local governments, while subsection (c) requires the Secretary, to the maximum extent possible, to use that information

"instead of conducting direct inquiries." Assuming that § 6(c) applies, the Secretary complied with it for essentially the same reasons that his decision was not arbitrary and capricious: Administrative records would not, in his judgment, provide the more complete and accurate data that DOJ sought. The Secretary also complied with § 141(f), which requires him to make a series of reports to Congress about his plans for the census. And even if he had violated that provision, the error would be harmless because he fully informed Congress of, and explained, his decision. Pp. 2571 – 2573.

6. In order to permit meaningful judicial review, an agency must " 'disclose the basis' " of its action. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–169, 83 S.Ct. 239, 9 L.Ed.2d 207. A court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460, but it may inquire into "the mental processes of administrative decisionmakers" upon a "strong showing of bad faith or improper behavior," *Overton Park*, 401 U.S. at 420, 91 S.Ct. 814. While the District Court prematurely invoked that exception in ordering extra-record discovery here, it was ultimately justified in light of the expanded administrative record. Accordingly, the District Court's ruling on pretext will be reviewed in light of all the evidence in the record, including the extra-record discovery.

It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. Yet viewing the evidence as a whole, this Court shares the District Court's conviction that the decision to reinstate a citizenship question cannot adequately be explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, taken together, reveal a significant mismatch between the Secretary's decision and the rationale he provided. The record shows that he began taking steps to reinstate the question a week into his tenure, but gives no hint that he was considering VRA enforcement. His director of policy attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ's Office of Immigration Review before turning to the VRA rationale and DOJ's Civil Rights Division. For its part, DOJ's actions suggest that it was more interested in helping the Commerce Department than in securing the data. Altogether, the evidence tells a story that does not match the Secretary's explanation for his decision. Unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived. The reasoned explanation requirement of administrative law is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. The explanation provided here was more of a distraction. In these unusual circumstances, the District Court was warranted in remanding to the agency. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643. Pp. 2572 – 2576.

351 F.Supp.3d 502, affirmed in part, reversed in part, and remanded.

ROBERTS, C. J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III, IV–B, and IV–C, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined; with respect to Part IV–A, in which THOMAS, GINSBURG, BREYER, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined; and with respect to Part V, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which GORSUCH and KAVANAUGH, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in part and dissenting in part.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***2561** The Secretary of Commerce decided to reinstate a question about citizenship on the 2020 census questionnaire. A group of plaintiffs challenged that decision on constitutional and statutory grounds. We now decide whether the Secretary violated the Enumeration Clause of the Constitution, the Census Act, or otherwise abused his discretion.

I

A

In order to apportion Members of the House of Representatives among the States, the Constitution requires an "Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct." Art. I, § 2, cl. 3; Amdt. 14, § 2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census "in such form and content as he may determine." 13 U. S. C. § 141(a). The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce. See §§ 2, 21.

The population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States and to draw electoral districts. *Wisconsin v. City of New York*, 517 U.S. 1, 5–6, 116 S.Ct. 1091, 134 L.Ed.2d 167 (1996). The census additionally serves as a means of collecting demographic information, which "is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldrige v. Shapiro*, 455 U.S. 345, 353–354, n. 9, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982). Over the years, the census has asked questions about (for example) race, sex, age, health, education, occupation, housing, and military service. It has also asked about radio ownership, age at first marriage, and native tongue. The Census Act obliges everyone to answer census questions truthfully and requires the Secretary to keep individual answers confidential, including from other Government agencies. §§ 221, 8(b), 9(a).

There have been 23 decennial censuses from the first census in 1790 to the most recent in 2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. Between 1820 and 1950, the question was asked of all households. Between 1960 and 2000, it was asked of about one-fourth to one-sixth of the population. That change was part of a larger effort to simplify the census by asking most people a few basic demographic questions (such as sex, age, race, and marital status) on a short-form questionnaire, while asking a sample of the population more detailed demographic questions on a long-form questionnaire. In explaining the decision to move the citizenship question to the long-form questionnaire, the Census Bureau opined that "general census information on citizenship had become of less importance compared with other possible questions to be included in the census, particularly in view of the ***2562** recent statutory requirement for annual alien registration which could provide the Immigration and Naturalization Service, the principal user of such data, with the information it needed." Dept. of Commerce, Bureau of Census, 1960 Censuses of Population and Housing 194 (1966). [1]

In 2010, the year of the latest census, the format changed again. All households received the same questionnaire, which asked about sex, age, race, Hispanic origin, and living arrangements. The more detailed demographic questions previously asked on the long-form questionnaire, including the question about citizenship, were instead asked in the American Community Survey (or ACS), which is sent each year to a rotating sample of about 2.6% of households.

The Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage noncitizens from responding to the census and lead to a less accurate count of the total population. See, *e.g.*, *Federation of Am. Immigration Reform v. Klutznick*, 486 F.Supp. 564, 568 (DDC 1980) ("[A]ccording to the Bureau[,] any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count"); Brief for Former Directors of the U. S. Census Bureau

as *Amici Curiae* in *Evenwel* v. *Abbott*, O. T. 2014, No. 14–940, p. 25 (inquiring about citizenship would "invariably lead to a lower response rate").

B

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire. The Secretary stated that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (or VRA)—specifically the Act's ban on diluting the influence of minority voters by depriving them of single-member districts in which they can elect their preferred candidates. App. to Pet. for Cert. 548a. DOJ explained that federal courts determine whether a minority group could constitute a majority in a particular district by looking to the citizen voting-age population of the group. According to DOJ, the existing citizenship data from the American Community Survey was not ideal: It was not reported at the level of the census block, the basic component of legislative districting plans; it had substantial margins of error; and it did not align in time with the census-based population counts used to draw legislative districts. DOJ therefore formally requested reinstatement of the citizenship question on the census questionnaire. *Id.*, at 565a–569a.

The Secretary's memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action. The first was to continue to collect citizenship information in the American Community Survey and attempt to develop a data model that would more accurately estimate citizenship at the census block level. The Secretary rejected that option because the Bureau "did not assert and could not confirm" that such ACS-based data modeling was possible "with a sufficient degree of accuracy." *Id.*, at 551a.

***2563** The second option was to reinstate a citizenship question on the decennial census. The Bureau predicted that doing so would discourage some noncitizens from responding to the census. That would necessitate increased "non-response follow up" operations—procedures the Bureau uses to attempt to count people who have not responded to the census—and potentially lead to a less accurate count of the total population.

Option three was to use administrative records from other agencies, such as the Social Security Administration and Citizenship and Immigration Services, to provide DOJ with citizenship data. The Census Bureau recommended this option, and the Secretary found it a "potentially appealing solution" because the Bureau has long used administrative records to supplement and improve census data. *Id.*, at 554a. But the Secretary concluded that administrative records alone were inadequate because they were missing for more than 10% of the population.

The Secretary ultimately asked the Census Bureau to develop a fourth option that would combine options two and three: reinstate a citizenship question on the census questionnaire, and also use the time remaining until the 2020 census to "further enhance" the Bureau's "administrative record data sets, protocols, and statistical models." *Id.*, at 555a. The memo explained that, in the Secretary's judgment, the fourth option would provide DOJ with the "most complete and accurate" citizen voting-age population data in response to its request. *Id.*, at 556a.

The Secretary "carefully considered" the possibility that reinstating a citizenship question would depress the response rate. *Ibid*. But after evaluating the Bureau's "limited empirical evidence" on the question—evidence drawn from estimated non-response rates to previous American Community Surveys and census questionnaires—the Secretary concluded that it was not possible to "determine definitively" whether inquiring about citizenship in the census would materially affect response rates. *Id.*, at 557a, 562a. He also noted the long history of the citizenship question on the census, as well as the facts that the United Nations recommends collecting census-based citizenship information, and other major democracies such as Australia, Canada, France, Indonesia, Ireland, Germany, Mexico, Spain, and the United Kingdom inquire about citizenship in their censuses. Altogether, the Secretary determined that "the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate." *Id.*, at 557a.

C

Shortly after the Secretary announced his decision, two groups of plaintiffs filed suit in Federal District Court in New York, challenging the decision on several grounds. The first group of plaintiffs included 18 States, the District of Columbia, various counties and cities, and the United States Conference of Mayors. They alleged that the Secretary's decision violated the Enumeration Clause of the Constitution and the requirements of the Administrative Procedure Act. The second group of plaintiffs consisted of several non-governmental organizations that work with immigrant and minority communities. They added an equal protection claim. The District Court consolidated the two cases. Both groups of plaintiffs are respondents here.

The Government moved to dismiss the lawsuits, arguing that the Secretary's decision was unreviewable and that respondents had failed to state cognizable claims ***2564** under the Enumeration Clause and the Equal Protection Clause. The District Court dismissed the Enumeration Clause claim but allowed the other claims to proceed. 315 F.Supp.3d 766 (SDNY 2018).

In June 2018, the Government submitted to the District Court the Commerce Department's "administrative record": the materials that Secretary Ross considered in making his decision. That

record included DOJ's December 2017 letter requesting reinstatement of the citizenship question, as well as several memos from the Census Bureau analyzing the predicted effects of reinstating the question. Shortly thereafter, at DOJ's urging, the Government supplemented the record with a new memo from the Secretary, "intended to provide further background and context regarding" his March 2018 memo. App. to Pet. for Cert. 546a. The supplemental memo stated that the Secretary had begun considering whether to add the citizenship question in early 2017, and had inquired whether DOJ "would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act." *Ibid.* According to the Secretary, DOJ "formally" requested reinstatement of the citizenship question after that inquiry. *Ibid.*

Respondents argued that the supplemental memo indicated that the Government had submitted an incomplete record of the materials considered by the Secretary. They asked the District Court to compel the Government to complete the administrative record. The court granted that request, and the parties jointly stipulated to the inclusion of more than 12,000 pages of additional materials in the administrative record. Among those materials were emails and other records confirming that the Secretary and his staff began exploring the possibility of reinstating a citizenship question shortly after he was confirmed in early 2017, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to request reinstatement of the question for VRA enforcement purposes.

In addition, respondents asked the court to authorize discovery outside the administrative record. They claimed that such an unusual step was warranted because they had made a strong preliminary showing that the Secretary had acted in bad faith. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The court also granted that request, authorizing expert discovery and depositions of certain DOJ and Commerce Department officials.

In August and September 2018, the District Court issued orders compelling depositions of Secretary Ross and of the Acting Assistant Attorney General for DOJ's Civil Rights Division. We granted the Government's request to stay the Secretary's deposition pending further review, but we declined to stay the Acting AAG's deposition or the other extra-record discovery that the District Court had authorized.

The District Court held a bench trial and issued findings of fact and conclusions of law on respondents' statutory and equal protection claims. After determining that respondents had standing to sue, the District Court ruled that the Secretary's action was arbitrary and capricious, based on a pretextual rationale, and violated certain provisions of the Census Act. On the equal protection claim, however, the District Court concluded that respondents had not met their burden of showing that the Secretary was motivated by discriminatory animus. The court granted judgment to respondents on their statutory claims, vacated the Secretary's decision, and enjoined him from

reinstating the citizenship question until he cured the legal errors the ***2565** court had identified. 351 F.Supp.3d 502 (SDNY 2019).

The Government appealed to the Second Circuit, but also filed a petition for writ of certiorari before judgment, asking this Court to review the District Court's decision directly because the case involved an issue of imperative public importance, and the census questionnaire needed to be finalized for printing by the end of June 2019. We granted the petition. 586 U. S. ——, 139 S.Ct. 16, 202 L.Ed.2d 306 (2019). At the Government's request, we later ordered the parties to address whether the Enumeration Clause provided an alternative basis to affirm. 586 U. S. ——, 139 S.Ct. 16, 202 L.Ed.2d 306 (2019).

II

We begin with jurisdiction. Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue. The doctrine of standing "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong" and "confines the federal courts to a properly judicial role." *Spokeo, Inc.* v. *Robins*, 578 U. S. ——, ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). To have standing, a plaintiff must "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008).

Respondents assert a number of injuries—diminishment of political representation, loss of federal funds, degradation of census data, and diversion of resources—all of which turn on their expectation that reinstating a citizenship question will depress the census response rate and lead to an inaccurate population count. Several States with a disproportionate share of noncitizens, for example, anticipate losing a seat in Congress or qualifying for less federal funding if their populations are undercounted. These are primarily future injuries, which "may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (internal quotation marks omitted).

The District Court concluded that the evidence at trial established a sufficient likelihood that the reinstatement of a citizenship question would result in noncitizen households responding to the census at lower rates than other groups, which in turn would cause them to be undercounted and lead to many of respondents' asserted injuries. For purposes of standing, these findings of fact were not so suspect as to be clearly erroneous.

We therefore agree that at least some respondents have Article III standing. Several state respondents here have shown that if noncitizen households are undercounted by as little as 2% —lower than the District Court's 5.8% prediction—they will lose out on federal funds that are distributed on the basis of state population. That is a sufficiently concrete and imminent injury to satisfy Article III, and there is no dispute that a ruling in favor of respondents would redress that harm.

The Government contends, however, that any harm to respondents is not fairly traceable to the Secretary's decision, because such harm depends on the independent action of third parties choosing to violate their legal duty to respond to the census. The chain of causation is made ***2566** even more tenuous, the Government argues, by the fact that such intervening, unlawful third-party action would be motivated by unfounded fears that the Federal Government will itself break the law by using noncitizens' answers against them for law enforcement purposes. The Government invokes our steady refusal to "endorse standing theories that rest on speculation about the decisions of independent actors," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013), particularly speculation about future unlawful conduct, *Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

But we are satisfied that, in these circumstances, respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully and despite the requirement that the Government keep individual answers confidential. The evidence at trial established that noncitizen households have historically responded to the census at lower rates than other groups, and the District Court did not clearly err in crediting the Census Bureau's theory that the discrepancy is likely attributable at least in part to noncitizens' reluctance to answer a citizenship question. Respondents' theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties. Cf. *Bennett v. Spear*, 520 U.S. 154, 169–170, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *Davis*, 554 U.S. at 734–735, 128 S.Ct. 2759. Because Article III "requires no more than *de facto* causality," *Block v. Meese*, 793 F.2d 1303, 1309 (CADC 1986) (Scalia, J.), traceability is satisfied here. We may therefore consider the merits of respondents' claims, at least as far as the Constitution is concerned.

III

The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary's decision. The text of that clause "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,' " and Congress "has delegated its broad authority over the

census to the Secretary." *Wisconsin*, 517 U.S. at 19, 116 S.Ct. 1091. Given that expansive grant of authority, we have rejected challenges to the conduct of the census where the Secretary's decisions bore a "reasonable relationship to the accomplishment of an actual enumeration." *Id.*, at 20, 116 S.Ct. 1091.

Respondents ask us to evaluate the Secretary's decision to reinstate a citizenship question under that "reasonable relationship" standard, but we agree with the District Court that a different analysis is needed here. Our cases applying that standard concerned decisions about the population count itself—such as a postcensus decision not to use a particular method to adjust an undercount, *id.*, at 4, 116 S.Ct. 1091, and a decision to allocate overseas military personnel to their home States, *Franklin v. Massachusetts*, 505 U.S. 788, 790–791, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). We have never applied the standard to decisions about what kinds of demographic information to collect in the course of taking the census. Indeed, as the District Court recognized, applying the "reasonable relationship" standard to *every* census-related decision "would lead to the conclusion that it is unconstitutional to ask *any* demographic question on the census" because "asking such questions bears no relationship whatsoever to the goal of an accurate headcount." 315 F.Supp.3d at 804–805. Yet demographic questions have been asked in *every* census since 1790, and questions about citizenship in particular ***2567** have been asked for nearly as long. Like the District Court, we decline respondents' invitation to measure the constitutionality of the citizenship question by a standard that would seem to render every census since 1790 unconstitutional.

We look instead to Congress's broad authority over the census, as informed by long and consistent historical practice. All three branches of Government have understood the Constitution to allow Congress, and by extension the Secretary, to use the census for more than simply counting the population. Since 1790, Congress has sought, or permitted the Secretary to seek, information about matters as varied as age, sex, marital status, health, trade, profession, literacy, and value of real estate owned. See *id.*, at 801. Since 1820, it has sought, or permitted the Secretary to seek, information about citizenship in particular. Federal courts have approved the practice of collecting demographic data in the census. See, *e.g.*, *United States v. Moriarity*, 106 F. 886, 891 (CC SDNY 1901) (duty to take a census of population "does not prohibit the gathering of other statistics, if 'necessary and proper,' for the intelligent exercise of other powers enumerated in the constitution"). While we have never faced the question directly, we have assumed that Congress has the power to use the census for information-gathering purposes, see *Legal Tender Cases*, 12 Wall. 457, 536, 20 L.Ed. 287 (1871), and we have recognized the role of the census as a "linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country," *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 341, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999) (internal quotation marks omitted).

That history matters. Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that "has been open, widespread, and unchallenged since the early days of the Republic." *NLRB v. Noel Canning*, 573 U.S. 513, 572, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (Scalia, J., concurring in judgment); see also *Wisconsin*, 517 U.S. at 21, 116 S.Ct. 1091 (noting "importance of historical practice" in census context). In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire. We need not, and do not, decide the constitutionality of any other question that Congress or the Secretary might decide to include in the census.

IV

The District Court set aside the Secretary's decision to reinstate a citizenship question on the grounds that the Secretary acted arbitrarily and violated certain provisions of the Census Act. The Government contests those rulings, but also argues that the Secretary's decision was not judicially reviewable under the Administrative Procedure Act in the first place. We begin with that contention.

A

The Administrative Procedure Act embodies a "basic presumption of judicial review," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), and instructs reviewing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706(2)(A). Review is not available, however, "to the extent that" a relevant statute precludes it, § 701(a)(1), or the agency action is "committed to agency discretion by law," § 701(a)(2). The Government argues that the Census Act ***2568** commits to the Secretary's unreviewable discretion decisions about what questions to include on the decennial census questionnaire.

We disagree. To be sure, the Act confers broad authority on the Secretary. Section 141(a) instructs him to take "a decennial census of population" in "such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U. S. C. § 141. The Act defines "census of population" to mean "a census of population, housing, and matters relating to population and housing," § 141(g), and it authorizes the Secretary, in "connection with any such census," to "obtain such other census information as necessary," § 141(a). It also states that the "Secretary shall prepare questionnaires, and shall determine the inquiries, and the

number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title." § 5. And it authorizes him to acquire materials, such as administrative records, from other federal, state, and local agencies in aid of conducting the census. § 6. Those provisions leave much to the Secretary's discretion. See *Wisconsin*, 517 U.S. at 19, 116 S.Ct. 1091 ("Through the Census Act, Congress has delegated its broad authority over the census to the Secretary.").

But they do not leave his discretion unbounded. In order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review, we have read the § 701(a)(2) exception for action committed to agency discretion "quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.' " *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U. S. ——, ——, 139 S.Ct. 361, 370, 202 L.Ed.2d 269 (2018) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993)). And we have generally limited the exception to "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,' " *id.*, at 191, 113 S.Ct. 2024, such as a decision not to institute enforcement proceedings, *Heckler v. Chaney*, 470 U.S. 821, 831–832, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), or a decision by an intelligence agency to terminate an employee in the interest of national security, *Webster v. Doe*, 486 U.S. 592, 600–601, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988).

The taking of the census is not one of those areas traditionally committed to agency discretion. We and other courts have entertained both constitutional and statutory challenges to census-related decisionmaking. See, *e.g.*, *Department of Commerce*, 525 U.S. 316, 119 S.Ct. 765, 142 L.Ed.2d 797; *Wisconsin*, 517 U.S. 1, 116 S.Ct. 1091, 134 L.Ed.2d 167; *Carey v. Klutznick*, 637 F.2d 834 (CA2 1980).

Nor is the statute here drawn so that it furnishes no meaningful standard by which to judge the Secretary's action. In contrast to the National Security Act in *Webster*, which gave the Director of Central Intelligence discretion to terminate employees whenever he "deem[ed]" it "advisable," 486 U.S. at 594, 108 S.Ct. 2047, the Census Act constrains the Secretary's authority to determine the form and content of the census in a number of ways. Section 195, for example, governs the extent to which he can use statistical sampling. Section 6(c), which will be considered in more detail below, circumscribes his power in certain circumstances to collect information through direct inquiries when administrative records are available. More generally, by mandating a population count that will be used to apportion representatives, ***2569** see § 141(b), 2 U. S. C. § 2a, the Act imposes "a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Franklin*, 505 U.S. at 819–820, 112 S.Ct. 2767 (Stevens, J., concurring in part and concurring in judgment).

The Secretary's decision to reinstate a citizenship question is amenable to review for compliance with those and other provisions of the Census Act, according to the general requirements of reasoned agency decisionmaking. Because this is not a case in which there is "no law to apply," *Overton Park*, 401 U.S. at 410, 91 S.Ct. 814, the Secretary's decision is subject to judicial review.

B

At the heart of this suit is respondents' claim that the Secretary abused his discretion in deciding to reinstate a citizenship question. We review the Secretary's exercise of discretion under the deferential "arbitrary and capricious" standard. See 5 U. S. C. § 706(2)(A). Our scope of review is "narrow": we determine only whether the Secretary examined "the relevant data" and articulated "a satisfactory explanation" for his decision, "including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks omitted). We may not substitute our judgment for that of the Secretary, *ibid.*, but instead must confine ourselves to ensuring that he remained "within the bounds of reasoned decisionmaking," *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983).

The District Court set aside the Secretary's decision for two independent reasons: His course of action was not supported by the evidence before him, and his stated rationale was pretextual. We focus on the first point here and take up the question of pretext later.

The Secretary examined the Bureau's analysis of various ways to collect improved citizenship data and explained why he thought the best course was to both reinstate a citizenship question and use citizenship data from administrative records to fill in the gaps. He considered but rejected the Bureau's recommendation to use administrative records alone. As he explained, records are lacking for about 10% of the population, so the Bureau would still need to estimate citizenship for millions of voting-age people. Asking a citizenship question of everyone, the Secretary reasoned, would eliminate the need to estimate citizenship for many of those people. And supplementing census responses with administrative record data would help complete the picture and allow the Bureau to better estimate citizenship for the smaller set of cases where it was still necessary to do so.

The evidence before the Secretary supported that decision. As the Bureau acknowledged, each approach—using administrative records alone, or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a

citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau's estimates. With a citizenship question, there would also be some erroneous self-responses (about 500,000) and some conflicts ***2570** between responses and administrative record data (about 9.5 million).

The Bureau explained that the "relative quality" of the citizenship data generated by each approach would depend on the "relative importance of the errors" in each, but it was not able to "quantify the relative magnitude of the errors across the alternatives." App. 148. The Bureau nonetheless recommended using administrative records alone because it had "high confidence" that it could develop an accurate model for estimating the citizenship of the 35 million people for whom administrative records were not available, and it thought the resulting citizenship data would be of superior quality. *Id.*, at 146, 158–159. But when the time came for the Secretary to make a decision, the model did not yet exist, and even if it had, there was no way to gauge its relative accuracy. As the Bureau put it, "we will most likely never possess a fully adequate truth deck to benchmark" the model—which appears to be bureaucratese for "maybe, maybe not." *Id.*, at 146. The Secretary opted instead for the approach that would yield a more complete set of data at an acceptable rate of accuracy, and would require estimating the citizenship of fewer people.

The District Court overruled that choice, agreeing with the Bureau's assessment that its recommended approach would yield higher quality citizenship data on the whole. But the choice between reasonable policy alternatives in the face of uncertainty was the Secretary's to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision. In overriding that reasonable exercise of discretion, the court improperly substituted its judgment for that of the agency.

The Secretary then weighed the benefit of collecting more complete and accurate citizenship data against the risk that inquiring about citizenship would depress census response rates, particularly among noncitizen households. In the Secretary's view, that risk was difficult to assess. The Bureau predicted a 5.1% decline in response rates among noncitizen households if the citizenship question were reinstated. [2] It relied for that prediction primarily on studies showing that, while noncitizens had responded at lower rates than citizens to the 2000 short-form and 2010 censuses, which did not ask about citizenship, they responded at even lower rates than citizens to the 2000 long-form census and the 2010 American Community Survey, which did ask about citizenship. The Bureau thought it was reasonable to infer that the citizenship question accounted for the differential decline in noncitizen responses. But, the Secretary explained, the Bureau was unable to rule out other causes. For one thing, the evidence before the Secretary suggested that noncitizen households tend to be more distrustful of, and less likely to respond to, *any* government effort to collect information. For another, both the 2000 long-form census and 2010 ACS asked over 45 questions on a range of topics, including employment, income, and housing characteristics. Noncitizen households might disproportionately fail to respond to a lengthy and intrusive Government questionnaire

for a number of reasons besides reluctance to answer a citizenship question—reasons relating to education level, socioeconomic status, and less exposure to Government outreach efforts. See App. to Pet. for Cert. 553a–554a, 557a–558a.

***2571** The Secretary justifiably found the Bureau's analysis inconclusive. Weighing that uncertainty against the value of obtaining more complete and accurate citizenship data, he determined that reinstating a citizenship question was worth the risk of a potentially lower response rate. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census.

Justice BREYER would conclude otherwise, but only by subordinating the Secretary's policymaking discretion to the Bureau's technocratic expertise. Justice BREYER's analysis treats the Bureau's (pessimistic) prediction about response rates and (optimistic) assumptions about its data modeling abilities as touchstones of substantive reasonableness rather than simply evidence for the Secretary to consider. He suggests that the Secretary should have deferred to the Bureau or at least offered some special justification for drawing his own inferences and adopting his own assumptions. But the Census Act authorizes the Secretary, not the Bureau, to make policy choices within the range of reasonable options. And the evidence before the Secretary hardly led ineluctably to just one reasonable course of action. It called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty. The Secretary was required to consider the evidence and give reasons for his chosen course of action. He did so. It is not for us to ask whether his decision was "the best one possible" or even whether it was "better than the alternatives." *FERC v. Electric Power Supply Assn.*, 577 U. S. ——, ——, 136 S.Ct. 760, 782, 193 L.Ed.2d 661 (2016). By second-guessing the Secretary's weighing of risks and benefits and penalizing him for departing from the Bureau's inferences and assumptions, Justice BREYER—like the District Court—substitutes his judgment for that of the agency.

C

The District Court also ruled that the Secretary violated two particular provisions of the Census Act, § 6(c) and § 141(f).

Section 6 has three subsections. Subsections (a) and (b) authorize the Secretary to acquire administrative records from other federal agencies and from state and local governments.[3] Subsection (c) states:

> "To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any

source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries." 13 U. S. C. § 6(c).

The District Court held, and respondents argue, that the Secretary failed to comply with § 6(c) because he opted to collect citizenship data using direct inquiries when it was possible to provide DOJ with data from administrative records alone.

***2572** At the outset, § 6(c) may not even apply here. It governs the Secretary's choices with respect to "statistics required." The parties have assumed that phrase refers to census-related data that the Secretary wishes to acquire, but it may instead refer to particular kinds of statistics that other provisions of the Census Act actually do *require* the Secretary to collect and publish. See, *e.g.*, § 41 ("The Secretary shall collect and publish statistics concerning [cotton and cotton production]."); § 61 ("The Secretary shall collect, collate, and publish monthly statistics concerning [vegetable and animal oils and the like]."); § 91 ("The Secretary shall collect and publish quarterly financial statistics of business operations, organization, practices, management, and relation to other businesses."). If so, § 6(c) would seem to have nothing to say about the Secretary's collection of census-related citizenship data, which is not a "statistic" he is "required" to collect.

Regardless, assuming the provision applies, the Secretary complied with it, for essentially the same reasons that his decision was not arbitrary and capricious. As he explained, administrative records would not, in his judgment, provide the more complete and accurate data that DOJ sought. He thus could not, "consistent with" the kind and quality of the "statistics required," use administrative records instead of asking about citizenship directly. Respondents' arguments to the contrary rehash their disagreement with the Secretary's policy judgment about which approach would yield the most complete and accurate citizenship data. For the reasons already discussed, we may not substitute our judgment for that of the Secretary here.

We turn now to § 141(f), which requires the Secretary to report to Congress about his plans for the census. Paragraph (1) instructs him to submit, at least three years before the census date, a report containing his "determination of the subjects proposed to be included, and the types of information to be compiled," in the census. Paragraph (2) then tells him to submit, at least two years before the census date, a report containing his "determination of the questions proposed to be included" in the census. Paragraph (3) provides:

"[A]fter submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, [he shall submit] a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified."

The Secretary timely submitted his paragraph (1) report in March 2017. It did not mention citizenship. In December 2017, he received DOJ's formal request. Three months later, in March 2018, he timely submitted his paragraph (2) report. It did propose asking a question about citizenship.

The District Court held that the Secretary's failure to mention citizenship in his March 2017 report violated § 141(f)(1) and provided an independent basis to set aside his action. Assuming without deciding that the Secretary's compliance with the reporting requirement is for courts—rather than Congress—to police, we disagree. The Secretary's March 2018 report satisfied the requirements of paragraph (3): By informing Congress that he proposed to include a citizenship question, the Secretary necessarily also informed Congress that he proposed to modify the original list of subjects that he submitted in the March 2017 report. Nothing ***2573** in § 141(f) suggests that the same report cannot simultaneously fulfill the requirements of paragraphs (2) and (3). And to the extent paragraph (3) requires the Secretary to explain his finding of new circumstances, he did so in his March 2018 memo, which described DOJ's intervening request.

In any event, even if we agreed with the District Court that the Secretary technically violated § 141(f) by submitting a paragraph (2) report that doubled as a paragraph (3) report, the error would surely be harmless in these circumstances, where the Secretary nonetheless fully informed Congress of, and explained, his decision. See 5 U. S. C. § 706 (in reviewing agency action, "due account shall be taken of the rule of prejudicial error").

V

We now consider the District Court's determination that the Secretary's decision must be set aside because it rested on a pretextual basis, which the Government conceded below would warrant a remand to the agency.

We start with settled propositions. First, in order to permit meaningful judicial review, an agency must "disclose the basis" of its action. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–169, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962) (internal quotation marks omitted); see also *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.").

Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record. *Vermont Yankee*

Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978); *Camp v. Pitts*, 411 U.S. 138, 142–143, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (*per curiam*). That principle reflects the recognition that further judicial inquiry into "executive motivation" represents "a substantial intrusion" into the workings of another branch of Government and should normally be avoided. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268, n. 18, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); see *Overton Park*, 401 U.S. at 420, 91 S.Ct. 814.

Third, a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons. See *Jagers v. Federal Crop Ins. Corp.*, 758 F.3d 1179, 1185–1186 (CA10 2014) (rejecting argument that "the agency's subjective desire to reach a particular result must necessarily invalidate the result, regardless of the objective evidence supporting the agency's conclusion"). Relatedly, a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a "rarified technocratic process, unaffected by political considerations or the presence of Presidential power." *Sierra Club v. Costle*, 657 F.2d 298, 408 (CADC 1981). Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).

Finally, we have recognized a narrow exception to the general rule against inquiring into "the mental processes of administrative decisionmakers." *Overton Park*, 401 U.S. at 420, 91 S.Ct. 814. On a ***2574** "strong showing of bad faith or improper behavior," such an inquiry may be warranted and may justify extra-record discovery. *Ibid.*

The District Court invoked that exception in ordering extra-record discovery here. Although that order was premature, we think it was ultimately justified in light of the expanded administrative record. Recall that shortly after this litigation began, the Secretary, prodded by DOJ, filed a supplemental memo that added new, pertinent information to the administrative record. The memo disclosed that the Secretary had been considering the citizenship question for some time and that Commerce had inquired whether DOJ would formally request reinstatement of the question. That supplemental memo prompted respondents to move for both completion of the administrative record and extra-record discovery. The District Court granted both requests at the same hearing, agreeing with respondents that the Government had submitted an incomplete administrative record and that the existing evidence supported a prima facie showing that the VRA rationale was pretextual.

The Government did not challenge the court's conclusion that the administrative record was incomplete, and the parties stipulated to the inclusion of more than 12,000 pages of internal

deliberative materials as part of the administrative record, materials that the court later held were sufficient on their own to demonstrate pretext. The Government did, however, challenge the District Court's order authorizing extra-record discovery, as well as the court's later orders compelling depositions of the Secretary and of the Acting Assistant Attorney General for DOJ's Civil Rights Division.

We agree with the Government that the District Court should not have ordered extra-record discovery when it did. At that time, the most that was warranted was the order to complete the administrative record. But the new material that the parties stipulated should have been part of the administrative record—which showed, among other things, that the VRA played an insignificant role in the decisionmaking process—largely justified such extra-record discovery as occurred (which did not include the deposition of the Secretary himself). We accordingly review the District Court's ruling on pretext in light of all the evidence in the record before the court, including the extra-record discovery.

That evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court's view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question "well before" receiving DOJ's request, and did so for reasons unknown but unrelated to the VRA. 351 F.Supp.3d at 660.

The Government, on the other hand, contends that there was nothing objectionable or even surprising in this. And we agree—to a point. It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. The record here reflects the sometimes involved nature of Executive Branch decisionmaking, but no ***2575** particular step in the process stands out as inappropriate or defective.

And yet, viewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided.

The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. The Secretary's Director of Policy did not know why the Secretary

wished to reinstate the question, but saw it as his task to "find the best rationale." *Id.*, at 551. The Director initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ's Executive Office for Immigration Review, neither of which is responsible for enforcing the VRA. After those attempts failed, he asked Commerce staff to look into whether the Secretary could reinstate the question without receiving a request from another agency. The possibility that DOJ's Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way and eventually pursued.

Even so, it was not until the Secretary contacted the Attorney General directly that DOJ's Civil Rights Division expressed interest in acquiring census-based citizenship data to better enforce the VRA. And even then, the record suggests that DOJ's interest was directed more to helping the Commerce Department than to securing the data. The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors. Their influence may explain why the letter went beyond a simple entreaty for better citizenship data—what one might expect of a typical request from another agency—to a specific request that Commerce collect the data by means of reinstating a citizenship question on the census. Finally, after sending the letter, DOJ declined the Census Bureau's offer to discuss alternative ways to meet DOJ's stated need for improved citizenship data, further suggesting a lack of interest on DOJ's part.

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free." *United States v. Stanchich*, 550 F.2d 1294, 1300 (CA2 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important ***2576** decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985). We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.

* * *

The judgment of the United States District Court for the Southern District of New York is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice GORSUCH and Justice KAVANAUGH join, concurring in part and dissenting in part.

In March 2018, the Secretary of Commerce exercised his broad discretion over the administration of the decennial census to resume a nearly unbroken practice of asking a question relating to citizenship. Our only role in this case is to decide whether the Secretary complied with the law and gave a reasoned explanation for his decision. The Court correctly answers these questions in the affirmative. *Ante*, at 2566 – 2573. That ought to end our inquiry.

The Court, however, goes further. For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale. Echoing the din of suspicion and distrust that seems to typify modern discourse, the Court declares the Secretary's memorandum "pretextual" because, "viewing the evidence as a whole," his explanation that including a citizenship question on the census would help enforce the Voting Rights Act (VRA) "seems to have been contrived." *Ante*, at 2572 – 2573, 2574 – 2575, 2575 – 2576. The Court does not hold that the Secretary merely had *additional*, unstated reasons for reinstating the citizenship question. Rather, it holds that the Secretary's stated rationale did not factor *at all* into his decision.

The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. And, if taken seriously as a rule of decision, this holding would transform administrative law. It is not difficult for political opponents of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives. Significant policy decisions are regularly criticized as products of partisan influence, interest-group pressure, corruption, and animus. Crediting these accusations on evidence as thin as the evidence here could

lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the Administrative Procedure Act (APA).

Unable to identify any legal problem with the Secretary's reasoning, the Court imputes one by concluding that he must not be telling the truth. The Court therefore upholds the decision of the District Court—which, in turn, was transparently based on the application of an administration-specific standard. App. to Pet. for Cert. 527a (crediting respondents' allegations ***2577** that "the *current* Department of Justice has shown little interest in enforcing the" VRA (emphasis added)).

The law requires a more impartial approach. Even assuming we are authorized to engage in the review undertaken by the Court—which is far from clear—we have often stated that courts reviewing agency action owe the Executive a "presumption of regularity." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The Court pays only lipservice to this principle. But, the evidence falls far short of supporting its decision. The Court, I fear, will come to regret inventing the principles it uses to achieve today's result. I respectfully dissent from Part V of the opinion of the Court. [1]

I

As the Court explains, federal law directs the Secretary of Commerce to "take a decennial census." 13 U. S. C. § 141(a); see U. S. Const., Art. I, § 2, cl. 3; Amdt. XIV, § 2; *ante*, at 2561 – 2562. The discretion afforded the Secretary is extremely broad. Subject only to constitutional limitations and a handful of inapposite statutory requirements, the Secretary is expressly authorized to "determine the inquiries" on the census questionnaire and to conduct the census "in such form and content as he may determine." §§ 5, 141(a); see *ante*, at 2567 – 2569, 2571 – 2573. [2] Prior census questionnaires have included questions ranging from sex, age, and race to commute, education, and radio ownership. And between 1820 and 2010, every decennial census questionnaire but one asked some segment of the population a question related to citizenship. The 2010 census was the first since 1840 that did not include any such question.

In March 2018, the Secretary issued a memorandum reinstating a citizenship question on the 2020 census. He explained that the Department of Justice (DOJ) had formally requested reinstatement of the question because the data obtained would help enforce § 2 of the VRA. He further explained that the question had been well tested in light of its extensive previous use, that he had consulted with the Census Bureau on the proposal, and that his final decision incorporated feedback from the Bureau. He recognized that staff at the Bureau believed that better data could be obtained through modeling and reliance on existing records, but he disagreed with that assessment, explaining that the data was inconclusive and that he thought it preferable to ask the question directly of the entire

population. Respondents brought suit, seeking judicial review of the Secretary's decision under the APA, 5 U. S. C. § 706.

II

As relevant here, the APA requires courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in ***2578** accordance with law." § 706(2)(A). We have emphasized that "[r]eview under the arbitrary and capricious standard is deferential." *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007); see *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 466, n. 8, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). It requires the reviewing court to determine whether the agency " 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.' " *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). We have described this as a " 'narrow' standard of review" under which the reviewing court cannot " 'substitute its judgment for that of the agency,' and should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " *Id.*, at 513–514, 129 S.Ct. 1800 (citation omitted); accord, *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). [3]

Part IV–B of the opinion of the Court correctly applies this standard to conclude that the Secretary's decision survives ordinary arbitrary-and-capricious review. That holding should end our inquiry.

But the opinion continues. Acknowledging that "no particular step" in the proceedings here "stands out as inappropriate or defective," even after reviewing "all the evidence in the record ..., including the extra-record discovery," *ante*, at 2574, the Court nevertheless agrees with the District Court that the Secretary's rationale for reinstating the citizenship question was "pretextual—that is, that the real reason for his decision was something other than the sole reason he put forward in his memorandum, namely enhancement of DOJ's VRA enforcement efforts." 351 F.Supp.3d 502, 660 (SDNY 2019); see *ante*, at 2575 – 2576. According to the Court, something just "seems" wrong. *Ibid.*

This conclusion is extraordinary. The Court engages in an unauthorized inquiry into evidence not properly before us to reach an unsupported conclusion. Moreover, each step of the inquiry offends the presumption of regularity we owe the Executive. The judgment of the District Court should be reversed.

A

Section 706(2) of the APA contemplates review of the administrative "record" to determine whether an agency's "action, findings, and conclusions" satisfy six specified standards. See §§ 706(2)(A)–(F). None instructs the Court to inquire into pretext. Consistent with this statutory text, we have held that a court is "ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Ante*, at 2573 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978)); see *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based"). If an agency's stated findings and conclusions withstand scrutiny, the APA does not permit a court to set aside the decision solely because the agency had "other unstated ***2579** reasons" for its decision, such as "political considerations" or the "Administration's priorities." *Ante*, at 2573 – 2574.

Unsurprisingly, then, this Court has never held an agency decision arbitrary and capricious on the ground that its supporting rationale was "pretextual." Nor has it previously suggested that this was even a possibility. Under "settled propositions" of administrative law, *ante*, at 2572 – 2573, pretext is virtually never an appropriate or relevant inquiry for a reviewing court to undertake.

Respondents conceptualize pretext as a subset of "arbitrary and capricious" review. It is far from clear that they are correct. But even if they were, an agency action is not arbitrary or capricious merely because the decisionmaker has other, unstated reasons for the decision. *Ante*, at 2573 – 2574. Nor is an agency action arbitrary and capricious merely because the decisionmaker was "inclined" to accomplish it before confirming that the law and facts supported that inclination. *In re Dept. of Commerce*, 586 U. S. ——, ——, 139 S.Ct. 16, 17, 202 L.Ed.2d 306 (2018) (GORSUCH, J., concurring in part and dissenting in part).

Accordingly, even under respondents' approach, a showing of pretext could render an agency action arbitrary and capricious only in the infinitesimally small number of cases in which the administrative record establishes that an agency's stated rationale did not factor *at all* into the decision, thereby depriving the action of an adequate supporting rationale.[4] This showing is extremely difficult to make because the administrative record will rarely, if ever, contain evidence sufficient to show that an agency's stated rationale did not actually factor into its decision. And we have stated that a "strong showing of bad faith or improper behavior" is necessary to venture beyond the agency's "administrative findings" and inquire into "the mental processes of administrative decisionmakers." *Overton Park*, 401 U.S. at 420, 91 S.Ct. 814.[5] We have never

before found *Overton Park*'s exception satisfied, much less invalidated an agency action based on "pretext."

Undergirding our arbitrary-and-capricious analysis is our longstanding precedent affording the Executive a "presumption of regularity." *Id.,* at 415, 91 S.Ct. 814; see *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15, 47 S.Ct. 1, 71 L.Ed. 131 (1926). This presumption reflects respect for a coordinate branch of government whose officers not only take ***2580** an oath to support the Constitution, as we do, Art. VI, but also are charged with "faithfully execut[ing]" our laws, Art. II, § 3. See *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941) (presumption of regularity ensures that the "integrity of the administrative process" is appropriately respected). In practice, then, we give the benefit of the doubt to the agency.

B

The Court errs at the outset by proceeding beyond the administrative record to evaluate pretext. Respondents have not made a "strong showing of bad faith or improper behavior." *Overton Park*, *supra*, at 420, 91 S.Ct. 814.

The District Court's initial order granting extra-record discovery relied on four categories of evidence:

> "evidence that [the Secretary] was predisposed to reinstate the citizenship question when he took office; that the [DOJ] hadn't expressed a desire for more detailed citizenship data until the Secretary solicited its view; that he overruled the objections of his agency's career staff; and that he declined to order more testing of the question given its long history." *Dept. of Commerce*, 586 U. S., at ——, 139 S.Ct., at 18.

None of this comes close to showing bad faith or improper behavior. Indeed, there is nothing even "unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape." *Ibid.* Today all Members of the Court who reach the question agree that the District Court abused its discretion in ordering extra-record discovery based on this evidence. *Ante*, at 2574 ("We agree with the Government that the District Court should not have ordered extra-record discovery when it did").

Nevertheless, the Court excuses the error because, in its view, "the new material that the parties [later] stipulated should have been part of the administrative record ... largely justified such extra-record discovery as occurred." *Ibid.* Given the requirement that respondents make a "strong

showing" of bad faith, one would expect the Court to identify which "new material" supported such a showing. It does not. Nor does the Court square its suggestion that some of the extra-record discovery was *not* "justified" with its consideration of "all ... the extra-record discovery." *Ante*, at 2574 – 2575. Regardless, I assume that the Court has in mind the administrative-record materials that the District Court would later rely on to establish pretext:

> "evidence that [the Secretary] had made the decision to add the citizenship question well before DOJ requested its addition in December 2017; the absence of any mention, *at all*, of VRA enforcement in the discussions of adding the question that preceded the [DOJ] Letter; unsuccessful attempts by Commerce Department staff to shop around for a request by another agency regarding citizenship data; and [the Secretary's] personal outreach to Attorney General Sessions, followed by the [DOJ] Letter; not to mention the conspicuous procedural irregularities that accompanied the decision to add the question." 351 F.Supp.3d at 661 (citations omitted).

This evidence fails to make a strong showing of bad faith or improper behavior. Taken together, it proves at most that the Secretary was predisposed to add a citizenship question to the census and took steps to achieve that end before settling on the VRA rationale he included in his memorandum. Perhaps he had reasons for adding ***2581** the citizenship question other than the VRA, but by the Court's own telling, that does not amount to evidence of bad faith or improper behavior. *Ante*, at 2573 – 2574; see *Dept. of Commerce*, *supra*, at 17.

The Court thus errs in relying on materials outside the record to support its holding. And the Court does not claim that the evidence in the administrative record alone would prove that the March 2018 memorandum was a pretext. Given the presumption of regularity, the evidence discussed above falls far short of establishing that the VRA rationale did not factor at all into the Secretary's decision.

C

Even if it were appropriate for the Court to rely on evidence outside the administrative record, that evidence still fails to establish pretext. None of the evidence cited by the Court or the District Court comes close to showing that the Secretary's stated rationale—that adding a citizenship question to the 2020 census questionnaire would "provide ... data that are not currently available" and "permit more effective enforcement of the [VRA]," App. to Pet. for Cert. 548a—did not factor *at all* into his decision.

Once again, the evidence cited by the Court suggests at most that the Secretary had "other unstated reasons" for reinstating the citizenship question. *Ante*, at 2573 – 2574. For example, the Court states that the Secretary's Director of Policy "initially attempted to elicit requests

for citizenship data from the Department of Homeland Security and DOJ's Executive Office for Immigration Review." *Ante*, at 2575. But this hardly shows pretext. It simply suggests that the Director believed that citizenship information could be useful in tackling problems related to national security and illegal immigration—a view that would also explain why the Secretary might not have been "considering VRA enforcement" early on. *Ibid.*; see also American Community Survey, Why We Ask: Place of Birth, Citizenship and Year of Entry (2016) (explaining that inquiries about "place of birth, citizenship, and year of entry" provide statistics that are "essential for agencies and policy makers setting and evaluating immigration policies and laws, understanding how different immigrant groups are assimilated, and monitoring against discrimination"), https://www2.census.gov/programs-surveys/acs/about/qbyqfact/2016/Citizenship.pdf (as last visited June 25, 2019).

The Court emphasizes that the VRA rationale for the citizenship question originated in the Department of Commerce, and suggests that DOJ officials unthinkingly fell in line after the Attorney General was looped into the process. See *ante*, at 2575. But the Court ignores that the letter was drafted by the then-Acting Assistant Attorney General for Civil Rights and reviewed by five other DOJ attorneys, including the Chief of the DOJ's Voting Section. 351 F.Supp.3d at 554–556. Given the DOJ's multilayer review process and its explanation for requesting citizenship data, the Court's suggestion that the DOJ's letter was inadequately vetted or improperly "influence[d]" by the Department of Commerce is entirely unsupported. *Ante*, at 2575. In any event, none of this suggests, much less proves, that the Secretary harbored an unstated belief that adding the citizenship question would *not* help enforce the VRA, or that the VRA rationale otherwise did not factor at all into his decision. It simply suggests that a number of executive officials agreed that adding a citizenship question would support VRA enforcement.

The Court's other evidence is even further afield. The Court thinks it telling that the DOJ's letter included "a specific request ***2582** that Commerce collect the [citizenship] data by means of reinstating a citizenship question on the census," rather than a more open-ended "entreaty for better citizenship data." *Ibid.* I do not understand how the specificity of the DOJ's letter bears on whether the Secretary's rationale was pretextual—particularly since the letter specifically explained why "census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in [VRA] litigation" than existing data. App. to Pet. for Cert. 568a; see *id.*, at 567a–568a. Unless the Court is now suggesting that agency correspondence must comply with the Court's subjective, unsupported view of what "might" constitute a "typical request from another agency," *ante*, at 2575, the specificity of the DOJ's letter is irrelevant. The Court also points to the DOJ's decision not to meet with the Census Bureau "to discuss alternative ways to meet DOJ's stated need for improved citizenship data." *Ibid.* But the Court does not explain how the DOJ's refusal bears on the *Secretary's* rationale. Besides, it is easy to understand why DOJ officials would not be interested in meeting with the Census Bureau. The meeting would have been with career employees whose acknowledged purpose was to talk the DOJ out of its request. See

351 F.Supp.3d at 557. Having already considered the issue and explained the rationale behind the request, it seems at least plausible that the DOJ officials believed such a meeting would be unproductive.

In short, the evidence cited by the Court establishes, at most, that leadership at both the Department of Commerce and the DOJ believed it important—for a variety of reasons—to include a citizenship question on the census.

The Court also fails to give credit where it is due. The Secretary initiated this process inclined to favor what he called "Option B"—that is, simply "add[ing] a citizenship question to the decennial census." App. to Pet. for Cert. 552a. But the Census Bureau favored "Option C"—relying solely on "administrative records" to supply the information needed by the DOJ. *Id.*, at 554a. The Secretary considered this view and found it a "potentially appealing solution," *ibid.*, but concluded that it had shortcomings. Rather than revert to his original inclination, however, he "asked the Census Bureau to develop a fourth alternative, Option D, which would combine Options B and C." *Id.*, at 555a. And he settled on that solution. Whatever one thinks of the Secretary's choice, his willingness to change his mind in light of the Bureau's feedback belies the idea that his rationale or decisionmaking process was a pretext.

The District Court's lengthy opinion pointed to other facts that, in its view, supported a finding of pretext. 351 F.Supp.3d at 567–572, 660–664 (discussing the statements, e-mails, acts, and omissions of numerous people involved in the process). I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web. Cf. *id.*, at 662 (inferring "from the various ways in which [the Secretary] and his aides acted like people with something to hide that they *did* have something to hide"). But the Court does not rely on this evidence, and rightly so: It casts no doubt on whether the Secretary's stated rationale factored into his decision. The evidence suggests, at most, that the Secretary had *multiple* reasons for wanting to include the citizenship question on the census.

Finally, if there could be any doubt about this conclusion, the presumption of ***2583** regularity resolves it. Where there are equally plausible views of the evidence, one of which involves attributing bad faith to an officer of a coordinate branch of Government, the presumption compels giving the benefit of the doubt to that officer.

III

The Court's erroneous decision in this case is bad enough, as it unjustifiably interferes with the 2020 census. But the implications of today's decision are broader. With today's decision, the Court has opened a Pandora's box of pretext-based challenges in administrative law.

Today's decision marks the first time the Court has ever invalidated an agency action as "pretextual." Having taken that step, one thing is certain: This will not be the last time it is asked to do so. Virtually every significant agency action is vulnerable to the kinds of allegations the Court credits today. These decisions regularly involve coordination with numerous stakeholders and agencies, involvement at the highest levels of the Executive Branch, opposition from reluctant agency staff, and—perhaps most importantly—persons who stand to gain from the action's demise. Opponents of future executive actions can be expected to make full use of the Court's new approach.

The 2015 "Open Internet Order" provides a case in point. In 2015, the Federal Communications Commission (FCC) adopted a controversial order reclassifying broadband Internet access service as a "telecommunications service" subject to regulation under Title II of the Communications Act. See *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5618 (2015). According to a dissenting Commissioner, the FCC "flip-flopp[ed]" on its previous policy not because of a change in facts or legal understanding, but based on "one reason and one reason alone. President Obama told us to do so." *Id.,* at 5921 (statement of Comm'r Pai). His view was supported by a 2016 congressional Report in which Republican Senate staff concluded that "the FCC bent to the political pressure of the White House" and "failed to live up to standards of transparency." Majority Staff Report, Senate Committee on Homeland Security and Governmental Affairs, Regulating the Internet: How the White House Bowled Over FCC Independence, 114th Cong., 1st Sess., 29 (Comm. Print 2016). The Report cited evidence strikingly similar to that relied upon by the Court here—including agency-initiated "meetings with certain outside groups to support" the new result, *id.*, at 3; "apparen[t] ... concern from the career staff that there was insufficient notice to the public and affected stakeholders," *id.,* at 4; and "regula[r] communicatio[n]" between the FCC Chairman and "presidential advisors," *id.*, at 25.

Under the malleable standard applied by the Court today, a serious case could be made that the Open Internet Order should have been invalidated as "pretextual," regardless of whether any "particular step in the process stands out as inappropriate or defective." *Ante*, at 2575. It is enough, according to the Court, that a judge believes that the ultimate rationale "seems to have been contrived" when the evidence is considered "as a whole." *Ante*, at 2574, 2575 – 2576.

Now that the Court has opened up this avenue of attack, opponents of executive actions have strong incentives to craft narratives that would derail them. Moreover, even if the effort to invalidate the action is ultimately unsuccessful, the Court's decision enables partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction. The Court's

decision could even implicate separation-of-powers concerns insofar as it ***2584** enables judicial interference with the enforcement of the laws.

In short, today's decision is a departure from traditional principles of administrative law. Hopefully it comes to be understood as an aberration—a ticket good for this day and this train only.

* * *

Because the Secretary's decision to reinstate a citizenship question on the 2020 census was legally sound and a reasoned exercise of his broad discretion, I respectfully dissent from Part V of the opinion of the Court.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and dissenting in part.
I join Parts I, II, IV–A, and V of the Court's opinion (except as otherwise indicated in this opinion). I dissent, however, from the conclusion the Court reaches in Part IV–B. To be more specific, I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire and that a remand to the agency is appropriate on that ground. But I write separately because I also believe that the Secretary's decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA).

There is no serious dispute that adding a citizenship question would diminish the accuracy of the enumeration of the population—the sole constitutional function of the census and a task of great practical importance. The record demonstrates that the question would likely cause a disproportionate number of noncitizens and Hispanics to go uncounted in the upcoming census. That, in turn, would create a risk that some States would wrongfully lose a congressional representative and funding for a host of federal programs. And, the Secretary was told, the adverse consequences would fall most heavily on minority communities. The Secretary decided to ask the question anyway, citing a need for more accurate citizenship data. But the evidence indicated that asking the question would produce citizenship data that is *less* accurate, not more. And the reason the Secretary gave for needing better citizenship data in the first place—to help enforce the Voting Rights Act of 1965—was not convincing.

In short, the Secretary's decision to add a citizenship question created a severe risk of harmful consequences, yet he did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal. The Secretary thus failed to "articulate a satisfactory explanation" for his decision, "failed to consider ... important aspect[s] of the problem," and "offered an explanation for [his] decision that runs counter to the evidence," all

in violation of the APA. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). These failures, in my view, risked undermining public confidence in the integrity of our democratic system itself. I would therefore hold that the Secretary's decision—whether pretextual or not—was arbitrary, capricious, and an abuse of discretion.

I

A

Three sets of laws determine the legal outcome of this case. First, the Constitution requires an "actual Enumeration" of the "whole number of persons in each State" every 10 years. Art. I, § 2, cl. 3; Amdt. 14, § 2. It does so in order to ***2585** "provide a basis for apportioning representatives among the states in the Congress." *Baldrige v. Shapiro*, 455 U.S. 345, 353, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982); see also Art. I, § 2, cl. 3. The inclusion of this provision in the Constitution itself underscores the importance of conducting an accurate census. See *Utah v. Evans*, 536 U.S. 452, 478, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002) (recognizing "a strong constitutional interest in [the] accuracy" of the enumeration).

Second, the Census Act contains two directives that constrain the Secretary's ability to add questions to the census. Section 195 says that the Secretary "shall, if he considers it feasible," authorize the use of statistical "sampling" in collecting demographic information. That means the Secretary must, if feasible, obtain demographic information through a survey sent to a *sample* of households, rather than through the short-form census questionnaire to which *every* household must respond. The other relevant provision, § 6(c), says that "[*t*]*o the maximum extent possible* and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available" from administrative sources "instead of conducting direct inquiries." (Emphasis added.) These provisions, taken together, reflect a congressional preference for keeping the short form short, so that it does not burden recipients and thereby discourage them from responding.

Third, the APA prohibits administrative agencies from making choices that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706(2)(A). We have said that courts, in applying this provision, must decide "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The agency must have "examine[d] the relevant data and articulate[d] a

satisfactory explanation for its action[,] including a 'rational connection between the facts found and the choice made.' " *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. An agency ordinarily fails to meet this standard if it has "failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Ibid.*

Courts do not apply these principles of administrative law mechanically. Rather, they take into account, for example, the nature and importance of the particular decision, the relevance and importance of missing information, and the inadequacies of a particular explanation in light of their importance. The Federal Government makes tens of thousands, perhaps millions, of administrative decisions each year. And courts would be wrong to expect or insist upon administrative perfection. But here, the Enumeration Clause, the Census Act, and the nature of the risks created by the agency's decision all make clear that the decision before us is highly important to the proper functioning of our democratic system. It is therefore particularly important that courts here not overlook an agency's (1) failure to consider serious risks of harm, (2) failure to explain its refusal to minimize those risks, or (3) failure to link its conclusion to available evidence. My view, like that of the District Court, is that the agency here failed on all three counts.

B

A brief history of how the census has worked over the years will help the reader understand some of the shortcomings of ***2586** the Secretary's decisionmaking process. The Framers wrote into the Constitution a mandate to conduct an "actual Enumeration" of the population every 10 years. Art. I, § 2, cl. 3. They did so for good reason. The purpose of the census is to "provide a basis for apportioning representatives among the states in the Congress," *Baldrige*, 455 U.S. at 353, 102 S.Ct. 1103, ensuring that "comparative state political power in the House ... reflect[s] comparative population," *Evans*, 536 U.S. at 477, 122 S.Ct. 2191. The Framers required an actual count of every resident to "limit political chicanery" and to prevent the census count from being "skewed for political ... purposes." *Id.*, at 500, 122 S.Ct. 2191 (THOMAS, J., concurring in part and dissenting in part).

Throughout most of the Nation's history, the Federal Government used enumerators, often trained census takers, to conduct the census by going door to door. The enumerators would ask a host of questions, including place of birth, citizenship, and others. But after the 1950 census, the Bureau began to change its approach. Post-census studies revealed that the census had failed to count more than 5 million people and that the undercount disproportionately affected members of minority groups. See M. Anderson, The American Census: A Social History 201–202 (1988); Brief for

Historians and Social Scientists as *Amici Curiae* 15. Studies showed that statistical sampling would produce higher quality data. Anderson, American Census, at 201.

Beginning with the 1960 census, the Bureau consequently divided its questioning into a short form and a long form. The short form contained a list of questions—a short list—that the census would ask of every household. That list included basic demographic questions like sex, age, race, and marital status. The short form did not include, and has never included, a question about citizenship. See *ibid.*; Dept. of Commerce, U. S. Census Bureau, Measuring America: The Decennial Censuses From 1790 to 2000, p. 128 (2002). By way of contrast, the long form set forth a host of questions that would be asked of only a sample of households. In 1960, the long form was sent to one in every four households; in subsequent years, it was sent to approximately one in every six. See 351 F.Supp.3d 502, 520 (SDNY 2019). And it was more recently replaced by the American Community Survey (ACS), which is sent to approximately 1 in 38 households each year. The long form (and now the ACS) has often included a question about citizenship.

In 1970, the Census Bureau made another important change to the census. It significantly reduced its reliance upon in-person enumerators. See Anderson, *supra*, at 206. Instead, it sent nearly all households a questionnaire by mail. Most households received the short form, and a small sample received the long form. Instructions on the form told each household to fill out the questionnaire and return it to the Census Bureau by mail. Enumerators would follow up with households that did not return the questionnaire.

To maximize accuracy and minimize cost, the Bureau tried to bring about the highest possible "self-response" rate, *i.e.*, to encourage as many households as possible to respond by mail. For that reason, it tried to keep the short form as short as possible. And it consistently opposed placing a citizenship question on that form. It feared that adding a question about citizenship would "inevitably jeopardize the overall accuracy of the population count," partly because of added response burden but also because, as it explained, noncitizens faced with a citizenship question would be less likely to respond due to ***2587** fears of "the information being used against them." *Federation for Am. Immigration Reform v. Klutznick*, 486 F.Supp. 564, 568 (DDC 1980).

Likely for similar reasons, Congress amended the Census Act in 1976, enacting the two statutory provisions to which I previously referred. These two provisions, 13 U. S. C. § 6(c) and § 195, together encourage the Secretary not to ask demographic questions on the short form if the information can be obtained either through the long form or through administrative records.

II

With this statutory and historical background, we can more easily consider the agency decision directly under review. That decision "reinstate[s] [a] citizenship question on the 2020 decennial census." App. to Pet. for Cert. 549a−550a (Memorandum from Wilbur L. Ross, Jr., Secretary of Commerce, to Karen Dunn Kelley, Under Secretary for Economic Affairs (Mar. 26, 2018)). The agency's decision memorandum provided one and only one reason for making that decision—namely, that the question was "necessary to provide complete and accurate data in response to" a request from the Department of Justice (DOJ). *Id.*, at 562a. The DOJ had requested the citizenship question for "use [in] ... determining violations of Section 2 of the Voting Rights Act." *Id.*, at 548a.

The decision memorandum adds that the agency had not been able to "determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness. However, even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns." *Id.*, at 562a. The Secretary's decision thus rests upon a weighing of potentially adverse consequences (diminished responses and a less accurate census count) against potentially offsetting advantages (better citizenship data). In my view, however, the Secretary did not make reasonable decisions about these potential costs and benefits in light of the administrative record.

A

Consider first the Secretary's conclusion that he was "not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness." *Ibid.* Insofar as this statement implies that adding the citizenship question is unlikely to affect "responsiveness" very much (or perhaps at all), the evidence in the record indicates the contrary.

1

The administrative record includes repeated Census Bureau statements that adding the question would produce a less accurate count because noncitizens and Hispanics would be less likely to respond to the questionnaire. See App. 105, 109–112, 158. The Census Bureau's chief scientist said specifically that adding the question would have "an adverse impact on self-response and, as a result, on the accuracy and quality of the 2020 Census." *Id.*, at 109. And the chief scientist backed this statement up by pointing to "[t]hree distinct analyses." *Ibid.*

The first analysis compared nonresponse rates for the short-form census questionnaire (which did not include a citizenship question) to nonresponse rates for the ACS (which did). Obviously, more people fail to respond to the ACS than to the short form. Yet taking into account the fact that the nonresponse rate will be greater for the ACS than for the short form, the Bureau found that

the difference ***2588** between the two is yet greater for noncitizen households than for citizen households (by 5.1%, according to the Bureau). *Id.*, at 111. This led the Bureau to say that it was a "reasonable inference" that the presence of the citizenship question accounted for the difference. *Ibid.*

The Bureau conducted two additional studies, both analyzing data from the ACS. One study looked at response rates for particular questions on the ACS. It showed that the "no answer" rate for the citizenship question was "much greater than the comparable rates" for other census questions (for example, questions about age, sex, race, and ethnicity). *Id.*, at 110. And it showed that the "no answer" rate for the citizenship question was significantly higher among Hispanics. *Id.*, at 109−110. The last study examined "break-off" rates, *i.e.*, the rate at which respondents stopped answering the questionnaire upon reaching a particular question. It found that Hispanics were significantly more likely than were non-Hispanics to stop answering at the point they reached the citizenship question. *Id.*, at 112. Together, these two studies provided additional support for the Census Bureau's determination that the citizenship question is likely to mean disproportionately fewer responses from noncitizens and Hispanics than from others. *Ibid.*

Putting numbers upon these study results, the Census Bureau estimated that adding the question to the short form would lead to 630,000 additional nonresponding households. *Id.*, at 114. That is to say, the question would cause households covering more than 1 million additional people to decline to respond to the census. When the Bureau does not receive a response, it follows up with in-person interviews in an effort to obtain the missing information. The Bureau often interviews what it calls "proxies," such as family members and neighbors. But this followup process is subject to error; and the error rate is much greater than the error rate for self-responses. *Ibid.* The Bureau thus explained that lower self-response rates "degrade data quality" by increasing the risk of error and leading to hundreds of thousands of fewer correct enumerations. *Id.*, at 113−115. The Bureau added that its estimate was "conservative." *Id.*, at 115. It expected "differences between citizen and noncitizen response rates and data quality" to be "amplified" in the 2020 census "compared to historical levels." *Ibid.* Thus, it explained, "the decrease in self-response for citizen households in 2020 could be much greater than the 5.1 percentage points [it] observed during the 2010 Census." *Id.*, at 115−116. Its conclusion in light of this evidence was clear. Adding the citizenship question to the short form was "very likely to reduce the self-response rate" and thereby "har[m] the quality of the census count." *Id.*, at 105, 158.

The Census Bureau's analysis received support from other submissions. Several States pointed out that noncitizens and racial minorities had been undercounted in every prior census. Administrative Record 1091−1092. They also drew attention to recent surveys indicating that noncitizens had significant concerns about the confidentiality of census responses. *Ibid.* Former directors of the Census Bureau wrote that adding the citizenship question so late in the process "would put the accuracy of the enumeration and success of the census in all communities at grave risk." *Id.*, at

1057. The American Sociological Association and Census Scientific Advisory Committee echoed these warnings. See *id.*, at 787, 794−795. On the other hand, the Secretary received submissions by other groups that supported adding the question. See, *e.g.*, *id.*, at 1178−1179, 1206, 1276. But as far as I can tell (or as far as the ***2589** arguments made here and in the District Court inform the matter), none of these latter submissions significantly added to, or detracted from, the Census Bureau's submissions in respect to the question's likely impact on response rates.

2

The Secretary's decision memorandum reached a quite different conclusion from the Census Bureau. The memorandum conceded that "a lower response rate would lead to ... less accurate responses." App. to Pet. for Cert. 556a. But it concluded that neither the Census Bureau nor any stakeholders had provided "definitive, empirical support" for the proposition that the citizenship question would reduce response rates. *Id.*, at 554a. The memorandum relied for that conclusion upon a number of considerations, but each is contradicted by the record.

The memorandum first pointed to perceived shortcomings in the Census Bureau's analysis of nonresponse rates. It noted that response rates are generally lower overall for the long form and ACS than they are for the short form. *Id.*, at 552a−554a. But the Bureau explained that its analysis accounted for this consideration, see App. 111, and no one has given us reason to think the contrary. The Secretary also noted that the Bureau "was not able to isolate what percentage of [the] decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey." App. to Pet. for Cert. 554a. But the Bureau said attributing the decline to the citizenship question was a "reasonable inference," App. 111, and again, nothing in the record contradicted the Bureau's judgment. And later analyses have borne out the Bureau's judgment that the citizenship question contributes to the decline in self-response. See, *e.g.*, *id.*, at 1002−1006, 1008 (August 2018 Census Bureau study).

The memorandum next cast doubt on the Census Bureau's analysis of the rate at which people responded to particular questions on the ACS. It noted that the "no answer" rate to the citizenship question was comparable to the "no answer" rate for other questions on the ACS, including educational attainment, income, and property insurance. App. to Pet. for Cert. 553a. But as discussed above, the Bureau found it significant that the "no answer" rate for the citizenship question was "much greater" than the "no answer" rate for the other questions that appear on the *short form*—that is, the form on which the citizenship question would appear. App. 110, 124. The Secretary offered no reason why the demographic variables to which he pointed provided a better point of comparison.

Finally, the memorandum relied on information provided by two outside stakeholders. The first was a study conducted by the private survey company Nielsen, in which questions about place of birth and time of arrival had not led to any appreciable decrease in the response rate. App. to Pet. for Cert. 552a. But Nielsen, which in fact urged the Secretary *not* to add the question, stated that its respondents (unlike census respondents) were *paid* to respond, and it is consequently not surprising that they did so. Administrative Record 1276. The memorandum also cited statements by former Census Bureau officials suggesting that empirical evidence about the question's potential impact on response rates was "limited." App. to Pet. for Cert. 558a–559a; see also *id.*, at 552a. But there was no reason to expect the former officials to provide more extensive empirical evidence as to a citizenship question when they were not privy to the internal Bureau analyses on this question. And, like Nielsen, the former ***2590** officials strongly urged the Secretary *not* to ask the question. See Administrative Record 1057.

The upshot is that the Secretary received evidence of a likely drop in census accuracy by a number somewhere in the hundreds of thousands, and he received nothing significant to the contrary. The Secretary pointed out that the Census Bureau's information was uncertain, *i.e.*, not "definitive." But that is not a satisfactory answer. Few public-policy-related statistical studies of risks (say, of many health or safety matters) are definitive. As the Court explained in *State Farm*, "[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." 463 U.S. at 52, 103 S.Ct. 2856. But an agency confronted with this situation cannot "merely recite the terms 'substantial uncertainty' as a justification for its actions." *Ibid.* Instead, it "must explain the evidence which is available" and typically must offer a reasoned explanation for taking action without "engaging in a search for further evidence." *Ibid.*

The Secretary did not do so here. He did not explain why he made the decision to add the question without following the Bureau's ordinary practice of extensively testing proposed changes to the census questionnaire. See App. 624–630, 641 (discussing testing process); see also, *e.g.*, Brief for Former Census Bureau Directors as *Amici Curiae* 17–21 (discussing prior examples of questions that the Bureau decided not to add after many years of pretesting). Without that testing, the Secretary could not treat the Bureau's expert opinions and its experience with the relevant surveys as worthless merely because its conclusions were not precise. The Bureau's opinions were properly considered as evidence of likelihoods, probabilities, or risks.

As noted above, the consequences of mistakes in the census count, of even a few hundred thousand, are grave. Differences of a few thousand people, as between one State and another, can mean a loss or gain of a congressional seat—a matter of great consequence to a State. See 351 F.Supp.3d at 594. And similar small differences can make a large difference to the allocation of federal funds among competing state programs. *Id.*, at 596–597; see also *Baldrige*, 455 U.S. at 353–354,

n. 9, 102 S.Ct. 1103. If near-absolute certainty is what the Secretary meant by "definitive," that insistence would itself be arbitrary in light of the constitutional and statutory consequences at stake. And if the Secretary instead meant that the evidence does not indicate a serious risk of a less accurate count, that conclusion does not find support in the record.

B

Now consider the Secretary's conclusion that, even if adding a citizenship question diminishes the accuracy of the enumeration, "the value of more complete and accurate data derived from surveying the entire population *outweighs* ... concerns" about diminished accuracy. App. to Pet. for Cert. 562a (emphasis added). That conclusion was also arbitrary. The administrative record indicates that adding a citizenship question to the short form would produce less "complete and accurate data," not more.

1

The Census Bureau informed the Secretary that, for about 90% of the population, accurate citizenship data is available from administrative records maintained by the Social Security Administration and Internal Revenue Service. App. 146. The Bureau ***2591** further informed the Secretary that it had "high confidence" that it could develop a statistical model that would accurately impute citizenship status for the remaining 10% of the population. *Ibid.* The Bureau stated that these methods alone—using existing administrative records for 90% of the population and statistical modeling for the remaining 10%—would yield more accurate citizenship data than also asking a citizenship question. *Id.*, at 159. How could that be so? The answer is somewhat technical but readily understandable.

First, consider the 90% of the population (about 295 million people) as to whom administrative records are available. The Government agrees that using these administrative records would provide highly reliable information about citizenship, because the records "require proof of citizenship." *Id.*, at 117. By contrast, if responses to a citizenship question were used for this group, the Census Bureau predicted without contradiction that about one-third of the noncitizens in this group who respond would answer the question untruthfully, claiming to be citizens when they are not. *Id.*, at 147. Those incorrect answers—about 9.5 million in total—would conflict with the administrative records on file for those noncitizens. And what would the Census Bureau do with the conflicting data? If it accepts the answer to the citizenship question as determinative, it will have less accurate data. If it accepts the citizenship data from administrative records as determinative, asking the question will have served no purpose.

Thus, as to 295 million people—the overwhelming majority of the population—asking the citizenship question would at best add nothing at all. I say "at best" because, for one thing, the Census Bureau informed the Secretary that asking the question would produce 1 million more people who could not be linked to administrative records, which in turn would require the Census Bureau to resort to a less accurate source of citizenship data for these people. See *id.*, at 147−149; see also 351 F.Supp.3d at 538−539. For another, the policy of the Census Bureau has always been to use census responses rather than administrative records in cases where the two conflict. App. 147. In this case, that practice would mean accepting 9.5 million inaccurate responses even though accurate administrative records are available. See *ibid.* The Census Bureau could perhaps change that practice, but the Secretary's decision memorandum said nothing about the matter. It did not address the problem.

Second, consider the remaining 10% of the population (about 35 million people) for whom the Government lacks administrative records. The question here is which approach would yield the most "complete and accurate" citizenship data for this group—adding a citizenship question or using statistical modeling alone? To answer this question, we must further divide this group into two categories—those who would respond to the citizenship question if it were asked and those who would not.

Start with the category of about 22 million people who would answer a citizenship question if it were asked. Would their answers regarding citizenship be more accurate than citizenship data produced by statistical modeling? The Census Bureau said no. That is because many of the noncitizens in this group would answer the question falsely, resulting in an estimated 500,000 inaccurate answers. See *id.*, at 148. And those who answer the question falsely would be commingled, perhaps randomly, with those who answer it correctly, thereby casting doubt on the answers of all 22 million, with no way of knowing which answers are correct and which are false. By contrast, the Bureau believed that it could develop a statistical model that ***2592** would produce more accurate citizenship data than these census responses. The Bureau therefore informed the Secretary that it could do better. As the Bureau's chief scientist explained, although "[o]ne might think" that asking the question "could help fill the ... gaps" in the administrative records, the data did not support that assumption. *Id.*, at 157. Instead, he explained, responses to the citizenship question "may not be reliable," which "calls into question their ability to improve upon" the Bureau's statistical modeling process. *Ibid.*

Next, turn to the more than 13 million remaining people who would not answer the citizenship question even if it were asked. As to this category, the Census Bureau would *still need to use statistical modeling* to obtain citizenship data, because there would be no census response to use instead. Hence, asking the citizenship question would add nothing at all as to this group. To the contrary, as the Government concedes, asking the question would *reduce* the accuracy of the citizenship data for this group, because the relatively inaccurate answers to the citizenship

question would diminish the overall accuracy of the Census Bureau's statistical model. See Brief for Petitioners 34 (conceding that the Census Bureau model will be "highe[r] quality" without the question than with it); 351 F.Supp.3d at 640 (explaining that asking the question would "corrup[t] ... the data generated by extrapolating from self-responses through imputation").

In sum, in respect to the 295 million persons for whom administrative records exist, asking the question on the short form would, at best, be no improvement over using administrative records alone. And in respect to the remaining 35 million people for whom no administrative records exist, asking the question would be no better, and in some respects would be worse, than using statistical modeling. The Census Bureau therefore told the Secretary that asking the citizenship question, even in addition to using administrative records, "would result in poorer quality citizenship data" than using administrative records alone, and would "still have all the negative cost and quality implications" of asking the citizenship question. App. 159. I could find no evidence contradicting that prediction.

2

If my description of the record is correct, it raises a serious legal problem. How can an agency support the decision to add a question to the short form, thereby risking a significant undercount of the population, on the ground that it will *improve* the accuracy of citizenship data, when in fact the evidence indicates that adding the question will *harm* the accuracy of citizenship data? Of course it cannot. But, as I have just said, I have not been able to find evidence to suggest that adding the question would result in more accurate citizenship data. Neither could the District Court. After reviewing the record in detail, the District Court found that "all of the relevant evidence before Secretary Ross—*all* of it—demonstrated that using administrative records ... would actually produce more accurate [citizenship] data than adding a citizenship question to the census." 351 F.Supp.3d at 650.

What consideration did the Secretary give to this problem? He stated simply that "[a]sking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer," which "may eliminate the need for the Census Bureau to have to impute an answer for millions of people." App. to Pet. for Cert. 556a. He therefore must have assumed, *sub silentio*, exactly what ***2593** the Census Bureau experts urged him not to assume—that answers to the citizenship question would be more accurate than statistical modeling. And he ignored the undisputed respects in which asking the question would make the existing data less accurate. Other than his assumption, the Secretary said nothing, absolutely nothing, to suggest a reasoned basis for disagreeing with the Bureau's expert statistical judgment.

The Government now maintains that the Secretary reasonably discounted the Census Bureau's recommendation because it was based on an untested prediction about the accuracy of its model. But this is not a case in which the Secretary was presented with a policy choice between two reasonable but uncertain options. For one thing, the record is much less uncertain than the Government acknowledges. Although it is true that the Census Bureau at one point told the Secretary that it could not "quantify the relative magnitude of the errors across the alternatives at this time," App. 148, it unequivocally stated that asking the question "*would result in poorer quality citizenship data*" than omitting it, *id.*, at 159 (emphasis added). Thus, even if the Bureau could not "quantify" the relative accuracy of the options, it could and did conclude that one option was likely more accurate than the other. Even in the face of some uncertainty, where all available evidence indicates that one option is better than the other, it is unreasonable to choose the worse option without explanation.

For another thing, to the extent the record reflects some uncertainty regarding the accuracy of the Census Bureau's statistical model, that is because the model needed to be "developed and tested" before it could be employed. *Id.*, at 146. But the Secretary made his decision before any such development or testing could be completed. Having decided to make an immediate decision rather than wait for testing, the Secretary could not dismiss the Bureau's prediction about the inadvisability of that decision on the ground that the prediction reflected likelihoods, probabilities, and risks rather than certainties.

Finally, recall that the Census Act requires the Secretary to use administrative records rather than direct inquiries to "the maximum extent possible." 13 U. S. C. § 6(c). That statutory requirement highlights what should be obvious: Whether adding a citizenship question to the short form would produce more accurate citizenship data is a relevant factor—indeed, a critically important factor—that the Secretary was required to consider. Here, the Secretary did not adequately explain why he rejected the evidence that adding the question would yield less accurate data. He did not even acknowledge that the Census Act obliged him to use administrative records rather than asking a question to the extent possible. And he did not explain how obtaining citizenship data that is no better or worse than the data otherwise available could justify jeopardizing the accuracy of the census count.

In these respects, the Secretary failed to consider "important aspect[s] of the problem" and "offered an explanation for [his] decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856.

C

The Secretary's failure to consider this evidence—that adding the question would harm the census count in the interest of obtaining less accurate citizenship data—provides a sufficient basis for setting the decision aside. But there is more. The reason that the Secretary provided for needing more accurate citizenship information in the first place—to help the DOJ ***2594** enforce the Voting Rights Act—is unconvincing.

The Secretary stated that adding the citizenship question was "necessary to provide complete and accurate data in response to the DOJ request." App. to Pet. for Cert. 562a. The DOJ's request in turn asserted that the citizenship data currently available from the ACS was not "ideal" for enforcing the Voting Rights Act. *Id.*, at 567a. One of the DOJ's principal complaints was that ACS data is reported for *groups* of census blocks rather than for each census block itself. The DOJ letter stated that adding a citizenship question could provide it with individual block-by-block data which, the DOJ maintained, would allow it to better enforce the Voting Rights Act's protections for minority voters. *Id.*, at 568a.

This rationale is difficult to accept. One obvious problem is that the DOJ provided no basis to believe that more precise data would in fact help with Voting Rights Act enforcement. Congress enacted the Voting Rights Act in 1965—15 years after the census last asked every household about citizenship. Actions to enforce the Act have therefore *always* used citizenship data derived from sampling. Yet I am aware of no one—not in the Department of Commerce proceeding, in the District Court, or in this Court—who has provided a single example in which enforcement of the Act has suffered due to lack of more precise citizenship data. Organizations with expertise in this area tell us that asking the citizenship question will not help enforce the Act. See, *e.g.*, Brief for NAACP Legal Defense & Educational Fund, Inc., as *Amicus Curiae* 30−36. Rather, the question will, by depressing the count of minority groups, hurt those whom the Act seeks to help. See, *e.g.*, Brief for Leadership Conference on Civil and Human Rights et al. as *Amici Curiae* 21−29.

Another problem with the Secretary's rationale is that, even assuming the DOJ needed more detailed citizenship data, there were better ways of obtaining the needed data. The Census Bureau offered to provide the DOJ with data using administrative records, which, as I have pointed out, are likely just as accurate, if not more accurate, than responses to a citizenship question. The Census Bureau offered to provide this data at the census block level, which would resolve each of the DOJ's complaints about the existing ACS data. See Administrative Record 3289. But the Secretary rejected this alternative without explaining why it would not fully respond to the DOJ's request. That failure was particularly problematic given that the Census Act requires the Secretary to use other methods of obtaining demographic information if at all possible. See §§ 6(c), 195.

Normally, the Secretary would be entitled to place considerable weight upon the DOJ's expertise in matters involving the Voting Rights Act, but there are strong reasons for discounting that expertise here. The administrative record shows that DOJ's request to add a citizenship question originated

not with the DOJ, but with the Secretary himself. See Administrative Record 3710. The Voting Rights Act rationale was in fact first proposed by Commerce Department officials. See *ibid.* DOJ officials, for their part, were initially uninterested in obtaining more detailed citizenship data, App. 414, and they agreed to request the data only after the Secretary personally spoke to the Attorney General about the matter, see Administrative Record 2651. And when the acting director of the Census Bureau proposed alternative means of obtaining better citizenship data, DOJ officials declined to meet to discuss the proposal. See *id.*, at 3460.

***2595** Taken as a whole, the evidence in the administrative record indicates that the Voting Rights Act rationale offered by the Secretary was not just unconvincing, but pretextual. And, as the Court concludes, further evidence outside the administrative record but present in the trial record supports the finding of pretext. See Part V, *ante.* Among other things, that evidence reveals that the DOJ official who wrote the letter agreed that adding the question "is not necessary for DOJ's VRA enforcement efforts." App. 1113. And that official further acknowledged that he did not "know whether or not [citizenship] data produced from responses to the citizenship question ... will, in fact, be more precise than the [citizenship] data on which the DOJ is currently relying for purposes of VRA enforcement." *Id.*, at 1102.

The Court explains, and I agree, that a court normally should not "reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Ante*, at 2573. But in this case, "the evidence tells a story that does not match the explanation the Secretary gave for his decision." *Ante*, at 2575. This evidence strongly suggests that the Secretary's stated rationale was pretextual. I consequently join Part V of the Court's opinion (except insofar as it concludes that the Secretary's decision was reasonable apart from the question of pretext). And I agree that the pretextual nature of the Secretary's decision provides a sufficient basis to affirm the District Court's decision to send the matter back to the agency.

* * *

I agree with the Court that the APA gives agencies broad leeway to carry out their legislatively delegated duties. And I recognize that Congress has specifically delegated to the Secretary of Commerce the authority to conduct a census of the population "in such form and content as he may determine." § 141(a). But although this delegation is broad, it is not without limits. The APA supplies one such limit. In an effort to ensure rational decisionmaking, the APA prohibits an agency from making decisions that are "arbitrary, capricious, [or] an abuse of discretion." 5 U. S. C. § 706(2)(A).

This provision, of course, does not insist that decisionmakers think through every minor aspect of every problem that they face. But here, the Secretary's decision was a major one, potentially affecting the proper workings of our democratic government and the proper allocation of hundreds

of billions of dollars in federal funds. Cf. *ante*, at 2565 – 2566. Yet the decision was ill considered in a number of critically important respects. The Secretary did not give adequate consideration to issues that should have been central to his judgment, such as the high likelihood of an undercount, the low likelihood that a question would yield more accurate citizenship data, and the apparent lack of any need for more accurate citizenship data to begin with. The Secretary's failures in considering those critical issues make his decision unreasonable. They are the kinds of failures for which, in my view, the APA's arbitrary and capricious provision was written.

As I have said, I agree with the Court's conclusion as to pretext and with the decision to send the matter back to the agency. I do not agree, however, with several of the Court's conclusions concerning application of the arbitrary and capricious standard. In my view, the Secretary's decision—whether pretextual or not—was arbitrary, capricious, and an abuse of his lawfully delegated discretion. I consequently concur in the Court's judgment to the extent that it affirms the judgment of the District Court.

Justice ALITO, concurring in part and dissenting in part.

***2596** It is a sign of our time that the inclusion of a question about citizenship on the census has become a subject of bitter public controversy and has led to today's regrettable decision. While the decision to place such a question on the 2020 census questionnaire is attacked as racist, there is a broad international consensus that inquiring about citizenship on a census is not just appropriate but advisable. No one disputes that it is important to know how many inhabitants of this country are citizens. [1] And the most direct way to gather this information is to ask for it in a census. The United Nations recommends that a census inquire about citizenship, [2] and many countries do so. [3]

Asking about citizenship on the census also has a rich history in our country. Every census, from the very first one in 1790 to the most recent in 2010, has sought not just a count of the number of inhabitants but also varying amounts of additional demographic information. In 1800, Thomas Jefferson, as president of the American Philosophical Society, signed a letter to Congress asking for the inclusion on the census of questions regarding " 'the respective numbers of native citizens, citizens of foreign birth, and of aliens' " " 'for the purpose ... of more exactly distinguishing the increase of population by birth and immigration.' " C. Wright, History and Growth of the United States Census (prepared for the Senate Committee on the Census), S. Doc. No. 194, 56th Cong., 1st Sess., 19 (1900). In 1820, John Quincy Adams, as Secretary of State, was responsible for conducting the census, and consistent with the 1820 Census Act, he instructed the marshals who were charged with gathering the information to ask about citizenship. [4] In 1830, when Martin Van Buren was Secretary of State, a question about citizenship was again included. [5] With the exception of the census of 1840, at least some portion of the population was asked a question about citizenship as part of the census through 2000, after which the question was moved to the

American Community Survey, which is sent to only a small fraction of the population. All these census inquiries were made by the Executive pursuant to congressional authorization. None were reviewed by the courts.

Now, for the first time, this Court has seen fit to claim a role with respect to the inclusion of a citizenship question on the census, and in doing so, the Court has set a dangerous precedent, both with regard ***2597** to the census itself and with regard to judicial review of all other executive agency actions. For the reasons ably stated by Justice THOMAS, see *ante*, p. —— (opinion concurring in part and dissenting in part), today's decision is either an aberration or a license for widespread judicial inquiry into the motivations of Executive Branch officials. If this case is taken as a model, then any one of the approximately 1,000 district court judges in this country, upon receiving information that a controversial agency decision might have been motivated by some unstated consideration, may order the questioning of Cabinet officers and other high-ranking Executive Branch officials, and the judge may then pass judgment on whether the decision was pretextual. What Bismarck is reputed to have said about laws and sausages comes to mind. And that goes for decisionmaking by all three branches.

To put the point bluntly, the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons. Of course, we may determine whether the decision is constitutional. But under the considerations that typically guide this Court in the exercise of its power of judicial review of agency action, we have no authority to decide whether the Secretary's decision was rendered in compliance with the Administrative Procedure Act (APA).

I

The APA authorizes judicial review of "agency action" taken in violation of law, 5 U. S. C. §§ 706(2)(A)–(D), but § 701(a)(2) of the APA bars judicial review of agency actions that are "committed to agency discretion by law." Although we have characterized the scope of § 701(a)(2) as " 'narrow,' " *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985), there are circumstances in which it applies. And while our cases recognize a strong presumption in favor of judicial review of agency action, see, *e.g.*, *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 586 U. S. ——, ——, 139 S.Ct. 361, 370, 202 L.Ed.2d 269 (2018), this "is 'just' a presumption," and like all real presumptions, it may be (and has been) rebutted, *Lincoln v. Vigil*, 508 U.S. 182, 190, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993).[6]

In considering whether the general presumption in favor of judicial review has been rebutted in specific cases, we have identified factors that are relevant to the inquiry: whether the text and structure of the relevant statutes leave a court with any " 'meaningful standard against which to judge the agency's exercise of discretion,' " *Webster v. Doe*, 486 U.S. 592, 600, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (quoting *Heckler*, *supra*, at 830, 105 S.Ct. 1649); whether the matter at hand has traditionally been viewed as committed to agency discretion, see *ICC v. Locomotive Engineers*, 482 U.S. 270, 282, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987); whether the challenged action manifests a "general unsuitability" for judicial review because it involves a "complicated balancing of a number of factors," including judgments regarding the allocation of agency resources or matters otherwise committed to ***2598** another branch, *Heckler*, *supra*, at 831–832, 105 S.Ct. 1649; and whether judicial review would produce "disruptive practical consequences," *Southern R. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 457, 99 S.Ct. 2388, 60 L.Ed.2d 1017 (1979) (applying this factor to the reviewability inquiry under § 701(a)(1)).

Applying those factors, I conclude that the decision of the Secretary of Commerce to add core demographic questions to the decennial census questionnaire is committed to agency discretion by law and therefore may not be challenged under the APA. [7]

II

A

I start with the question whether the relevant statutory provisions provide any standard that courts can apply in reviewing the Secretary's decision to restore a citizenship question to the census. The provision that directly addresses this question is 13 U. S. C. § 141(a), the statute that vests the Secretary with authority to administer the decennial census. This provision gives the Secretary unfettered discretion to include on the census questions about basic demographic characteristics like citizenship. It begins by providing that the Secretary

> "shall, in the year 1980 and every 10 years thereafter, take a decennial *census of population ... in such form and content as he may determine*, including the use of sampling procedures and special surveys." *Ibid.* (emphasis added).

The two phrases I have highlighted—"census of population" and "in such form and content as he may determine"—are of immediate importance. A "census of population" is broader than a mere head count. The term is defined as "a census of population ... *and matters relating to population*."

§ 141(g) (emphasis added). Because this definition refers to both "a census of population" and "matters relating to population," the latter concept must include more than a "census of population" in the strict sense of a head count. And it seems obvious that what this additional information must include is the sort of basic demographic information that has long been sought in the census. So the statute clearly authorizes the Secretary to gather such information.

The second phrase, "in such form and content as he may determine," specifies how this information is to be gathered, namely, by a method having the "form and content" that the Secretary "may determine." In other words, this is left purely to the Secretary's discretion. A clearer and less restricted conferral of discretion is hard to imagine.

It is instructive to compare this delegation of authority to the statutory language at issue in one of our most well-known § 701(a)(2) cases, *Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632. There, the relevant statute allowed termination of a Central Intelligence Agency employee whenever the Director "shall deem such termination necessary or advisable in the interests of the United States." *Id.*, at 600, 108 S.Ct. 2047 (internal quotation marks omitted and emphasis deleted). Reasoning that the statute's "shall *deem*" standard "fairly exudes ***2599** deference to the Director," the Court concluded that the text of the statute "appear[ed] ... to foreclose the application of any meaningful judicial standard of review." *Ibid.*

The § 141(a) language discussed above is even more sweeping than that of the statute in *Webster.* Unlike the Census Act, the statute in *Webster* placed a condition on the Director's action—in particular, the requirement that he terminate an employee only after concluding that doing so would further the "interests of the United States." No such condition applies to the Secretary's determination about the form and content of the decennial census, a fact that distinguishes the statute at issue here from others this Court has found to fall outside § 701(a)(2) and thus within courts' power to review. See, *e.g.*, *Weyerhaeuser Co.*, 586 U. S., at ——, 139 S.Ct., at 370 (statute conditioning agency power to exclude land from critical habitat designation on agency's consideration of " 'economic impact' " of designation and " 'determin[ation] that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat' ").

B

Those arguing in favor of judicial review contend that the § 141(a) language that I have discussed so far is limited by language that follows immediately after. That part of § 141(a) states:

> "In connection with any such census [*i.e.*, the decennial "census of population"], the Secretary is authorized to obtain such other census information as *necessary*." (Emphasis added.)

This means, it is argued, that information about citizenship may be obtained by means of the census only if that is "necessary." But this argument is clearly wrong. The information that must be "necessary" (whatever that means in this context) is "*other* census information." That refers to information other than that obtained in the "census of population," and as explained, the term "census of population" includes not just a head count but other "matters relating to population," a category that encompasses basic demographic information such as citizenship. Accordingly, this argument is definitively refuted by the text of § 141. And although it is not necessary to look beyond that text, it is worth noting that this argument, if accepted, would require that the term "necessary" be given a less than strictly literal meaning; otherwise, it would run contrary to the broad delegation effected by the first portion of § 141(a) by making it all but impossible for the Secretary to include on the census anything other than questions relating to the number of persons living at a particular address. That would be so because it will often not be "necessary" to obtain this information via the census rather than by some other means.

C

Another argument in favor of review relies on 13 U. S. C. § 195, which states:

> "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

Justice BREYER, for example, interprets this provision to mean that "the Secretary must, if feasible, obtain demographic information through a survey sent to a *sample* of households, rather than through the short-form census questionnaire to which *every* household must respond." *Ante*, at 2585 (opinion concurring in part and dissenting in part). Under that reading of § 195, it is asserted, the provision sets ***2600** forth a judicially reviewable limit on the Secretary's authority to obtain information through direct inquiries.

This argument fails to take into account that the current version of § 195 was enacted as part of the same Act of Congress that included the present version of § 141 [8] and that the two provisions are both parts of a unified scheme regarding the use of sampling. Section 141, a provision concerned exclusively with the census, addresses the use of sampling in that particular context. I previously quoted the relevant language, but I repeat it now so that it is clearly in mind. Section 141(a) provides that the Secretary

> "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population ... *in such form and content as he may determine, including the use of sampling procedures and special surveys*." (Emphasis added.)

What this means is that the Secretary, in conducting the "census of population," has discretion to choose the form and content of the vehicles used in that project, and among the methods that he may employ, if he sees fit, are sampling and special surveys.

Section 195 is not a census-specific provision, but it does have one (important) thing to say specifically about the census: It prohibits the use of sampling "for the determination of population for purposes of apportionment of Representatives in Congress." In this one way, it qualifies the Secretary's discretion regarding the "form and content" of the vehicles used in conducting the "census of population." And that is what we meant in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 338, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999), when we said that § 141(a)'s "broad grant of authority ... is informed ... by the narrower and more specific § 195." Otherwise, the text of § 195 does not deal specifically with the census. It addresses all the many information-gathering activities conducted by the Commerce Department, and as to these, it says that the Secretary shall use sampling if he deems it "feasible."

If § 195 were read to mean that no information other than a head count can be sought by means of a census questionnaire unless it is not "feasible" to get that information by sampling, then there would be little if anything left of the broad discretion "to use sampling techniques" conferred on the Secretary by § 141(a). "Feasible" means "capable of being done, executed, or effected," Webster's Third New International Dictionary 831 (1961), and it is not clear that the gathering of *any* core demographic information is not "capable of being done" by sampling. So if that were what § 195 means, then Congress, in the same Act, would have given the Secretary discretion to use sampling in the census "as he may determine" but also compelled him to use sampling in almost all instances. That is no way to read the provisions of a single Act. A law's provisions should be read to work together. See A. Scalia & B. Garner, Reading Law 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory"). See also, *e.g.*, *Parker Drilling Management Services, Ltd. v. Newton*, 587 U. S. ——, —— – ——, 139 S.Ct. 1881, 1887–1889, L.Ed.2d —— (2019) (slip op., at 5–6); *Star Athletica, L. L. C. v. Varsity Brands, Inc.*, 580 U. S. ——, —— – ——, 137 S.Ct. 1002, 1009–1010, 197 L.Ed.2d 354 (2017); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108, 130 S.Ct. 2433, 177 L.Ed.2d 424 (2010). And if there is tension between a specific provision, like ***2601** § 141's instruction regarding the use of sampling in the decennial census, and a general one, like § 195's directive regarding the use of sampling in all data-collection activities, the specific provision

must take precedence. Cf. *NLRB v. SW General, Inc.*, 580 U. S. ——, ——, 137 S.Ct. 929, 941–942, 197 L.Ed.2d 263 (2017).

When §§ 141 and 195 are read in this way, it is easy to see how they fit together. In using the census to gather information "relating to population" for any use other than the actual enumeration, the Secretary may use sampling "as he may determine." In conducting all the Department's efforts to collect data by other means, he may authorize the use of sampling if he thinks that is "feasible." The upshot for present purposes is that § 195 does not require the "counterintuitive resul[t]" of barring the Secretary from including on the census questionnaire the kinds of basic demographic questions that have been asked as part of every census in U. S. history. *RJR Nabisco, Inc. v. European Community*, 579 U. S. ——, ——, 136 S.Ct. 2090, 2104, 195 L.Ed.2d 476 (2016).

D

One additional provision, 13 U. S. C. § 6(c),[9] requires close consideration. This provision, which was enacted in 1976 in the same Act as §§ 141(a) and 195, has three subsections. Subsection (a) provides that the Secretary may call on other components of the Federal Government to obtain information that is "pertinent to" the Department's work. Subsection (b) authorizes the Secretary to "acquire, by purchase or otherwise" from state and local governments and private sources "such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title." Finally, subsection (c) provides:

> "To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries."

The District Court interpreted subsection (c) to mean that the Secretary must turn to another federal agency or outside source for demographic information (rather than seeking the information on the census) unless doing so would not be "possible" or "consistent with the kind, timeliness, quality and scope of the statistics required." This argument fails for reasons similar to those that sank the § 195 argument just discussed. Section 6(c) is not a census-specific provision but instead applies generally to all the Commerce Department's information-gathering activities. If it is read to apply to the "census of population," it cannot be reconciled with § 141(a), which, as noted, broadly authorizes the Secretary to use that vehicle for obtaining information "relating to population," ***2602** *i.e.*, core demographic information. If § 6(c) applied to the gathering of such information, it would make it hard to justify the inclusion of *any* demographic questions on the census, even though this has been done since 1790. (Is it not possible to get information about age and sex, for example, from any outside source (or combination of sources), even if the Department offers

to acquire it from a private source by purchase?) Reading § 6(c) to mean what the District Court thought would turn it into the proverbial elephant stuffed into a mouse hole. Section 6(c), however, is a decidedly mouse-like provision. It was enacted with no fanfare and no real explanation, [10] and remained in the shadows, virtually unused and unnoticed, for more than 40 years.

E

Respondents and the Court cite two other provisions in support of reviewability, but neither has anything to do with the issue of putting a citizenship question on the census. In determining whether statutory provisions include standards that could provide a basis for judicial review, it is necessary to focus on the precise claims at issue, see, *e.g.*, *Webster*, 486 U.S. at 601–602, 108 S.Ct. 2047 (distinguishing between statutory and constitutional claims); *Locomotive Engineers*, 482 U.S. at 277–279, 107 S.Ct. 2360 (parsing claims under different prongs of reopener statute); *Heckler*, 470 U.S. at 836, 105 S.Ct. 1649 (rejecting as "irrelevant" to the agency decision at issue two statutory provisions that were argued to provide " 'law to apply' "). And when viewed in this way, the remaining statutory provisions cited in support of reviewability are of no value.

Respondents point to § 141(b), which requires the Secretary to complete the tabulation of total population by States "within 9 months after the census date" and then to report the results to the President. That provision sets out an easily administered deadline, and it has nothing to do with the content of the census questionnaire.

Respondents also claim that § 141(f) is relevant to the question of judicial review, but that provision concerns *congressional* review. It directs the Secretary to report to Congress, at specified times, the subjects and questions that he intends to include on the census. According to respondents, the Secretary's compliance with those requirements is judicially reviewable, and that, they contend, takes the Secretary's decision to include a citizenship question out from under § 701(a)(2).

Respondents fundamentally misunderstand the significance of congressional reporting requirements in evaluating whether a particular agency action is subject to judicial review. Congressional reporting requirements are "legion in federal law," *Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 317 (CADC 1988), and their purpose is to permit Congress to monitor and, if it sees fit, to correct Executive Branch actions to which it objects. When a congressional reporting requirement "[l]ack[s] a provision for judicial review," compliance "by its nature seems singularly committed to *congressional* discretion in measuring the fidelity of the ***2603** Executive Branch actor to legislatively mandated requirements." *Id.*, at 318. In other words, it is Congress, not the Judiciary, that is best situated to determine whether an agency's

responses to Congress are sufficient and, if not, to "take what it deems to be the appropriate action." *Id.*, at 319.

In that respect, § 141(f) actually cuts against judicial review. The Constitution gives Congress the authority to "direct" the "Manner" in which the census is conducted, and by imposing the § 141(f) reporting requirements, Congress retained some of that supervisory authority. It did not transfer it to the courts. [11]

Respondents protest that congressional review may not be enough to guard against a Secretary's abuses, especially when the party in control of Congress stands to benefit. But that complaint simply expresses disagreement with the Framers' choice to vest power over the census in a political body, cf. *Baldrige v. Shapiro*, 455 U.S. 345, 347–348, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982) ("Under [the] Constitution, responsibility for conducting the decennial census rests with Congress"), and the manner in which Congress has chosen to exercise that power, see *Wisconsin v. City of New York*, 517 U.S. 1, 19, 116 S.Ct. 1091, 134 L.Ed.2d 167 (1996) (Congress has delegated its "virtually unlimited discretion" in conducting the census to the Secretary). In any event, the ability to press constitutional challenges to the Secretary's decisions, see n. 7, *supra,* answers many of the examples in respondents' parade of horribles.

In short, the relevant text of § 141(a) "fairly exudes deference" to the Secretary. *Webster*, 486 U.S. at 600, 108 S.Ct. 2047. And no other provision of law cited by respondents or my colleagues provides any "meaningful judicial standard" for reviewing the Secretary's selection of demographic questions for inclusion on the census. *Ibid.*

III

In addition to requiring an examination of the text and structure of the relevant statutes, our APA § 701(a)(2) cases look to whether the agency action in question is a type that has traditionally been viewed as committed to agency discretion or whether it is instead one that "federal courts regularly review." *Weyerhaeuser Co.*, 586 U. S., at ——, 139 S.Ct., at 370. In cases where the Court has found that agency action is committed to agency discretion by law, an important factor has been the absence of an established record of judicial review prior to the adoption of the APA. See *Heckler*, 470 U.S. at 832–833, 105 S.Ct. 1649 (agency nonenforcement); *Locomotive Engineers*, 482 U.S. at 282, 107 S.Ct. 2360 (agency decision not to reopen final decision based on material error); *Lincoln*, 508 U.S. at 192, 113 S.Ct. 2024 (agency use of lump-sum appropriations).

***2604** Here, there is no relevant record of judicial review. We are confronted with a practice that reaches back two centuries. The very first census went beyond a mere head count and gathered additional demographic information, and during virtually the entire period prior to the enactment of the APA, a citizenship question was asked of everyone. Notably absent from that long record is any practice of judicial review of the content of the census. Indeed, this Court has never before encountered a direct challenge to a census question. App. to Pet. for Cert. 416a. And litigation in the lower courts about the census is sparse and generally of relatively recent vintage.

Not only is this sort of history significant in all § 701(a)(2) cases, see *Locomotive Engineers*, *supra*, at 282, 107 S.Ct. 2360, but we have previously stressed the particular "importance of historical practice" when it comes to evaluating the Secretary's authority over the census. *Wisconsin*, *supra*, at 21, 116 S.Ct. 1091; see also *ante,* at 2567 (opinion of the Court). Moreover, where the relevant question is not whether review may be had at all, but rather the branch with the authority to exercise review, the absence of any substantial record of judicial review is especially revealing. See, *e.g.,* *NLRB v. Noel Canning*, 573 U.S. 513, 525, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (it is "neither new nor controversial" that "longstanding practice of the government can inform our determination of what the law is" (internal quotation marks and citation omitted)); *United States v. Midwest Oil Co.*, 236 U.S. 459, 473, 35 S.Ct. 309, 59 L.Ed. 673 (1915) ("in determining ... the existence of a power, weight [is] given to ... usage"). Thus, the absence of any real tradition of judicial review of decisions regarding the content of the census counsels against review in this case.

In an attempt to show that there is no relevant "tradition of nonreviewability," *Locomotive Engineers*, *supra*, at 282, 107 S.Ct. 2360, respondents contend that this Court has recently engaged in review of the "conduct of the census," Brief for Government Respondents 26–27. But in none of the cases they cite did the Court address an APA challenge to the content of census questions. [12] Some involved constitutional claims about enumeration and apportionment. See *Franklin v. Massachusetts*, 505 U.S. 788, 790, 801, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (constitutional challenge to "method used for counting federal employees serving overseas" as part of "reapportionment determination"); *Wisconsin*, 517 U.S. at 20, 116 S.Ct. 1091 (constitutional challenge to Secretary's decision not to adjust count). Others concerned enforcement of statutes with specific directives. See *Department of Commerce*, 525 U.S. at 343, 119 S.Ct. 765 (holding that § 195 bars use of "sampling" to reach actual enumeration for apportionment); *Utah v. Evans*, 536 U.S. 452, 464–465, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002) (considering whether statistical method violated § 195's bar on use of "sampling" in apportionment enumeration). According to respondents, these cases mean that *all* the Secretary's census-related decisions are suitable for judicial review and thus fall outside of § 701(a)(2), and the Court apparently agrees, rejecting

the Government's § 701(a)(2) argument in part because "[w]e and other courts have entertained both constitutional and statutory challenges to census-related decisionmaking." *Ante*, at 2568.

***2605** This argument misses the point of § 701(a)(2). The question under that provision is whether *the challenged action* "is committed to agency discretion by law," not whether a different action by the same agency is reviewable under the APA, much less whether an action taken by the same agency can be challenged under the Constitution. Take the example of *Heckler* v. *Chaney*, *supra*, where the Court considered whether a particular Food and Drug Administration (FDA) decision was reviewable under the APA. Many FDA actions are subject to APA review, see, *e.g.*, *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973), but that did not prevent the *Heckler* Court from holding that the particular FDA decision at issue there fell within § 701(a)(2). See also, *e.g.*, *Heckler*, *supra,* at 836–837, 105 S.Ct. 1649.

Respondents and some of their *amici* contend that the Secretary's decision is at least amenable to judicial review for consistency with the APA's reasoned-explanation requirement. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (describing requirement). Thus, the argument goes, even if no statute sets out a standard that can be used in reviewing the particular agency action in question, a court may review an agency's explanation of the reasons for its action and set it aside if the court finds those reasons to be arbitrary or irrational.

This argument would obliterate § 701(a)(2). Even if a statute expressly gave an agency absolute, unrestricted, unfettered, unlimited, and unqualified discretion with respect to a particular decision, a court could still review the agency's explanation of the reasons for its decision. That is not what § 701(a)(2) means. As we put it previously in answering a similar argument against application of § 701(a)(2), it is "fals[e]" to suggest "that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Locomotive Engineers*, 482 U.S. at 283, 107 S.Ct. 2360. That is because when an action "is committed to agency discretion by law," the Judiciary has no role to play, even when an agency sets forth "an eminently 'reviewable' proposition." *Id.,* at 282–283, 107 S.Ct. 2360.

IV

In sum, neither respondents nor my colleagues have been able to identify any relevant, judicially manageable limits on the Secretary's decision to put a core demographic question back on the

census. And without an "adequate standard of review for such agency action," *id.*, at 282, 107 S.Ct. 2360, courts reviewing decisions about the "form and content" of the census would inevitably be drawn into second-guessing the Secretary's assessment of complicated policy tradeoffs, [13] another indicator of "general unsuitability" for judicial review. *Heckler*, *supra*, at 831, 105 S.Ct. 1649.

Indeed, if this litigation is any indication, widespread judicial review of the Secretary's conduct of the census will usher in an era of "disruptive practical consequences," ***2606** and this too weighs against review. *Seaboard Allied Milling Corp.*, 442 U.S. at 457, 99 S.Ct. 2388. Cf. *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411, 1418 (CA7 1992) (expressing doubt about "both the provenance and the practicability" of allowing judicial review of census-related decisions).

Respondents protest that the importance of the census provides a compelling reason to allow APA review. See also *ante,* at 2595 (opinion of BREYER, J.). But this argument overlooks the fact that the Secretary is accountable in other ways for census-related decisionmaking. [14] If the Secretary violates the Constitution or any applicable statutory provision related to the census, his action is reviewable. The Secretary is also accountable to Congress with respect to the administration of the census since he has that power only because Congress has found it appropriate to entrust it to him. And the Secretary is always answerable to the President, who is, in turn, accountable to the people.

* * *

Throughout our Nation's history, the Executive Branch has decided without judicial supervision or interference whether and, if so, in what form the decennial census should inquire about the citizenship of the inhabitants of this country. Whether to put a citizenship question on the 2020 census questionnaire is a question that is committed by law to the discretion of the Secretary of Commerce and is therefore exempt from APA review. The District Court had the authority to decide respondents' constitutional claims, but the remainder of their complaint should have been dismissed.

I join Parts I, II, III, IV–B, and IV–C [15] of the opinion of the Court. I do not join the remainder, and insofar as the Court holds that the Secretary's decision is reviewable under the APA, I respectfully dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The annual alien registration requirement was repealed in 1981. See § 11, 95 Stat. 1617 (1981).

2 Several months after the Secretary made his decision, the Bureau updated its prediction to 5.8%, the figure the District Court later relied on in its standing analysis. See 351 F.Supp.3d 502, 579 (SDNY 2019).

3 The full text of subsections (a) and (b) provides:
"(a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.
"(b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title." 13 U. S. C. § 6.

1 Justice KAVANAUGH and I join Parts I, II, III, and IV of the opinion of the Court. Justice GORSUCH joins Parts I, II, III, IV–B, and IV–C.

2 Justice ALITO has made a strong argument that the specific decision at issue here—whether to include a citizenship question on the census—is a matter "committed to agency discretion by law." 5 U. S. C. § 701(a)(2); see *post*, at 2596 – 2597 (opinion concurring in part and dissenting in part). As he explains, the Secretary's decision plainly falls within the scope of the Secretary's constitutional authority, does not implicate any statutory prohibition, and is among the "inquiries" and "content[s]" of the census that the Secretary is expressly directed to "determine" for himself. §§ 5, 141(a); see *post*, at 2598 – 2603. Nevertheless, I assume, for the purpose of this opinion, that the Secretary's decision is subject to judicial review.

3 Deferential review of the agency's discretionary choices and reasoning under the arbitrary-and-capricious standard stands in marked contrast to a court's plenary review of the agency's interpretation and application of the law. See §§ 706(A)–(D) (court must review agency action to ensure that it complies with all "constitutional," "statutory," and "procedur[al]" requirements, and is otherwise "in accordance with law").

4 We do not have before us a claim that information outside the administrative record calls into question the legality of an agency action based on an unstated, unlawful bias or motivation (*e.g.*, a claim of religious discrimination under the Free Exercise Clause). But to the extent such a claim is viable, the analysis would have nothing to do with the arbitrary-

and-capricious review pressed by respondents. See §§ 706(2)(A)–(C) (addressing agency actions that violate "constitutional" or "statutory" requirements, or that "otherwise [are] not in accordance with law").

5 Insofar as *Overton Park* authorizes an exception to review on the administrative record, it has been criticized as having "no textual grounding in the APA" and as "created by the Court, without citation or explanation, to facilitate Article III review." Gavoor & Platt, Administrative Records and the Courts, 67 U. Kan. L. Rev. 1, 44 (2018); see *id.*, at 22 (further arguing that the exception was "neither presented by the facts of the case nor briefed by the parties"). The legitimacy and scope of the exception—which by its terms contemplates only "administrative officials who participated in the decision ... giv[ing] testimony explaining their action," *Overton Park*, 401 U.S. at 420, 91 S.Ct. 814—is an important question that may warrant future consideration. But because the Court's holding is incorrect regardless of the validity of the *Overton Park* exception, I will apply it here.

1 As a 2016 Census Bureau guidance document explained, obtaining citizenship statistics is "essential for agencies and policy makers setting and evaluating immigration policies and laws, understanding how different immigrant groups are assimilated, and monitoring against discrimination." Dept. of Commerce, Census Bureau, American Community Survey, Why We Ask: Place of Birth, Citizenship and Year of Entry, www2.census.gov/programs-surveys/acs/about/qbyqfact/2016/Citizenship.pdf (all Internet materials as last visited June 25, 2019).

2 United Nations, Dept. of Economic and Social Affairs Statistics Div., Principles and Recommendations for Population and Housing Censuses 163, 191 (rev. 3, 2017).

3 See, *e.g.*, Brief for Petitioners 29 (" '[O]ther major democracies inquire about citizenship on their census, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the United Kingdom, to name a few' " (quoting App. to Pet. for Cert. 561a)).

4 See Act of Mar. 14, 1820, ch. 24, 3 Stat. 550; Wright, History and Growth of the United States Census, S. Doc. No. 194, 56th Cong., 1st Sess., 133–137.

5 See Dept. of Commerce, Census Bureau, History: 1830 Census Questionnaire, https://www.census.gov/history/www/through_the_decades/questionnaires/1830_2.html.

6 Because the § 701(a)(2) analysis dictates *whether* APA review may be had, Justice BREYER's assertion that the APA "supplies [a] limit" on the Secretary's otherwise "broad" delegation, *ante*, at 2595 (opinion concurring in part and dissenting in part), mistakenly assumes the answer to the reviewability question. Cf. *Heckler v. Chaney*, 470 U.S. 821, 828, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) ("[B]efore any review at all may be had, a party must first clear the hurdle of § 701(a)").

7 The Government concedes that courts may review constitutional challenges to the Secretary's actions. Cf. *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988). For the reasons given in the Court's opinion, see *ante*, at 2566 – 2567, I agree that the only remaining constitutional claim at issue—respondents' Enumeration Clause claim—

lacks merit and thus does not constitute a basis for enjoining the addition of the citizenship question.

8 See 90 Stat. 2459.

9 Section 6 states:

"(a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.

"(b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.

"(c) To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries."

10 The most respondents can muster are snippets from the legislative history of the 1976 Census Act indicating that § 6(c) was enacted to decrease the Secretary's use of "direct inquiries" in the interest of "reducing respondent burden." H. R. Rep. No. 94–1719, p. 10H. R. Rep. No. 94–1719, p. 10 (1976). Even accepting that premise, it simply raises the same question just discussed—namely, whether Congress's desire to reduce respondent burden, as reflected by § 6(c), yields to the Secretary's broad authorization in § 141(a) to "determine" the "form and content" of any direct inquiries on the census. Cf. *id.,* at 11 (characterizing § 141 as a "provisio[n] directly related to decennial ... census").

11 It is notable that Congress, pursuant to its supervisory authority, has in some cases limited the particular demographic characteristics about which the Secretary may require information through census questionnaires. In § 221(c), for example, Congress has dictated that "no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body." Similarly, in a series of appropriation Acts, Congress has specified that "none of the funds provided in this or any other Act for any fiscal year may be used for the collection of census data on race identification that does not include 'some other race' as a category." 123 Stat. 3115, note following 13 U. S. C. § 5. Those examples highlight that when Congress wishes to limit the Secretary's authority to require responses to particular demographic questions, it "knows precisely how to do so." *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 572 U.S. 915, 923, 134 S.Ct. 2111, 189 L.Ed.2d 52 (2014).

12 The same can be said for the lower court cases on which respondents rely. See, *e.g.,*Brief for Government Respondents 26, and n. 6 (collecting cases, none of which "involved the census questionnaire" or the Secretary's selection of questions).

13 In determining how the census is to be conducted, the Secretary must make decisions about a bevy of matters, such as the best way to count particular persons or categories of persons with an adequate degree of accuracy (*e.g.*, by face-to-face interviews, telephone

calls, questionnaires to be mailed back, contacts with neighbors, or use of existing records); the use of followup procedures and other quality control measures; which persons should be included in which households; and issues concerning where a person should be enumerated. These and countless other factors may affect whether an individual receives or responds to the census questionnaire.

14 Since the time Secretary Ross publicly announced his intent to add the citizenship question, "Congress has questioned the Secretary about his decision in public hearings on several occasions." Brief for Petitioners 50 (collecting examples).

15 Although I would hold that the Secretary's decision is not reviewable under the APA, in the alternative I would conclude that the decision survives review under the applicable standards. I join Parts IV–B and IV–C on that understanding.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DISTRICT OF COLUMBIA ET AL. *v.* HELLER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07–290. Argued March 18, 2008—Decided June 26, 2008

District of Columbia law bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns; provides separately that no person may carry an unlicensed handgun, but authorizes the police chief to issue 1-year licenses; and requires residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device. Respondent Heller, a D. C. special policeman, applied to register a handgun he wished to keep at home, but the District refused. He filed this suit seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The District Court dismissed the suit, but the D. C. Circuit reversed, holding that the Second Amendment protects an individual's right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right.

Held:

1. The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. Pp. 2–53.

(a) The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms. Pp. 2–22.

(b) The prefatory clause comports with the Court's interpretation

Syllabus

of the operative clause. The "militia" comprised all males physically capable of acting in concert for the common defense. The Antifederalists feared that the Federal Government would disarm the people in order to disable this citizens' militia, enabling a politicized standing army or a select militia to rule. The response was to deny Congress power to abridge the ancient right of individuals to keep and bear arms, so that the ideal of a citizens' militia would be preserved. Pp. 22–28.

(c) The Court's interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed the Second Amendment. Pp. 28–30.

(d) The Second Amendment's drafting history, while of dubious interpretive worth, reveals three state Second Amendment proposals that unequivocally referred to an individual right to bear arms. Pp. 30–32.

(e) Interpretation of the Second Amendment by scholars, courts and legislators, from immediately after its ratification through the late 19th century also supports the Court's conclusion. Pp. 32–47.

(f) None of the Court's precedents forecloses the Court's interpretation. Neither *United States* v. *Cruikshank*, 92 U. S. 542, 553, nor *Presser* v. *Illinois*, 116 U. S. 252, 264–265, refutes the individual-rights interpretation. *United States* v. *Miller*, 307 U. S. 174, does not limit the right to keep and bear arms to militia purposes, but rather limits the type of weapon to which the right applies to those used by the militia, *i.e.*, those in common use for lawful purposes. Pp. 47–54.

2. Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *Miller*'s holding that the sorts of weapons protected are those "in common use at the time" finds support in the historical tradition of prohibiting the carrying of dangerous and unusual weapons. Pp. 54–56.

3. The handgun ban and the trigger-lock requirement (as applied to self-defense) violate the Second Amendment. The District's total ban on handgun possession in the home amounts to a prohibition on an entire class of "arms" that Americans overwhelmingly choose for the lawful purpose of self-defense. Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this

Syllabus

prohibition—in the place where the importance of the lawful defense of self, family, and property is most acute—would fail constitutional muster. Similarly, the requirement that any lawful firearm in the home be disassembled or bound by a trigger lock makes it impossible for citizens to use arms for the core lawful purpose of self-defense and is hence unconstitutional. Because Heller conceded at oral argument that the D. C. licensing law is permissible if it is not enforced arbitrarily and capriciously, the Court assumes that a license will satisfy his prayer for relief and does not address the licensing requirement. Assuming he is not disqualified from exercising Second Amendment rights, the District must permit Heller to register his handgun and must issue him a license to carry it in the home. Pp. 56–64.

478 F. 3d 370, affirmed.

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

SUPREME COURT OF THE UNITED STATES

No. 07–290

DISTRICT OF COLUMBIA, ET AL., PETITIONERS *v.*
DICK ANTHONY HELLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 26, 2008]

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution.

I

The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is prohibited. See D. C. Code §§7–2501.01(12), 7–2502.01(a), 7–2502.02(a)(4) (2001). Wholly apart from that prohibition, no person may carry a handgun without a license, but the chief of police may issue licenses for 1-year periods. See §§22–4504(a), 22–4506. District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, "unloaded and disassembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities. See §7–2507.02.[1]

[1] There are minor exceptions to all of these prohibitions, none of which is relevant here.

Respondent Dick Heller is a D. C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center. He applied for a registration certificate for a handgun that he wished to keep at home, but the District refused. He thereafter filed a lawsuit in the Federal District Court for the District of Columbia seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of "functional firearms within the home." App. 59a. The District Court dismissed respondent's complaint, see *Parker* v. *District of Columbia*, 311 F. Supp. 2d 103, 109 (2004). The Court of Appeals for the District of Columbia Circuit, construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense,[2] reversed, see *Parker* v. *District of Columbia*, 478 F. 3d 370, 401 (2007). It held that the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right. See *id.*, at 395, 399–401. The Court of Appeals directed the District Court to enter summary judgment for respondent.

We granted certiorari. 552 U. S. ___ (2007).

II

We turn first to the meaning of the Second Amendment.

A

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be

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[2] That construction has not been challenged here.

infringed." In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States* v. *Sprague*, 282 U. S. 716, 731 (1931); see also *Gibbons* v. *Ogden*, 9 Wheat. 1, 188 (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

The two sides in this case have set out very different interpretations of the Amendment. Petitioners and today's dissenting Justices believe that it protects only the right to possess and carry a firearm in connection with militia service. See Brief for Petitioners 11–12; *post*, at 1 (STEVENS, J., dissenting). Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. See Brief for Respondent 2–4.

The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, "Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." See J. Tiffany, A Treatise on Government and Constitutional Law §585, p. 394 (1867); Brief for Professors of Linguistics and English as *Amici Curiae* 3 (hereinafter Linguists' Brief). Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose. See generally Volokh, The Commonplace Second Amendment, 73 N. Y. U. L. Rev. 793, 814–821

(1998).

Logic demands that there be a link between the stated purpose and the command. The Second Amendment would be nonsensical if it read, "A well regulated Militia, being necessary to the security of a free State, the right of the people to petition for redress of grievances shall not be infringed." That requirement of logical connection may cause a prefatory clause to resolve an ambiguity in the operative clause ("The separation of church and state being an important objective, the teachings of canons shall have no place in our jurisprudence." The preface makes clear that the operative clause refers not to canons of interpretation but to clergymen.) But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause. See F. Dwarris, A General Treatise on Statutes 268–269 (P. Potter ed. 1871) (hereinafter Dwarris); T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 42–45 (2d ed. 1874).[3] "'It is nothing unusual in acts . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.'" J. Bishop,

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[3] As Sutherland explains, the key 18th-century English case on the effect of preambles, *Copeman* v. *Gallant*, 1 P. Wms. 314, 24 Eng. Rep. 404 (1716), stated that "the preamble could not be used to restrict the effect of the words of the purview." J. Sutherland, Statutes and Statutory Construction, 47.04 (N. Singer ed. 5th ed. 1992). This rule was modified in England in an 1826 case to give more importance to the preamble, but in America "the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms." *Ibid.*

JUSTICE STEVENS says that we violate the general rule that every clause in a statute must have effect. *Post*, at 8. But where the text of a clause itself indicates that it does not have operative effect, such as "whereas" clauses in federal legislation or the Constitution's preamble, a court has no license to make it do what it was not designed to do. Or to put the point differently, operative provisions should be given effect as operative provisions, and prologues as prologues.

Commentaries on Written Laws and Their Interpretation §51, p. 49 (1882) (quoting *Rex* v. *Marks*, 3 East, 157, 165 (K. B. 1802)). Therefore, while we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.[4]

1. Operative Clause.

a. "Right of the People." The first salient feature of the operative clause is that it codifies a "right of the people." The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.[5]

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[4] JUSTICE STEVENS criticizes us for discussing the prologue last. *Post*, at 8. But if a prologue can be used only to clarify an ambiguous operative provision, surely the first step must be to determine whether the operative provision is ambiguous. It might be argued, we suppose, that the prologue itself should be one of the factors that go into the determination of whether the operative provision is ambiguous—but that would cause the prologue to be used to produce ambiguity rather than just to resolve it. In any event, even if we considered the prologue *along with* the operative provision we would reach the same result we do today, since (as we explain) our interpretation of "the right of the people to keep and bear arms" furthers the purpose of an effective militia no less than (indeed, more than) the dissent's interpretation. See *infra*, at 26–27.

[5] JUSTICE STEVENS is of course correct, *post*, at 10, that the right to assemble cannot be exercised alone, but it is still an individual right, and not one conditioned upon membership in some defined "assembly," as he contends the right to bear arms is conditioned upon membership

Three provisions of the Constitution refer to "the people" in a context other than "rights"—the famous preamble ("We the people"), §2 of Article I (providing that "the people" will choose members of the House), and the Tenth Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "the people" acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a "right" attributed to "the people" refer to anything other than an individual right.[6]

What is more, in all six other provisions of the Constitution that mention "the people," the term unambiguously refers to all members of the political community, not an unspecified subset. As we said in *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 265 (1990):

> "'[T]he people' seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that 'the people' protected by the

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in a defined militia. And JUSTICE STEVENS is dead wrong to think that the right to petition is "primarily collective in nature." *Ibid.* See *McDonald* v. *Smith*, 472 U. S. 479, 482–484 (1985) (describing historical origins of right to petition).

[6] If we look to other founding-era documents, we find that some state constitutions used the term "the people" to refer to the people collectively, in contrast to "citizen," which was used to invoke individual rights. See Heyman, Natural Rights and the Second Amendment, in The Second Amendment in Law and History 179, 193–195 (C. Bogus ed. 2000) (hereinafter Bogus). But that usage was not remotely uniform. See, *e.g.*, N. C. Declaration of Rights §XIV (1776), in 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 2787, 2788 (F. Thorpe ed. 1909) (hereinafter Thorpe) (jury trial); Md. Declaration of Rights §XVIII (1776), in 3 *id.*, at 1686, 1688 (vicinage requirement); Vt. Declaration of Rights ch. 1, §XI (1777), in 6 *id.*, at 3737, 3741 (searches and seizures); Pa. Declaration of Rights §XII (1776), in 5 *id.*, at 3081, 3083 (free speech). And, most importantly, it was clearly not the terminology used in the Federal Constitution, given the First, Fourth, and Ninth Amendments.

> Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

This contrasts markedly with the phrase "the militia" in the prefatory clause. As we will describe below, the "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."

We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

b. "Keep and bear Arms." We move now from the holder of the right—"the people"—to the substance of the right: "to keep and bear Arms."

Before addressing the verbs "keep" and "bear," we interpret their object: "Arms." The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "weapons of offence, or armour of defence." 1 Dictionary of the English Language 107 (4th ed.) (hereinafter Johnson). Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 A New and Complete Law Dictionary (1771); see also N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster) (similar).

The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity. For instance, Cunningham's legal dictionary gave as an example of usage: "Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms." See also, *e.g.*, An Act for the trial of Negroes, 1797 Del. Laws ch. XLIII, §6, p. 104, in 1 First Laws of the State of Delaware 102, 104 (J. Cushing ed. 1981 (pt. 1)); see generally *State* v. *Duke*, 42 Tex. 455, 458 (1874) (citing decisions of state courts construing "arms"). Although one founding-era thesaurus limited "arms" (as opposed to "weapons") to "instruments of offence *generally* made use of in war," even that source stated that all firearms constituted "arms." 1 J. Trusler, The Distinction Between Words Esteemed Synonymous in the English Language 37 (1794) (emphasis added).

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo* v. *United States*, 533 U. S. 27, 35–36 (2001), the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.

We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Johnson 1095. Webster defined it as "[t]o hold; to retain in one's power or possession." No party has apprised us of an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons."

The phrase "keep arms" was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an individual right unconnected with militia service. William Blackstone, for example, wrote that Catholics convicted of not attending service in the Church of England suffered certain penalties, one of which was that they were not permitted to "keep arms in their houses." 4 Commentaries on the Laws of England 55 (1769) (hereinafter Blackstone); see also 1 W. & M., c. 15, §4, in 3 Eng. Stat. at Large 422 (1689) ("[N]o Papist . . . shall or may have or keep in his House . . . any Arms . . . "); 1 Hawkins, Treatise on the Pleas of the Crown 26 (1771) (similar). Petitioners point to militia laws of the founding period that required militia members to "keep" arms in connection with militia service, and they conclude from this that the phrase "keep Arms" has a militia-related connotation. See Brief for Petitioners 16–17 (citing laws of Delaware, New Jersey, and Virginia). This is rather like saying that, since there are many statutes that authorize aggrieved employees to "file complaints" with federal agencies, the phrase "file complaints" has an employment-related connotation. "Keep arms" was simply a common way of referring to possessing arms, for militiamen *and everyone else*.[7]

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[7] See, *e.g.*, 3 A Compleat Collection of State-Tryals 185 (1719) ("Hath not every Subject power to keep Arms, as well as Servants in his House for defence of his Person?"); T. Wood, A New Institute of the Imperial or Civil Law 282 (1730) ("Those are guilty of *publick* Force, who keep Arms in their Houses, and make use of them otherwise than upon Journeys or Hunting, or for Sale . . ."); A Collection of All the Acts of Assembly, Now in Force, in the Colony of Virginia 596 (1733) ("Free Negros, Mulattos, or Indians, and Owners of Slaves, seated at Frontier Plantations, may obtain Licence from a Justice of Peace, for keeping Arms, &c."); J. Ayliffe, A New Pandect of *Roman* Civil Law 195 (1734) ("Yet a Person might keep Arms in his House, or on his Estate, on the Account of Hunting, Navigation, Travelling, and on the Score of Selling

At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation. In *Muscarello* v. *United States*, 524 U. S. 125 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, JUSTICE GINSBURG wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Id.*, at 143 (dissenting opinion)

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them in the way of Trade or Commerce, or such Arms as accrued to him by way of Inheritance"); J. Trusler, A Concise View of the Common Law and Statute Law of England 270 (1781) ("if [papists] keep arms in their houses, such arms may be seized by a justice of the peace"); Some Considerations on the Game Laws 54 (1796) ("Who has been deprived by [the law] of keeping arms for his own defence? What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece . . . ?"); 3 B. Wilson, The Works of the Honourable James Wilson 84 (1804) (with reference to state constitutional right: "This is one of our many renewals of the Saxon regulations. 'They were bound,' says Mr. Selden, 'to keep arms for the preservation of the kingdom, and of their own person'"); W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31–32 (1833) (with reference to colonists' English rights: "The right of every individual to keep arms for his defence, suitable to his condition and degree; which was the public allowance, under due restrictions of the natural right of resistance and self-preservation"); 3 R. Burn, Justice of the Peace and the Parish Officer 88 (1815) ("It is, however, laid down by Serjeant Hawkins, . . . that if a lessee, after the end of the term, keep arms in his house to oppose the entry of the lessor, . . ."); *State* v. *Dempsey*, 31 N. C. 384, 385 (1849) (citing 1840 state law making it a misdemeanor for a member of certain racial groups "to carry about his person or keep in his house any shot gun or other arms").

(quoting Black's Law Dictionary 214 (6th ed. 1998)). We think that JUSTICE GINSBURG accurately captured the natural meaning of "bear arms." Although the phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," it in no way connotes participation in a structured military organization.

From our review of founding-era sources, we conclude that this natural meaning was also the meaning that "bear arms" had in the 18th century. In numerous instances, "bear arms" was unambiguously used to refer to the carrying of weapons outside of an organized militia. The most prominent examples are those most relevant to the Second Amendment: Nine state constitutional provisions written in the 18th century or the first two decades of the 19th, which enshrined a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state."[8] It is clear from those formulations that "bear arms" did not refer only to carry-

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[8]See Pa. Declaration of Rights §XIII, in 5 Thorpe 3083 ("That the people have a right to bear arms for the defence of themselves and the state. . . "); Vt. Declaration of Rights §XV, in 6 *id.*, at 3741 ("That the people have a right to bear arms for the defence of themselves and the State. . ."); Ky. Const., Art. XII, cl. 23 (1792), in 3 *id.*, at 1264, 1275 ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned"); Ohio Const., Art. VIII, §20 (1802), in 5 *id.*, at 2901, 2911 ("That the people have a right to bear arms for the defence of themselves and the State . . . "); Ind. Const., Art. I, §20 (1816), in 2 *id.*, at 1057, 1059 ("That the people have a right to bear arms for the defense of themselves and the State. . . "); Miss. Const., Art. I, §23 (1817), in 4 *id.*, at 2032, 2034 ("Every citizen has a right to bear arms, in defence of himself and the State"); Conn. Const., Art. I, §17 (1818), in 1 *id.*, at 536, 538 ("Every citizen has a right to bear arms in defence of himself and the state"); Ala. Const., Art. I, §23 (1819), in 1 *id.*, at 96, 98 ("Every citizen has a right to bear arms in defence of himself and the State"); Mo. Const., Art. XIII, §3 (1820), in 4 *id.*, at 2150, 2163 ("[T]hat their right to bear arms in defence of themselves and of the State cannot be questioned"). See generally Volokh, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L. & Politics 191 (2006).

ing a weapon in an organized military unit. Justice James Wilson interpreted the Pennsylvania Constitution's arms-bearing right, for example, as a recognition of the natural right of defense "of one's person or house"—what he called the law of "self preservation." 2 Collected Works of James Wilson 1142, and n. x (K. Hall & M. Hall eds. 2007) (citing Pa. Const., Art. IX, §21 (1790)); see also T. Walker, Introduction to American Law 198 (1837) ("Thus the right of self-defence [is] guaranteed by the [Ohio] constitution"); see also *id.*, at 157 (equating Second Amendment with that provision of the Ohio Constitution). That was also the interpretation of those state constitutional provisions adopted by pre-Civil War state courts.[9] These provisions demonstrate—again, in the most analogous linguistic context—that "bear arms" was not limited to the carrying of arms in a militia.

The phrase "bear Arms" also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: "to serve as a soldier, do military service, fight" or "to wage war." See Linguists' Brief 18; *post*, at 11 (STEVENS, J., dissenting). But it *unequivocally* bore that idiomatic meaning only when followed by the preposition "against," which was in turn followed by the target of the hostilities. See 2 Oxford 21. (That is how, for example, our Declaration of Independence ¶28, used the phrase: "He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country . . . .") Every example given by petitioners' *amici* for the idiomatic meaning of "bear arms"

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[9] See *Bliss* v. *Commonwealth*, 2 Litt. 90, 91–92 (Ky. 1822); *State* v. *Reid*, 1 Ala. 612, 616–617 (1840); *State* v. *Schoultz*, 25 Mo. 128, 155 (1857); see also *Simpson* v. *State,* 5 Yer. 356, 360 (Tenn. 1833) (interpreting similar provision with "common defence" purpose); *State* v. *Huntly*, 25 N. C. 418, 422–423 (1843) (same); cf. *Nunn* v. *State*, 1 Ga. 243, 250–251 (1846) (construing Second Amendment); *State* v. *Chandler*, 5 La. Ann. 489, 489–490 (1850) (same).

from the founding period either includes the preposition "against" or is not clearly idiomatic. See Linguists' Brief 18–23. Without the preposition, "bear arms" normally meant (as it continues to mean today) what JUSTICE GINSBURG's opinion in *Muscarello* said.

In any event, the meaning of "bear arms" that petitioners and JUSTICE STEVENS propose is *not even* the (sometimes) idiomatic meaning. Rather, they manufacture a hybrid definition, whereby "bear arms" connotes the actual carrying of arms (and therefore is not really an idiom) but only in the service of an organized militia. No dictionary has ever adopted that definition, and we have been apprised of no source that indicates that it carried that meaning at the time of the founding. But it is easy to see why petitioners and the dissent are driven to the hybrid definition. Giving "bear Arms" its idiomatic meaning would cause the protected right to consist of the right to be a soldier or to wage war—an absurdity that no commentator has ever endorsed. See L. Levy, Origins of the Bill of Rights 135 (1999). Worse still, the phrase "keep and bear Arms" would be incoherent. The word "Arms" would have two different meanings at once: "weapons" (as the object of "keep") and (as the object of "bear") one-half of an idiom. It would be rather like saying "He filled and kicked the bucket" to mean "He filled the bucket and died." Grotesque.

Petitioners justify their limitation of "bear arms" to the military context by pointing out the unremarkable fact that it was often used in that context—the same mistake they made with respect to "keep arms." It is especially unremarkable that the phrase was often used in a military context in the federal legal sources (such as records of congressional debate) that have been the focus of petitioners' inquiry. Those sources would have had little occasion to use it *except* in discussions about the standing army and the militia. And the phrases used primarily in those

military discussions include not only "bear arms" but also "carry arms," "possess arms," and "have arms"—though no one thinks that those *other* phrases also had special military meanings. See Barnett, Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?, 83 Tex. L. Rev. 237, 261 (2004). The common references to those "fit to bear arms" in congressional discussions about the militia are matched by use of the same phrase in the few nonmilitary federal contexts where the concept would be relevant. See, *e.g.*, 30 Journals of Continental Congress 349–351 (J. Fitzpatrick ed. 1934). Other legal sources frequently used "bear arms" in nonmilitary contexts.[10] Cunningham's legal dictionary, cited above,

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[10] See J. Brydall, Privilegia Magnatud apud Anglos 14 (1704) (Privilege XXXIII) ("In the 21st Year of King Edward the Third, a Proclamation Issued, that no Person should bear any Arms within London, and the Suburbs"); J. Bond, A Compleat Guide to Justices of the Peace 43 (1707) ("Sheriffs, and all other Officers in executing their Offices, and all other persons pursuing Hu[e] and Cry may lawfully bear arms"); 1 An Abridgment of the Public Statutes in Force and Use Relative to Scotland (1755) (entry for "Arms": "And if any person above described shall have in his custody, use, or bear arms, being thereof convicted before one justice of peace, or other judge competent, summarily, he shall for the first offense forfeit all such arms" (quoting 1 Geo. 1, c. 54, §1)); Statute Law of Scotland Abridged 132–133 (2d ed. 1769) ("Acts for disarming the highlands" but "exempting those who have particular licenses to bear arms"); E. de Vattel, The Law of Nations, or, Principles of the Law of Nature 144 (1792) ("Since custom has allowed persons of rank and gentlemen of the army to bear arms in time of peace, strict care should be taken that none but these should be allowed to wear swords"); E. Roche, Proceedings of a Court-Martial, Held at the Council-Chamber, in the City of Cork 3 (1798) (charge VI: "With having held traitorous conferences, and with having conspired, with the like intent, for the purpose of attacking and despoiling of the arms of several of the King's subjects, qualified by law to bear arms"); C. Humphreys, A Compendium of the Common Law in force in Kentucky 482 (1822) ("[I]n this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify people unnecessarily").

gave as an example of its usage a sentence unrelated to military affairs ("Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms"). And if one looks beyond legal sources, "bear arms" was frequently used in nonmilitary contexts. See Cramer & Olson, What Did "Bear Arms" Mean in the Second Amendment?, 6 Georgetown J. L. & Pub. Pol'y (forthcoming Sept. 2008), online at http://papers.ssrn.com/abstract=1086176 (as visited June 24, 2008, and available in Clerk of Court's case file) (identifying numerous nonmilitary uses of "bear arms" from the founding period).

JUSTICE STEVENS points to a study by *amici* supposedly showing that the phrase "bear arms" was most frequently used in the military context. See *post*, at 12–13, n. 9; Linguists' Brief 24. Of course, as we have said, the fact that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts. Moreover, the study's collection appears to include (who knows how many times) the idiomatic phrase "bear arms against," which is irrelevant. The *amici* also dismiss examples such as "'bear arms . . . for the purpose of killing game'" because those uses are "expressly qualified." Linguists' Brief 24. (JUSTICE STEVENS uses the same excuse for dismissing the state constitutional provisions analogous to the Second Amendment that identify private-use purposes for which the individual right can be asserted. See *post*, at 12.) That analysis is faulty. A purposive qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass (except, apparently, in some courses on Linguistics). If "bear arms" means, as we think, simply the carrying of arms, a modifier can limit the purpose of the carriage ("for the purpose of self-defense" or "to make war against the King"). But if "bear arms" means, as the petitioners and the dissent think, the

carrying of arms only for military purposes, one simply cannot add "for the purpose of killing game." The right "to carry arms in the militia for the purpose of killing game" is worthy of the mad hatter. Thus, these purposive qualifying phrases positively establish that "to bear arms" is not limited to military use.[11]

JUSTICE STEVENS places great weight on James Madison's inclusion of a conscientious-objector clause in his original draft of the Second Amendment: "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Creating the Bill of Rights 12 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit). He argues that this clause establishes that the drafters of the Second Amendment intended "bear Arms" to refer only to military service. See *post*, at 26. It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.[12] In any case, what JUSTICE STEVENS would conclude from the deleted provision does not follow. It was not meant to exempt from military service those who

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[11] JUSTICE STEVENS contends, *post*, at 15, that since we assert that adding "against" to "bear arms" gives it a military meaning we must concede that adding a purposive qualifying phrase to "bear arms" can alter its meaning. But the difference is that we do not maintain that "against" *alters* the meaning of "bear arms" but merely that it *clarifies* which of various meanings (one of which is military) is intended. JUSTICE STEVENS, however, argues that "[t]he term 'bear arms' is a familiar idiom; when used unadorned by any additional words, its meaning is 'to serve as a soldier, do military service, fight.'" *Post*, at 11. He therefore must establish that adding a contradictory purposive phrase can *alter* a word's meaning.

[12] JUSTICE STEVENS finds support for his legislative history inference from the recorded views of one Antifederalist member of the House. *Post*, at 26 n. 25. "The claim that the best or most representative reading of the [language of the] amendments would conform to the understanding and concerns of [the Antifederalists] is . . . highly problematic." Rakove, The Second Amendment: The Highest Stage of Originalism, Bogus 74, 81.

objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or knife in self-defense . . . must sometimes have been almost overwhelming." P. Brock, Pacifism in the United States 359 (1968); see M. Hirst, The Quakers in Peace and War 336–339 (1923); 3 T. Clarkson, Portraiture of Quakerism 103–104 (3d ed. 1807). The Pennsylvania Militia Act of 1757 exempted from service those *"scrupling the use of arms*"—a phrase that no one contends had an idiomatic meaning. See 5 Stat. at Large of Pa. 613 (J. Mitchell & H. Flanders eds. 1898) (emphasis added). Thus, the most natural interpretation of Madison's deleted text is that those opposed to carrying weapons for potential violent confrontation would not be "compelled to render military service," in which such carrying would be required.[13]

Finally, JUSTICE STEVENS suggests that "keep and bear Arms" was some sort of term of art, presumably akin to "hue and cry" or "cease and desist." (This suggestion usefully evades the problem that there is no evidence whatsoever to support a military reading of "keep arms.") JUSTICE STEVENS believes that the unitary meaning of

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[13]The same applies to the conscientious-objector amendments proposed by Virginia and North Carolina, which said: "That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead." See Veit 19; 4 J. Eliot, The Debates in the Several State Constitutions on the Adoption of the Federal Constitution 243, 244 (2d ed. 1836) (reprinted 1941). Certainly their second use of the phrase ("bear arms in his stead") refers, by reason of context, to compulsory bearing of arms for military duty. But their first use of the phrase ("any person religiously scrupulous of bearing arms") assuredly did not refer to people whose God allowed them to bear arms for defense of themselves but not for defense of their country.

"keep and bear Arms" is established by the Second Amendment's calling it a "right" (singular) rather than "rights" (plural). See *post*, at 16. There is nothing to this. State constitutions of the founding period routinely grouped multiple (related) guarantees under a singular "right," and the First Amendment protects the "right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances." See, *e.g.*, Pa. Declaration of Rights §§IX, XII, XVI, in 5 Thorpe 3083–3084; Ohio Const., Arts. VIII, §§11, 19 (1802), in *id.*, at 2910–2911.[14] And even if "keep and bear Arms" were a unitary phrase, we find no evidence that it bore a military meaning. Although the phrase was not at all common (which would be unusual for a term of art), we have found instances of its use with a clearly nonmilitary connotation. In a 1780 debate in the House of Lords, for example, Lord Richmond described an order to disarm private citizens (not militia members) as "a violation of the constitutional right of Protestant subjects to keep and bear arms for their own defense." 49 The London Magazine or Gentleman's Monthly Intelligencer 467 (1780). In response, another member of Parliament referred to "the right of bearing arms for personal defence," making clear that no special military meaning for "keep and bear arms" was intended in the discussion. *Id.*, at 467–468.[15]

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[14] Faced with this clear historical usage, JUSTICE STEVENS resorts to the bizarre argument that because the word "to" is not included before "bear" (whereas it is included before "petition" in the First Amendment), the unitary meaning of "to keep and bear" is established. *Post*, at 16, n. 13. We have never heard of the proposition that omitting repetition of the "to" causes two verbs with different meanings to become one. A promise "to support and to defend the Constitution of the United States" is not a whit different from a promise "to support and defend the Constitution of the United States."

[15] Cf. 3 Geo., 34, §3, in 7 Eng. Stat. at Large 126 (1748) ("That the Prohibition contained . . . in this Act, of having, keeping, bearing, or wearing any Arms or Warlike Weapons . . . shall not extend . . . to any

c. Meaning of the Operative Clause. Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed." As we said in *United States* v. *Cruikshank*, 92 U. S. 542, 553 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second amendment declares that it shall not be infringed . . . ."[16]

Between the Restoration and the Glorious Revolution, the Stuart Kings Charles II and James II succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents. See J. Malcolm, To Keep and Bear Arms 31–53 (1994) (hereinafter Malcolm); L. Schwoerer, The Declaration of Rights, 1689, p. 76 (1981). Under the auspices of the 1671 Game Act, for example, the Catholic James II had ordered general disarmaments of regions home to his Protestant enemies. See Malcolm 103–106. These experiences caused Englishmen to be extremely wary of concentrated military forces run by the state and to be jealous of their arms. They accordingly obtained an assurance from William and Mary, in the Declaration of Right (which was codified as the English Bill of Rights), that Protestants

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Officers or their Assistants, employed in the Execution of Justice . . .").

[16] Contrary to JUSTICE STEVENS' wholly unsupported assertion, *post*, at 1, 17, there was no pre-existing right in English law "to use weapons for certain military purposes" or to use arms in an organized militia.

would never be disarmed: "That the subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law." 1 W. & M., c. 2, §7, in 3 Eng. Stat. at Large 441 (1689). This right has long been understood to be the predecessor to our Second Amendment. See E. Dumbauld, The Bill of Rights and What It Means Today 51 (1957); W. Rawle, A View of the Constitution of the United States of America 122 (1825) (hereinafter Rawle). It was clearly an individual right, having nothing whatever to do with service in a militia. To be sure, it was an individual right not available to the whole population, given that it was restricted to Protestants, and like all written English rights it was held only against the Crown, not Parliament. See Schwoerer, To Hold and Bear Arms: The English Perspective, in Bogus 207, 218; but see 3 J. Story, Commentaries on the Constitution of the United States §1858 (1833) (hereinafter Story) (contending that the "right to bear arms" is a "limitatio[n] upon the power of parliament" as well). But it was secured to them as individuals, according to "libertarian political principles," not as members of a fighting force. Schwoerer, Declaration of Rights, at 283; see also *id.*, at 78; G. Jellinek, The Declaration of the Rights of Man and of Citizens 49, and n. 7 (1901) (reprinted 1979).

By the time of the founding, the right to have arms had become fundamental for English subjects. See Malcolm 122–134. Blackstone, whose works, we have said, "constituted the preeminent authority on English law for the founding generation," *Alden* v. *Maine*, 527 U. S. 706, 715 (1999), cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. See 1 Blackstone 136, 139–140 (1765). His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation," *id.*, at 139, and "the right of having and using arms for self-preservation and defence," *id.*, at 140;

see also 3 *id.*, at 2–4 (1768). Other contemporary authorities concurred. See G. Sharp, Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia 17–18, 27 (3d ed. 1782); 2 J. de Lolme, The Rise and Progress of the English Constitution 886–887 (1784) (A. Stephens ed. 1838); W. Blizard, Desultory Reflections on Police 59–60 (1785). Thus, the right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence.

And, of course, what the Stuarts had tried to do to their political enemies, George III had tried to do to the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. A New York article of April 1769 said that "[i]t is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence." A Journal of the Times: Mar. 17, New York Journal, Supp. 1, Apr. 13, 1769, in Boston Under Military Rule 79 (O. Dickerson ed. 1936); see also, *e.g.*, Shippen, Boston Gazette, Jan. 30, 1769, in 1 The Writings of Samuel Adams 299 (H. Cushing ed. 1968). They understood the right to enable individuals to defend themselves. As the most important early American edition of Blackstone's Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the "right of self-preservation" as permitting a citizen to "repe[l] force by force" when "the intervention of society in his behalf, may be too late to prevent an injury." 1 Blackstone's Commentaries 145–146, n. 42 (1803) (hereinafter Tucker's Blackstone). See also W. Duer, Outlines of the Constitutional Jurisprudence of the United States 31–32 (1833).

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, *e.g.*, *United States* v. *Williams*, 553 U. S. ___ (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*. Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause.

2. Prefatory Clause.

The prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State . . . ."

a. "Well-Regulated Militia." In *United States* v. *Miller*, 307 U. S. 174, 179 (1939), we explained that "the Militia comprised all males physically capable of acting in concert for the common defense." That definition comports with founding-era sources. See, *e.g.*, Webster ("The militia of a country are the able bodied men organized into companies, regiments and brigades . . . and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations"); The Federalist No. 46, pp. 329, 334 (B. Wright ed. 1961) (J. Madison) ("near half a million of citizens with arms in their hands"); Letter to Destutt de Tracy (Jan. 26, 1811), in The Portable Thomas Jefferson 520, 524 (M. Peterson ed. 1975) ("[T]he militia of the State, that is to say, of every man in it able to bear arms").

Petitioners take a seemingly narrower view of the militia, stating that "[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses (art. I, §8, cls. 15–16)." Brief for Petitioners 12.

Although we agree with petitioners' interpretive assumption that "militia" means the same thing in Article I and the Second Amendment, we believe that petitioners identify the wrong thing, namely, the organized militia. Unlike armies and navies, which Congress is given the power to create ("to raise . . . Armies"; "to provide . . . a Navy," Art. I, §8, cls. 12–13), the militia is assumed by Article I already to be *in existence*. Congress is given the power to "provide for calling forth the militia," §8, cl. 15; and the power not to create, but to "organiz[e]" it—and not to organize "a" militia, which is what one would expect if the militia were to be a federal creation, but to organize "the" militia, connoting a body already in existence, *ibid.*, cl. 16. This is fully consistent with the ordinary definition of the militia as all able-bodied men. From that pool, Congress has plenary power to organize the units that will make up an effective fighting force. That is what Congress did in the first militia Act, which specified that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia." Act of May 8, 1792, 1 Stat. 271. To be sure, Congress need not conscript every able-bodied man into the militia, because nothing in Article I suggests that in exercising its power to organize, discipline, and arm the militia, Congress must focus upon the entire body. Although the militia consists of all able-bodied men, the federally organized militia may consist of a subset of them.

Finally, the adjective "well-regulated" implies nothing more than the imposition of proper discipline and training. See Johnson 1619 ("Regulate": "To adjust by rule or method"); Rawle 121–122; cf. Va. Declaration of Rights §13 (1776), in 7 Thorpe 3812, 3814 (referring to "a well-regulated militia, composed of the body of the people,

trained to arms").

b. "Security of a Free State." The phrase "security of a free state" meant "security of a free polity," not security of each of the several States as the dissent below argued, see 478 F. 3d, at 405, and n. 10. Joseph Story wrote in his treatise on the Constitution that "the word 'state' is used in various senses [and in] its most enlarged sense, it means the people composing a particular nation or community." 1 Story §208; see also 3 *id.*, §1890 (in reference to the Second Amendment's prefatory clause: "The militia is the natural defence of a free country"). It is true that the term "State" elsewhere in the Constitution refers to individual States, but the phrase "security of a free state" and close variations seem to have been terms of art in 18th-century political discourse, meaning a "'free country'" or free polity. See Volokh, "Necessary to the Security of a Free State," 83 Notre Dame L. Rev. 1, 5 (2007); see, *e.g.*, 4 Blackstone 151 (1769); Brutus Essay III (Nov. 15, 1787), in The Essential Antifederalist 251, 253 (W. Allen & G. Lloyd eds., 2d ed. 2002). Moreover, the other instances of "state" in the Constitution are typically accompanied by modifiers making clear that the reference is to the several States—"each state," "several states," "any state," "that state," "particular states," "one state," "no state." And the presence of the term "foreign state" in Article I and Article III shows that the word "state" did not have a single meaning in the Constitution.

There are many reasons why the militia was thought to be "necessary to the security of a free state." See 3 Story §1890. First, of course, it is useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary—an argument that Alexander Hamilton made in favor of federal control over the militia. The Federalist No. 29, pp. 226, 227 (B. Wright ed. 1961) (A. Hamilton). Third, when the able-bodied men of a nation are trained in arms and organized, they are

better able to resist tyranny.

3. Relationship between Prefatory Clause and Operative Clause

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.

The debate with respect to the right to keep and bear arms, as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution. During the 1788 ratification debates, the fear that the federal government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric. See, *e.g.*, Letters from The Federal Farmer III (Oct. 10, 1787), in 2 The Complete Anti-Federalist 234, 242 (H. Storing ed. 1981). John Smilie, for example, worried not only that Congress's "command of the militia" could be used to create a "select militia," or to have "no militia at all," but also, as a separate concern, that "[w]hen a select militia is formed; the people in general may be disarmed." 2 Documentary History of the Ratification of the Constitution 508–509 (M. Jensen ed. 1976) (hereinafter Documentary Hist.). Federalists responded that because Congress was given no power to abridge the ancient right of individuals to keep and bear arms, such a force could never oppress the people. See, *e.g.*, A Pennsylvanian III (Feb. 20, 1788), in The

Origin of the Second Amendment 275, 276 (D. Young ed., 2d ed. 2001) (hereinafter Young); White, To the Citizens of Virginia, Feb. 22, 1788, in *id.*, at 280, 281; A Citizen of America, (Oct. 10, 1787) in *id.*, at 38, 40; Remarks on the Amendments to the federal Constitution, Nov. 7, 1788, in *id.*, at 556. It was understood across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down.

It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. JUSTICE BREYER's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms, see *post*, at 36, is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's *codification;* it was the *central component* of the right itself.

Besides ignoring the historical reality that the Second Amendment was not intended to lay down a "novel princip[e]" but rather codified a right "inherited from our English ancestors," *Robertson* v. *Baldwin*, 165 U. S. 275, 281 (1897), petitioners' interpretation does not even achieve the narrower purpose that prompted codification of the right. If, as they believe, the Second Amendment right is no more than the right to keep and use weapons as a member of an organized militia, see Brief for Petitioners 8—if, that is, the *organized* militia is the sole institu-

tional beneficiary of the Second Amendment's guarantee—it does not assure the existence of a "citizens' militia" as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force.[17] That is why the first Militia Act's requirement that only whites enroll caused States to amend their militia laws to exclude free blacks. See Siegel, The Federal Government's Power to Enact Color-Conscious Laws, 92 Nw. U. L. Rev. 477, 521–525 (1998). Thus, if petitioners are correct, the Second Amendment protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them. It guarantees a select militia of the sort the Stuart kings found useful, but not the people's militia that was the concern of the founding generation.

B

Our interpretation is confirmed by analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second Amendment. Four States adopted analogues to the Federal Second Amendment in the period between independence and the

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[17] Article I, §8, cl. 16 of the Constitution gives Congress the power

> "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

It could not be clearer that Congress's "organizing" power, unlike its "governing" power, can be invoked even for that part of the militia not "employed in the Service of the United States." JUSTICE STEVENS provides no support whatever for his contrary view, see *post*, at 19 n. 20. Both the Federalists and Anti-Federalists read the provision as it was written, to permit the creation of a "select" militia. See The Federalist No. 29, pp. 226, 227 (B. Wright ed. 1961); Centinel, Revived, No. XXIX, Philadelphia Independent Gazetteer, Sept. 9, 1789, in Young 711, 712.

ratification of the Bill of Rights. Two of them—Pennsylvania and Vermont—clearly adopted individual rights unconnected to militia service. Pennsylvania's Declaration of Rights of 1776 said: "That the people have a right to bear arms *for the defence of themselves*, and the state . . . ." §XIII, in 5 Thorpe 3082, 3083 (emphasis added). In 1777, Vermont adopted the identical provision, except for inconsequential differences in punctuation and capitalization. See Vt. Const., ch. 1, §15, in 6 *id.*, at 3741.

North Carolina also codified a right to bear arms in 1776: "That the people have a right to bear arms, for the defence of the State . . . ." Declaration of Rights §XVII, in *id.*, at 2787, 2788. This could plausibly be read to support only a right to bear arms in a militia—but that is a peculiar way to make the point in a constitution that elsewhere repeatedly mentions the militia explicitly. See §§14, 18, 35, in 5 *id.*, 2789, 2791, 2793. Many colonial statutes required individual arms-bearing for public-safety reasons—such as the 1770 Georgia law that "for the security and *defence of this province* from internal dangers and insurrections" required those men who qualified for militia duty individually "to carry fire arms" "to places of public worship." 19 Colonial Records of the State of Georgia 137–139 (A. Candler ed. 1911 (pt. 2)) (emphasis added). That broad public-safety understanding was the connotation given to the North Carolina right by that State's Supreme Court in 1843. See *State* v. *Huntly*, 3 Ired. 418, 422–423.

The 1780 Massachusetts Constitution presented another variation on the theme: "The people have a right to keep and to bear arms for the common defence. . . ." Pt. First, Art. XVII, in 3 Thorpe 1888, 1892. Once again, if one gives narrow meaning to the phrase "common defence" this can be thought to limit the right to the bearing of arms in a state-organized military force. But once again the State's highest court thought otherwise. Writing for the court in an 1825 libel case, Chief Justice Parker wrote:

"The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction." *Commonwealth* v. *Blanding*, 20 Mass. 304, 313–314. The analogy makes no sense if firearms could not be used for any individual purpose at all. See also Kates, Handgun Prohibition and the Original Meaning of the Second Amendment, 82 Mich. L. Rev. 204, 244 (1983) (19th-century courts never read "common defence" to limit the use of weapons to militia service).

We therefore believe that the most likely reading of all four of these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes. Other States did not include rights to bear arms in their pre-1789 constitutions—although in Virginia a Second Amendment analogue was proposed (unsuccessfully) by Thomas Jefferson. (It read: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]."[18] 1 The Papers of Thomas Jefferson 344 (J. Boyd ed. 1950)).

Between 1789 and 1820, nine States adopted Second Amendment analogues. Four of them—Kentucky, Ohio, Indiana, and Missouri—referred to the right of the people to "bear arms in defence of themselves and the State." See n. 8, *supra*. Another three States—Mississippi, Connecticut, and Alabama—used the even more individualistic phrasing that each citizen has the "right to bear arms in defence of himself and the State." See *ibid*. Finally, two States—Tennessee and Maine—used the "common defence" language of Massachusetts. See Tenn. Const., Art.

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[18] JUSTICE STEVENS says that the drafters of the Virginia Declaration of Rights rejected this proposal and adopted "instead" a provision written by George Mason stressing the importance of the militia. See *post*, at 24, and n. 24. There is no evidence that the drafters regarded the Mason proposal as a substitute for the Jefferson proposal.

XI, §26 (1796), in 6 Thorpe 3414, 3424; Me. Const., Art. I, §16 (1819), in 3 *id.*, at 1646, 1648. That of the nine state constitutional protections for the right to bear arms enacted immediately after 1789 at least seven unequivocally protected an individual citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right. And with one possible exception that we discuss in Part II–D–2, 19th-century courts and commentators interpreted these state constitutional provisions to protect an individual right to use arms for self-defense. See n. 9, *supra; Simpson* v. *State*, 5 Yer. 356, 360 (Tenn. 1833).

The historical narrative that petitioners must endorse would thus treat the Federal Second Amendment as an odd outlier, protecting a right unknown in state constitutions or at English common law, based on little more than an overreading of the prefatory clause.

C

JUSTICE STEVENS relies on the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one. But even assuming that this legislative history is relevant, JUSTICE STEVENS flatly misreads the historical record.

It is true, as JUSTICE STEVENS says, that there was concern that the Federal Government would abolish the institution of the state militia. See *post*, at 20. That concern found expression, however, *not* in the various Second Amendment precursors proposed in the State conventions, but in separate structural provisions that would have given the States concurrent and seemingly nonpre-emptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so.

See Veit 17, 20 (Virginia proposal); 4 J. Eliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 244, 245 (2d ed. 1836) (reprinted 1941) (North Carolina proposal); see also 2 Documentary Hist. 624 (Pennsylvania minority's proposal). The Second Amendment precursors, by contrast, referred to the individual English right already codified in two (and probably four) State constitutions. The Federalist-dominated first Congress chose to reject virtually all major structural revisions favored by the Antifederalists, including the proposed militia amendments. Rather, it adopted primarily the popular and uncontroversial (though, in the Federalists' view, unnecessary) individual-rights amendments. The Second Amendment right, protecting only individuals' liberty to keep and carry arms, did nothing to assuage Antifederalists' concerns about federal control of the militia. See, *e.g.*, Centinel, Revived, No. XXIX, Philadelphia Independent Gazetteer, Sept. 9, 1789, in Young 711, 712.

JUSTICE STEVENS thinks it significant that the Virginia, New York, and North Carolina Second Amendment proposals were "embedded . . . within a group of principles that are distinctly military in meaning," such as statements about the danger of standing armies. *Post*, at 22. But so was the highly influential minority proposal in Pennsylvania, yet that proposal, with its reference to hunting, plainly referred to an individual right. See 2 Documentary Hist. 624. Other than that erroneous point, JUSTICE STEVENS has brought forward absolutely no evidence that those proposals conferred only a right to carry arms in a militia. By contrast, New Hampshire's proposal, the Pennsylvania minority's proposal, and Samuel Adams' proposal in Massachusetts unequivocally referred to individual rights, as did two state constitutional provisions at the time. See Veit 16, 17 (New Hampshire proposal); 6 Documentary Hist. 1452, 1453 (J. Kaminski & G. Saladino eds. 2000) (Samuel Adams' pro-

posal). JUSTICE STEVENS' view thus relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.

D

We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century. Before proceeding, however, we take issue with JUSTICE STEVENS' equating of these sources with postenactment legislative history, a comparison that betrays a fundamental misunderstanding of a court's interpretive task. See *post*, at 27, n. 28. "Legislative history," of course, refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. *Ibid.* "Postenactment legislative history," *ibid.,* a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. As we will show, virtually all interpreters of the Second Amendment in the century after its enactment interpreted the amendment as we do.

1. Post-ratification Commentary

Three important founding-era legal scholars interpreted

the Second Amendment in published writings. All three understood it to protect an individual right unconnected with militia service.

St. George Tucker's version of Blackstone's Commentaries, as we explained above, conceived of the Blackstonian arms right as necessary for self-defense. He equated that right, absent the religious and class-based restrictions, with the Second Amendment. See 2 Tucker's Blackstone 143. In Note D, entitled, "View of the Constitution of the United States," Tucker elaborated on the Second Amendment: "This may be considered as the true palladium of liberty . . . . The right to self-defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." 1 *id.,* at App. 300 (ellipsis in original). He believed that the English game laws had abridged the right by prohibiting "keeping a gun or other engine for the destruction of game." *Ibid*; see also 2 *id.*, at 143, and nn. 40 and 41. He later grouped the right with some of the individual rights included in the First Amendment and said that if "a law be passed by congress, prohibiting" any of those rights, it would "be the province of the judiciary to pronounce whether any such act were constitutional, or not; and if not, to acquit the accused . . . ." 1 *id.*, at App. 357. It is unlikely that Tucker was referring to a person's being "accused" of violating a law making it a crime to bear arms in a state militia.[19]

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[19] JUSTICE STEVENS quotes some of Tucker's unpublished notes, which he claims show that Tucker had ambiguous views about the Second Amendment. See *post*, at 31, and n. 32. But it is clear from the notes that Tucker located the power of States to arm their militias in the *Tenth* Amendment, and that he cited the Second Amendment for the

In 1825, William Rawle, a prominent lawyer who had been a member of the Pennsylvania Assembly that ratified the Bill of Rights, published an influential treatise, which analyzed the Second Amendment as follows:

> "The first [principle] is a declaration that a well regulated militia is necessary to the security of a free state; a proposition from which few will dissent. . . .
>
> "The corollary, from the first position is, that the right of the people to keep and bear arms shall not be infringed.
>
> "The prohibition is general. No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both." Rawle 121–122.[20]

Like Tucker, Rawle regarded the English game laws as violating the right codified in the Second Amendment. See *id.*, 122–123. Rawle clearly differentiated between the people's right to bear arms and their service in a militia: "In a people permitted and accustomed to bear arms, we have the rudiments of a militia, which properly consists of armed citizens, divided into military bands, and instructed

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proposition that such armament could not run afoul of any power of the federal government (since the amendment prohibits Congress from ordering disarmament). Nothing in the passage implies that the Second Amendment pertains only to the carrying of arms in the organized militia.

[20] Rawle, writing before our decision in *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833), believed that the Second Amendment could be applied against the States. Such a belief would of course be nonsensical on petitioners' view that it protected only a right to possess and carry arms when conscripted by the State itself into militia service.

at least in part, in the use of arms for the purposes of war." *Id.*, at 140. Rawle further said that the Second Amendment right ought not "be abused to the disturbance of the public peace," such as by assembling with other armed individuals "for an unlawful purpose"—statements that make no sense if the right does not extend to *any* individual purpose.

Joseph Story published his famous Commentaries on the Constitution of the United States in 1833. JUSTICE STEVENS suggests that "[t]here is not so much as a whisper" in Story's explanation of the Second Amendment that favors the individual-rights view. *Post*, at 34. That is wrong. Story explained that the English Bill of Rights had also included a "right to bear arms," a right that, as we have discussed, had nothing to do with militia service. 3 Story §1858. He then equated the English right with the Second Amendment:

> "§1891. A similar provision [to the Second Amendment] in favour of protestants (for to them it is confined) is to be found in the bill of rights of 1688, it being declared, 'that the subjects, which are protestants, may have arms for their defence suitable to their condition, and as allowed by law.' But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege." (Footnotes omitted.)

This comparison to the Declaration of Right would not make sense if the Second Amendment right was the right to use a gun in a militia, which was plainly not what the English right protected. As the Tennessee Supreme Court recognized 38 years after Story wrote his Commentaries, "[t]he passage from Story, shows clearly that this right was intended . . . and was guaranteed to, and to be exercised and enjoyed by the citizen as such, and not by him as

a soldier, or in defense solely of his political rights." *Andrews* v. *State*, 50 Tenn. 165, 183 (1871). Story's Commentaries also cite as support Tucker and Rawle, both of whom clearly viewed the right as unconnected to militia service. See 3 Story §1890, n. 2; §1891, n. 3. In addition, in a shorter 1840 work Story wrote: "One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia." A Familiar Exposition of the Constitution of the United States §450 (reprinted in 1986).

Antislavery advocates routinely invoked the right to bear arms for self-defense. Joel Tiffany, for example, citing Blackstone's description of the right, wrote that "the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed." A Treatise on the Unconstitutionality of American Slavery 117–118 (1849); see also L. Spooner, The Unconstitutionality of Slavery 116 (1845) (right enables "personal defence"). In his famous Senate speech about the 1856 "Bleeding Kansas" conflict, Charles Sumner proclaimed:

> "The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached. And yet such is the madness of the hour, that, in defiance of the solemn guarantee, embodied in the Amendments to the Constitution, that 'the right of the people to keep and bear arms shall not be infringed,'

> the people of Kansas have been arraigned for keeping and bearing them, and the Senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed—of course, that the fanatics of Slavery, his allies and constituents, may meet no impediment." The Crime Against Kansas, May 19–20, 1856, in American Speeches: Political Oratory from the Revolution to the Civil War 553, 606–607 (2006).

We have found only one early 19th-century commentator who clearly conditioned the right to keep and bear arms upon service in the militia—and he recognized that the prevailing view was to the contrary. "The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such [militia-related] purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it." B. Oliver, The Rights of an American Citizen 177 (1832).

2. Pre-Civil War Case Law

The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service. In *Houston* v. *Moore*, 5 Wheat. 1, 24 (1820), this Court held that States have concurrent power over the militia, at least where not preempted by Congress. Agreeing in dissent that States could "organize, discipline, and arm" the militia in the absence of conflicting federal regulation, Justice Story said that the Second Amendment "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id.*, at 51–53. Of course, if the Amendment simply "protect[ed] the right of the people of each of the several States to maintain a well-regulated

militia," *post*, at 1 (STEVENS, J., dissenting), it would have enormous and obvious bearing on the point. But the Court and Story derived the States' power over the militia from the nonexclusive nature of federal power, not from the Second Amendment, whose preamble merely "confirms and illustrates" the importance of the militia. Even clearer was Justice Baldwin. In the famous fugitive-slave case of *Johnson* v. *Tompkins*, 13 F. Cas. 840, 850, 852 (CC Pa. 1833), Baldwin, sitting as a circuit judge, cited both the Second Amendment and the Pennsylvania analogue for his conclusion that a citizen has "a right to carry arms in defence of his property or person, and to use them, if either were assailed with such force, numbers or violence as made it necessary for the protection or safety of either."

Many early 19th-century state cases indicated that the Second Amendment right to bear arms was an individual right unconnected to militia service, though subject to certain restrictions. A Virginia case in 1824 holding that the Constitution did not extend to free blacks explained that "numerous restrictions imposed on [blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms." *Aldridge* v. *Commonwealth*, 2 Va. Cas. 447, 449 (Gen. Ct.). The claim was obviously not that blacks were prevented from carrying guns in the militia.[21] See also

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[21] JUSTICE STEVENS suggests that this is not obvious because free blacks in Virginia had been required to muster without arms. See *post*, at 28, n. 29 (citing Siegel, The Federal Government's Power to Enact Color-Conscious Laws, 92 Nw. U. L. Rev. 477, 497 (1998)). But that could not have been the type of law referred to in *Aldridge*, because that practice had stopped 30 years earlier when blacks were excluded

Waters v. *State*, 1 Gill 302, 309 (Md. 1843) (because free blacks were treated as a "dangerous population," "laws have been passed to prevent their migration into this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness"). An 1829 decision by the Supreme Court of Michigan said: "The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose." *United States* v. *Sheldon*, in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940) (hereinafter Blume). It is not possible to read this as discussing anything other than an individual right unconnected to militia service. If it did have to do with militia service, the limitation upon it would not be any "unlawful or unjustifiable purpose," but any nonmilitary purpose whatsoever.

In *Nunn* v. *State*, 1 Ga. 243, 251 (1846), the Georgia Supreme Court construed the Second Amendment as protecting the "*natural* right of self-defence" and therefore struck down a ban on carrying pistols openly. Its opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced

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entirely from the militia by the First Militia Act. See Siegel, *supra*, at 498, n. 120. JUSTICE STEVENS further suggests that laws barring blacks from militia service could have been said to violate the "right to bear arms." But under JUSTICE STEVENS' reading of the Second Amendment (we think), the protected right is the right to carry arms to the extent one is enrolled in the militia, not the right *to be in the militia.* Perhaps JUSTICE STEVENS really does adopt the full-blown idiomatic meaning of "bear arms," in which case every man and woman in this country has a right "to be a soldier" or even "to wage war." In any case, it is clear to us that *Aldridge*'s allusion to the existing Virginia "restriction" upon the right of free blacks "to bear arms" could only have referred to "laws prohibiting blacks from keeping weapons," Siegel, *supra,* at 497–498.

in the prefatory clause, in continuity with the English right:

> "The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia,* shall not be *infringed,* curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right,* originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta!"

Likewise, in *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850), the Louisiana Supreme Court held that citizens had a right to carry arms openly: "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."

Those who believe that the Second Amendment preserves only a militia-centered right place great reliance on the Tennessee Supreme Court's 1840 decision in *Aymette* v. *State*, 21 Tenn. 154. The case does not stand for that broad proposition; in fact, the case does not mention the word "militia" at all, except in its quoting of the Second Amendment. *Aymette* held that the state constitutional guarantee of the right to "bear" arms did not prohibit the banning of concealed weapons. The opinion first recog-

nized that both the state right and the federal right were descendents of the 1689 English right, but (erroneously, and contrary to virtually all other authorities) read that right to refer only to "protect[ion of] the public liberty" and "keep[ing] in awe those in power," *id.*, at 158. The court then adopted a sort of middle position, whereby citizens were permitted to carry arms openly, unconnected with any service in a formal militia, but were given the right to use them only for the military purpose of banding together to oppose tyranny. This odd reading of the right is, to be sure, not the one we adopt—but it is not petitioners' reading either. More importantly, seven years earlier the Tennessee Supreme Court had treated the state constitutional provision as conferring a right "of all the free citizens of the State to keep and bear arms for their defence," *Simpson,* 5 Yer., at 360; and 21 years later the court held that the "keep" portion of the state constitutional right included the right to personal self-defense: "[T]he right to keep arms involves, necessarily, the right to use such arms for all the ordinary purposes, and in all the ordinary modes usual in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace." *Andrews*, 50 Tenn., at 178; see also *ibid.* (equating state provision with Second Amendment).

3. Post-Civil War Legislation.

In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves. See generally S. Halbrook, Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866–1876 (1998) (hereinafter Halbrook); Brief for Institute for Justice as *Amicus Curiae.* Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original mean-

ing as earlier sources. Yet those born and educated in the early 19th century faced a widespread effort to limit arms ownership by a large number of citizens; their understanding of the origins and continuing significance of the Amendment is instructive.

Blacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms. Needless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia. A Report of the Commission of the Freedmen's Bureau in 1866 stated plainly: "[T]he civil law [of Kentucky] prohibits the colored man from bearing arms. . . . Their arms are taken from them by the civil authorities. . . . Thus, the right of the people to keep and bear arms as provided in the Constitution is *infringed*." H. R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236. A joint congressional Report decried:

> "in some parts of [South Carolina], armed parties are, without proper authority, engaged in seizing all fire-arms found in the hands of the freemen. Such conduct is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.' The freedmen of South Carolina have shown by their peaceful and orderly conduct that they can safely be trusted with fire-arms, and they need them to kill game for subsistence, and to protect their crops from destruction by birds and animals." Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, p. 229 (1866) (Proposed Circular of Brigadier General R. Saxton).

The view expressed in these statements was widely reported and was apparently widely held. For example,

an editorial in The Loyal Georgian (Augusta) on February 3, 1866, assured blacks that "[a]ll men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." Halbrook 19.

Congress enacted the Freedmen's Bureau Act on July 16, 1866. Section 14 stated:

> "[T]he right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . without respect to race or color, or previous condition of slavery. . . . " 14 Stat. 176–177.

The understanding that the Second Amendment gave freed blacks the right to keep and bear arms was reflected in congressional discussion of the bill, with even an opponent of it saying that the founding generation "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense." Cong. Globe, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis).

Similar discussion attended the passage of the Civil Rights Act of 1871 and the Fourteenth Amendment. For example, Representative Butler said of the Act: "Section eight is intended to enforce the well-known constitutional provision guaranteeing the right of the citizen to 'keep and bear arms,' and provides that whoever shall take away, by force or violence, or by threats and intimidation, the arms and weapons which any person may have for his defense, shall be deemed guilty of larceny of the same." H. R. Rep. No. 37, 41st Cong., 3d Sess., pp. 7–8 (1871). With respect to the proposed Amendment, Senator Pomeroy described as one of the three "indispensable" "safeguards of liberty . . . under the Constitution" a man's "right to bear arms for the defense of himself and family and his homestead."

Cong. Globe, 39th Cong., 1st Sess., 1182 (1866). Representative Nye thought the Fourteenth Amendment unnecessary because "[a]s citizens of the United States [blacks] have equal right to protection, and to keep and bear arms for self-defense." *Id.*, at 1073 (1866).

It was plainly the understanding in the post-Civil War Congress that the Second Amendment protected an individual right to use arms for self-defense.

4. Post-Civil War Commentators.

Every late-19th-century legal scholar that we have read interpreted the Second Amendment to secure an individual right unconnected with militia service. The most famous was the judge and professor Thomas Cooley, who wrote a massively popular 1868 Treatise on Constitutional Limitations. Concerning the Second Amendment it said:

> "Among the other defences to personal liberty should be mentioned the right of the people to keep and bear arms. . . . The alternative to a standing army is 'a well-regulated militia,' but this cannot exist unless the people are trained to bearing arms. How far it is in the power of the legislature to regulate this right, we shall not undertake to say, as happily there has been very little occasion to discuss that subject by the courts." *Id.,* at 350.

That Cooley understood the right not as connected to militia service, but as securing the militia by ensuring a populace familiar with arms, is made even clearer in his 1880 work, General Principles of Constitutional Law. The Second Amendment, he said, "was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people." *Id.*, at 270. In a section entitled "The Right in General," he continued:

> "It might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order." *Id.*, at 271.

All other post-Civil War 19th-century sources we have found concurred with Cooley. One example from each decade will convey the general flavor:

> "[The purpose of the Second Amendment is] to secure a well-armed militia. . . . But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons. To preserve this privilege, and to secure to the people the ability to oppose themselves in military force against the usurpa-

tions of government, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms. . . . The clause is analogous to the one securing the freedom of speech and of the press. Freedom, not license, is secured; the fair use, not the libellous abuse, is protected." J. Pomeroy, An Introduction to the Constitutional Law of the United States 152–153 (1868) (hereinafter Pomeroy).

"As the Constitution of the United States, and the constitutions of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons, when not on a journey, or as travellers, from *wearing or carrying concealed weapons*, be constitutional. There has been a great difference of opinion on the question." 2 J. Kent, Commentaries on American Law *340, n. 2 (O. Holmes ed., 12th ed. 1873) (hereinafter Kent).

"Some general knowledge of firearms is important to the public welfare; because it would be impossible, in case of war, to organize promptly an efficient force of volunteers unless the people had some familiarity with weapons of war. The Constitution secures the right of the people to keep and bear arms. No doubt, a citizen who keeps a gun or pistol under judicious precautions, practices in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right. No doubt, a person whose residence or duties involve peculiar peril may keep a pistol for prudent self-defence." B. Abbott, Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land 333 (1880) (hereinafter Abbott).

> "The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection to the person, it represents among all nations power coupled with the exercise of a certain jurisdiction. . . . [I]t was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed." J. Ordronaux, Constitutional Legislation in the United States 241–242 (1891).

E

We now ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment.

United States v. *Cruikshank*, 92 U. S. 542, in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms, held that the Second Amendment does not by its own force apply to anyone other than the Federal Government. The opinion explained that the right "is not a right granted by the Constitution [or] in any manner dependent upon that instrument for its existence. The second amendment . . . means no more than that it shall not be infringed by Congress." 92 U. S., at 553. States, we said, were free to restrict or protect the right under their police powers. The limited discussion of the Second Amendment in *Cruikshank* supports, if anything, the individual-rights interpretation. There was no claim in *Cruikshank* that the victims had been deprived of their right to carry arms in a militia; indeed, the Governor had disbanded the local militia unit the year before the mob's attack, see C. Lane, The Day Freedom Died 62 (2008). We described the right protected by the Second Amendment as "'bearing arms for a lawful purpose'"[22] and said that "the people [must] look

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[22] JUSTICE STEVENS' accusation that this is "not accurate," *post*, at 39,

for their protection against any violation by their fellow-citizens of the rights it recognizes" to the States' police power. 92 U. S., at 553. That discussion makes little sense if it is only a right to bear arms in a state militia.[23]

Presser v. *Illinois*, 116 U. S. 252 (1886), held that the right to keep and bear arms was not violated by a law that forbade "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law." *Id.*, at 264–265. This does not refute the individual-rights interpretation of the Amendment; no one supporting that interpretation has contended that States may not ban such groups. JUSTICE STEVENS presses *Presser* into service to support his view that the right to bear arms is limited to service in the militia by joining *Presser*'s brief discussion of the Second Amendment with a later portion of the opinion making the seemingly relevant (to the Second Amendment) point that the plaintiff was not a member of the state militia. Unfortunately for JUSTICE STEVENS' argument, that later portion deals with the *Fourteenth Amendment;* it was the *Fourteenth Amendment* to which the plaintiff's nonmembership in the militia was relevant. Thus, JUSTICE STEVENS' statement that *Presser* "suggested that. . . nothing in the Constitution protected the use of arms outside the context of a militia," *post*, at 40, is simply wrong.

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is wrong. It is true it was the indictment that described the right as "bearing arms for a lawful purpose." But, in explicit reference to the right described in the indictment, the Court stated that "The second amendment declares that it [*i.e.,* the right of bearing arms for a lawful purpose] shall not be infringed." 92 U. S., at 553.

[23] With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser* v. *Illinois*, 116 U. S. 252, 265 (1886) and *Miller* v. *Texas*, 153 U. S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.

Presser said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations.

JUSTICE STEVENS places overwhelming reliance upon this Court's decision in *United States* v. *Miller*, 307 U. S. 174 (1939). "[H]undreds of judges," we are told, "have relied on the view of the amendment we endorsed there," *post*, at 2, and "[e]ven if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself . . . would prevent most jurists from endorsing such a dramatic upheaval in the law," *post*, at 4. And what is, according to JUSTICE STEVENS, the holding of *Miller* that demands such obeisance? That the Second Amendment "protects the right to keep and bear arms for certain military purposes, but that it does not curtail the legislature's power to regulate the nonmilitary use and ownership of weapons." *Post*, at 2.

Nothing so clearly demonstrates the weakness of JUSTICE STEVENS' case. *Miller* did not hold that and cannot possibly be read to have held that. The judgment in the case upheld against a Second Amendment challenge two men's federal indictment for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was *not* that the defendants were "bear[ing] arms" not "for . . . military purposes" but for "nonmilitary use," *post*, at 2. Rather, it was that the *type of weapon at issue* was not eligible for Second Amendment protection: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment

guarantees the right to keep and bear *such an instrument*." 307 U. S., at 178 (emphasis added). "Certainly," the Court continued, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Ibid.* Beyond that, the opinion provided no explanation of the content of the right.

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen. JUSTICE STEVENS can say again and again that *Miller* did "not turn on the difference between muskets and sawed-off shotguns, it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns," *post*, at 42–43, but the words of the opinion prove otherwise. The most JUSTICE STEVENS can plausibly claim for *Miller* is that it declined to decide the nature of the Second Amendment right, despite the Solicitor General's argument (made in the alternative) that the right was collective, see Brief for United States, O. T. 1938, No. 696, pp. 4–5. *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.

It is particularly wrongheaded to read *Miller* for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment. JUSTICE STEVENS claims, *post*, at 42, that the opinion reached its conclusion "[a]fter reviewing many of the same sources that are discussed at greater length by the Court today." Not many, which was not entirely the Court's

fault. The defendants made no appearance in the case, neither filing a brief nor appearing at oral argument; the Court heard from no one but the Government (reason enough, one would think, not to make that case the beginning and the end of this Court's consideration of the Second Amendment). See Frye, The Peculiar Story of *United States* v. *Miller*, 3 N. Y. U. J. L. & Liberty 48, 65–68 (2008). The Government's brief spent two pages discussing English legal sources, concluding "that at least the carrying of weapons without lawful occasion or excuse was always a crime" and that (because of the class-based restrictions and the prohibition on terrorizing people with dangerous or unusual weapons) "the early English law did not guarantee an unrestricted right to bear arms." Brief for United States, O. T. 1938, No. 696, at 9–11. It then went on to rely primarily on the discussion of the English right to bear arms in *Aymette* v. *State*, 21 Tenn. 154, for the proposition that the only uses of arms protected by the Second Amendment are those that relate to the militia, not self-defense. See Brief for United States, O. T. 1938, No. 696, at 12–18. The final section of the brief recognized that "some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property," and launched an alternative argument that "weapons which are commonly used by criminals," such as sawed-off shotguns, are not protected. See *id.*, at 18–21. The Government's *Miller* brief thus provided scant discussion of the history of the Second Amendment—and the Court was presented with no counterdiscussion. As for the text of the Court's opinion itself, that discusses *none* of the history of the Second Amendment. It assumes from the prologue that the Amendment was designed to preserve the militia, 307 U. S., at 178 (which we do not dispute), and then reviews some historical materials dealing with the nature of the militia, and in particular with the nature of the arms their

members were expected to possess, *id.*, at 178–182. Not a word *(not a word)* about the history of the Second Amendment. This is the mighty rock upon which the dissent rests its case.[24]

We may as well consider at this point (for we will have to consider eventually) *what* types of weapons *Miller* permits. Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." 307 U. S., at 179. The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. "In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same." *State* v. *Kessler*, 289 Ore. 359, 368, 614 P. 2d 94, 98 (1980) (citing G. Neumann, Swords and Blades of the American Revolution 6–15, 252–254 (1973)). Indeed, that is precisely the way in which the Second

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[24] As for the "hundreds of judges," *post*, at 2, who have relied on the view of the Second Amendment JUSTICE STEVENS claims we endorsed in *Miller*: If so, they overread *Miller*. And their erroneous reliance upon an uncontested and virtually unreasoned case cannot nullify the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms. In any event, it should not be thought that the cases decided by these judges would necessarily have come out differently under a proper interpretation of the right.

Amendment's operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right, see Part III, *infra.*[25]

We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment. It should be unsurprising that such a significant matter has been for so long judicially unresolved. For most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens. Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified, see *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), and it was not until after World War II that we held a law

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[25] *Miller* was briefly mentioned in our decision in *Lewis* v. *United States*, 445 U. S. 55 (1980), an appeal from a conviction for being a felon in possession of a firearm. The challenge was based on the contention that the prior felony conviction had been unconstitutional. No Second Amendment claim was raised or briefed by any party. In the course of rejecting the asserted challenge, the Court commented gratuitously, in a footnote, that "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. See *United States* v. *Miller* . . . (the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia')." *Id.,* at 65–66, n. 8. The footnote then cites several Court of Appeals cases to the same effect. It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued.

invalid under the Establishment Clause, see *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71, Champaign Cty.*, 333 U. S. 203 (1948). Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). It is demonstrably not true that, as JUSTICE STEVENS claims, *post*, at 41–42, "for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial." For most of our history the question did not present itself.

III

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, *e.g.*, *Sheldon*, in 5 Blume 346; Rawle 123; Pomeroy 152–153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, *e.g.*, *State* v. *Chandler*, 5 La. Ann., at 489–490; *Nunn* v. *State*, 1 Ga., at 251; see generally 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884). Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of

arms.[26]

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." 307 U. S., at 179. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148–149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804); J. Dunlap, The New-York Justice 8 (1815); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 271–272 (1831); H. Stephen, Summary of the Criminal Law 48 (1840); E. Lewis, An Abridgment of the Criminal Law of the United States 64 (1847); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). See also *State* v. *Langford*, 10 N. C. 381, 383–384 (1824); *O'Neill* v. *State*, 16 Ala. 65, 67 (1849); *English* v. *State*, 35 Tex. 473, 476 (1871); *State* v. *Lanier*, 71 N. C. 288, 289 (1874).

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and

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[26] We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.

tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

IV

We turn finally to the law at issue here. As we have said, the law totally bans handgun possession in the home. It also requires that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable.

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights,[27] banning from

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[27] JUSTICE BREYER correctly notes that this law, like almost all laws, would pass rational-basis scrutiny. *Post*, at 8. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. See, *e.g.*, *Engquist* v. *Oregon Dept. of Agriculture*, 553 U. S. ___, ___ (2008) (slip op., at 9–10). In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . ."). If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irra-

the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," 478 F. 3d, at 400, would fail constitutional muster.

Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down. In *Nunn* v. *State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). See 1 Ga., at 251. In *Andrews* v. *State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment). That was so even though the statute did not restrict the carrying of long guns. *Ibid.* See also *State* v. *Reid*, 1 Ala. 612, 616–617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popu-

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tional laws, and would have no effect.

lar weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

We must also address the District's requirement (as applied to respondent's handgun) that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional. The District argues that we should interpret this element of the statute to contain an exception for self-defense. See Brief for Petitioners 56–57. But we think that is precluded by the unequivocal text, and by the presence of certain other enumerated exceptions: "Except for law enforcement personnel . . . , each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia." D. C. Code §7–2507.02. The nonexistence of a self-defense exception is also suggested by the D. C. Court of Appeals' statement that the statute forbids residents to use firearms to stop intruders, see *McIntosh* v. *Washington*, 395 A. 2d 744, 755–756 (1978).[28]

Apart from his challenge to the handgun ban and the trigger-lock requirement respondent asked the District Court to enjoin petitioners from enforcing the separate licensing requirement "in such a manner as to forbid the carrying of a firearm within one's home or possessed land without a license." App. 59a. The Court of Appeals did not invalidate the licensing requirement, but held only

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[28] *McIntosh* upheld the law against a claim that it violated the Equal Protection Clause by arbitrarily distinguishing between residences and businesses. See 395 A. 2d, at 755. One of the rational bases listed for that distinction was the legislative finding "that for each intruder stopped by a firearm there are four gun-related accidents within the home." *Ibid.* That tradeoff would not bear mention if the statute did not prevent stopping intruders by firearms.

that the District "may not prevent [a handgun] from being moved throughout one's house." 478 F. 3d, at 400. It then ordered the District Court to enter summary judgment "consistent with [respondent's] prayer for relief." *Id.*, at 401. Before this Court petitioners have stated that "if the handgun ban is struck down and respondent registers a handgun, he could obtain a license, assuming he is not otherwise disqualified," by which they apparently mean if he is not a felon and is not insane. Brief for Petitioners 58. Respondent conceded at oral argument that he does not "have a problem with . . . licensing" and that the District's law is permissible so long as it is "not enforced in an arbitrary and capricious manner." Tr. of Oral Arg. 74–75. We therefore assume that petitioners' issuance of a license will satisfy respondent's prayer for relief and do not address the licensing requirement.

JUSTICE BREYER has devoted most of his separate dissent to the handgun ban. He says that, even assuming the Second Amendment is a personal guarantee of the right to bear arms, the District's prohibition is valid. He first tries to establish this by founding-era historical precedent, pointing to various restrictive laws in the colonial period. These demonstrate, in his view, that the District's law "imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted." *Post*, at 2. Of the laws he cites, only one offers even marginal support for his assertion. A 1783 Massachusetts law forbade the residents of Boston to "take into" or "receive into" "any Dwelling House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building" loaded firearms, and permitted the seizure of any loaded firearms that "shall be found" there. Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts p. 218. That statute's text and its prologue, which makes clear that the purpose of the prohibition was to eliminate the danger to firefighters posed by the "depositing of

loaded Arms" in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law's application in that case). In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home. The other laws JUSTICE BREYER cites are gunpowder-storage laws that he concedes did not clearly prohibit loaded weapons, but required only that excess gunpowder be kept in a special container or on the top floor of the home. *Post*, at 6–7. Nothing about those fire-safety laws undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.

JUSTICE BREYER points to other founding-era laws that he says "restricted the firing of guns within the city limits to at least some degree" in Boston, Philadelphia and New York. *Post*, at 4 (citing Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America, 25 Law & Hist. Rev. 139, 162 (2007)). Those laws provide no support for the severe restriction in the present case. The New York law levied a fine of 20 shillings on anyone who fired a gun in certain places (including houses) on New Year's Eve and the first two days of January, and was aimed at preventing the "great Damages . . . frequently done on [those days] by persons going House to House, with Guns and other Firearms and being often intoxicated with Liquor." 5 Colonial Laws of New York 244–246 (1894). It is inconceivable that this law would have been enforced against a person exercising his right to self-defense on New Year's Day against such drunken

hooligans. The Pennsylvania law to which JUSTICE BREYER refers levied a fine of 5 shillings on one who fired a gun or set off fireworks in Philadelphia without first obtaining a license from the governor. See Act of Aug. 26, 1721, §4, in 3 Stat. at Large 253–254. Given Justice Wilson's explanation that the right to self-defense with arms was protected by the Pennsylvania Constitution, it is unlikely that this law (which in any event amounted to at most a licensing regime) would have been enforced against a person who used firearms for self-defense. JUSTICE BREYER cites a Rhode Island law that simply levied a 5-shilling fine on those who fired guns in *streets* and *taverns*, a law obviously inapplicable to this case. See An Act for preventing Mischief being done in the town of Newport, or in any other town in this Government, 1731, Rhode Island Session Laws. Finally, JUSTICE BREYER points to a Massachusetts law similar to the Pennsylvania law, prohibiting "discharg[ing] any Gun or Pistol charged with Shot or Ball in the Town of *Boston*." Act of May 28, 1746, ch. X, Acts and Laws of Mass. Bay 208. It is again implausible that this would have been enforced against a citizen acting in self-defense, particularly given its preambulatory reference to "the *indiscreet* firing of Guns." *Ibid.* (preamble) (emphasis added).

A broader point about the laws that JUSTICE BREYER cites: All of them punished the discharge (or loading) of guns with a small fine and forfeiture of the weapon (or in a few cases a very brief stay in the local jail), not with significant criminal penalties.[29] They are akin to modern penalties for minor public-safety infractions like speeding

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[29] The Supreme Court of Pennsylvania described the amount of five shillings in a contract matter in 1792 as "nominal consideration." *Morris's Lessee* v. *Smith*, 4 Dall. 119, 120 (Pa. 1792). Many of the laws cited punished violation with fine in a similar amount; the 1783 Massachusetts gunpowder-storage law carried a somewhat larger fine of £10 (200 shillings) and forfeiture of the weapon.

or jaywalking. And although such public-safety laws may not contain exceptions for self-defense, it is inconceivable that the threat of a jaywalking ticket would deter someone from disregarding a "Do Not Walk" sign in order to flee an attacker, or that the Government would enforce those laws under such circumstances. Likewise, we do not think that a law imposing a 5-shilling fine and forfeiture of the gun would have prevented a person in the founding era from using a gun to protect himself or his family from violence, or that if he did so the law would be enforced against him. The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place. See D. C. Code §7–2507.06.

JUSTICE BREYER moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Post*, at 10. After an exhaustive discussion of the arguments for and against gun control, JUSTICE BREYER arrives at his interest-balanced answer: because handgun violence is a problem, because the law is limited to an urban area, and because there were somewhat similar restrictions in the founding period (a false proposition that we have already discussed), the interest-balancing inquiry results in the constitutionality of the handgun ban. QED.

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the

Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) *(per curiam)*. The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people—which JUSTICE BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

JUSTICE BREYER chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible. See *post*, at 42–43. But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds* v. *United States*, 98 U. S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty. And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.

* * *

We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. The Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns, see *supra,* at 54–55, and n. 26. But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.

We affirm the judgment of the Court of Appeals.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 07–290

DISTRICT OF COLUMBIA, ET AL., PETITIONERS *v.*
DICK ANTHONY HELLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 26, 2008]

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

The question presented by this case is not whether the Second Amendment protects a "collective right" or an "individual right." Surely it protects a right that can be enforced by individuals. But a conclusion that the Second Amendment protects an individual right does not tell us anything about the scope of that right.

Guns are used to hunt, for self-defense, to commit crimes, for sporting activities, and to perform military duties. The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense is the question presented by this case. The text of the Amendment, its history, and our decision in *United States* v. *Miller*, 307 U. S. 174 (1939), provide a clear answer to that question.

The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable

threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.

In 1934, Congress enacted the National Firearms Act, the first major federal firearms law.[1] Sustaining an indictment under the Act, this Court held that, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." *Miller*, 307 U. S., at 178. The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption.

Since our decision in *Miller,* hundreds of judges have relied on the view of the Amendment we endorsed there;[2]

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[1] There was some limited congressional activity earlier: A 10% federal excise tax on firearms was passed as part of the Revenue Act of 1918, 40 Stat. 1057, and in 1927 a statute was enacted prohibiting the shipment of handguns, revolvers, and other concealable weapons through the United States mails. Ch. 75, 44 Stat. 1059–1060 (hereinafter 1927 Act).

[2] Until the Fifth Circuit's decision in *United States* v. *Emerson,* 270 F. 3d 203 (2001), every Court of Appeals to consider the question had understood *Miller* to hold that the Second Amendment does not protect the right to possess and use guns for purely private, civilian purposes. See, *e.g., United States* v. *Haney,* 264 F. 3d 1161, 1164–1166 (CA10 2001); *United States* v. *Napier,* 233 F. 3d 394, 402–404 (CA6 2000);

we ourselves affirmed it in 1980. See *Lewis* v. *United States,* 445 U. S. 55, 65–66, n. 8 (1980).[3] No new evidence has surfaced since 1980 supporting the view that the Amendment was intended to curtail the power of Congress to regulate civilian use or misuse of weapons. Indeed, a review of the drafting history of the Amendment demonstrates that its Framers *rejected* proposals that would have broadened its coverage to include such uses.

The opinion the Court announces today fails to identify any new evidence supporting the view that the Amendment was intended to limit the power of Congress to regulate civilian uses of weapons. Unable to point to any such evidence, the Court stakes its holding on a strained and

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Gillespie v. *Indianapolis,* 185 F. 3d 693, 710–711 (CA7 1999); *United States* v. *Scanio,* No. 97–1584, 1998 WL 802060, *2 (CA2, Nov. 12, 1998) (unpublished opinion); *United States* v. *Wright,* 117 F. 3d 1265, 1271–1274 (CA11 1997); *United States* v. *Rybar,* 103 F. 3d 273, 285–286 (CA3 1996); *Hickman* v. *Block,* 81 F. 3d 98, 100–103 (CA9 1996); *United States* v. *Hale,* 978 F. 2d 1016, 1018–1020 (CA8 1992); *Thomas* v. *City Council of Portland,* 730 F. 2d 41, 42 (CA1 1984) *(per curiam); United States* v. *Johnson,* 497 F. 2d 548, 550 (CA4 1974) *(per curiam); United States* v. *Johnson*, 441 F. 2d 1134, 1136 (CA5 1971); see also *Sandidge* v. *United States,* 520 A. 2d 1057, 1058–1059 (DC App. 1987). And a number of courts have remained firm in their prior positions, even after considering *Emerson.* See, *e.g., United States* v. *Lippman,* 369 F. 3d 1039, 1043–1045 (CA8 2004); *United States* v. *Parker,* 362 F. 3d 1279, 1282–1284 (CA10 2004); *United States* v. *Jackubowski,* 63 Fed. Appx. 959, 961 (CA7 2003) (unpublished opinion); *Silveira* v. *Lockyer,* 312 F. 3d 1052, 1060–1066 (CA9 2002); *United States* v. *Milheron,* 231 F. Supp. 2d 376, 378 (Me. 2002); *Bach* v. *Pataki,* 289 F. Supp. 2d 217, 224–226 (NDNY 2003); *United States* v. *Smith,* 56 M. J. 711, 716 (C. A. Armed Forces 2001).

[3] Our discussion in *Lewis* was brief but significant. Upholding a conviction for receipt of a firearm by a felon, we wrote: "These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they entrench upon any constitutionally protected liberties. See *United States* v. *Miller,* 307 U. S. 174, 178 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia')." 445 U. S., at 65, n. 8.

unpersuasive reading of the Amendment's text; significantly different provisions in the 1689 English Bill of Rights, and in various 19th-century State Constitutions; postenactment commentary that was available to the Court when it decided *Miller;* and, ultimately, a feeble attempt to distinguish *Miller* that places more emphasis on the Court's decisional process than on the reasoning in the opinion itself.

Even if the textual and historical arguments on both sides of the issue were evenly balanced, respect for the well-settled views of all of our predecessors on this Court, and for the rule of law itself, see *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600, 636 (1974) (Stewart, J., dissenting), would prevent most jurists from endorsing such a dramatic upheaval in the law.[4] As Justice Cardozo observed years ago, the "labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own

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[4]See *Vasquez* v. *Hillery,* 474 U. S. 254, 265, 266 (1986) ("*[Stare decisis]* permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 412 (1932) (Brandeis, J., dissenting)"); *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 652 (1895) (White, J., dissenting) ("The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity and let it be felt that on great constitutional questions this Court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people").

course of bricks on the secure foundation of the courses laid by others who had gone before him." The Nature of the Judicial Process 149 (1921).

In this dissent I shall first explain why our decision in *Miller* was faithful to the text of the Second Amendment and the purposes revealed in its drafting history. I shall then comment on the postratification history of the Amendment, which makes abundantly clear that the Amendment should not be interpreted as limiting the authority of Congress to regulate the use or possession of firearms for purely civilian purposes.

I

The text of the Second Amendment is brief. It provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Three portions of that text merit special focus: the introductory language defining the Amendment's purpose, the class of persons encompassed within its reach, and the unitary nature of the right that it protects.

"A well regulated Militia, being necessary to the security of a free State"

The preamble to the Second Amendment makes three important points. It identifies the preservation of the militia as the Amendment's purpose; it explains that the militia is necessary to the security of a free State; and it recognizes that the militia must be "well regulated." In all three respects it is comparable to provisions in several State Declarations of Rights that were adopted roughly contemporaneously with the Declaration of Independence.[5]

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[5]The Virginia Declaration of Rights ¶13 (1776), provided: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided, as dangerous to

Those state provisions highlight the importance members of the founding generation attached to the maintenance of state militias; they also underscore the profound fear shared by many in that era of the dangers posed by standing armies.[6] While the need for state militias has not been

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liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power." 1 B. Schwartz, The Bill of Rights 235 (1971) (hereinafter Schwartz).

Maryland's Declaration of Rights, Arts. XXV–XXVII (1776), provided: "That a well-regulated militia is the proper and natural defence of a free government"; "That standing armies are dangerous to liberty, and ought not to be raised or kept up, without consent of the Legislature"; "That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power." 1 Schwartz 282.

Delaware's Declaration of Rights, §§18–20 (1776), provided: "That a well regulated militia is the proper, natural, and safe defence of a free government"; "That standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the Legislature"; "That in all cases and at all times the military ought to be under strict subordination to and governed by the civil power." 1 Schwartz 278.

Finally, New Hampshire's Bill of Rights, Arts. XXIV–XXVI (1783), read: "A well regulated militia is the proper, natural, and sure defence of a state"; "Standing armies are dangerous to liberty, and ought not to be raised or kept up without consent of the legislature"; "In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power." 1 Schwartz 378. It elsewhere provided: "No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent." *Id.,* at 377 (Art. XIII).

[6]The language of the Amendment's preamble also closely tracks the language of a number of contemporaneous state militia statutes, many of which began with nearly identical statements. Georgia's 1778 militia statute, for example, began, "[w]hereas a well ordered and disciplined Militia, is essentially necessary, to the Safety, peace and prosperity, of this State." Act of Nov. 15, 1778, 19 Colonial Records of the State of Georgia 103 (Candler ed. 1911 (pt. 2)). North Carolina's 1777 militia statute started with this language: "Whereas a well regulated Militia is absolutely necessary for the defending and securing the Liberties of a free State." N. C. Sess. Laws ch. 1, §I, p. 1. And Connecticut's 1782 "Acts and Laws Regulating the Militia" began, "Whereas the Defence

a matter of significant public interest for almost two centuries, that fact should not obscure the contemporary concerns that animated the Framers.

The parallels between the Second Amendment and these state declarations, and the Second Amendment's omission of any statement of purpose related to the right to use firearms for hunting or personal self-defense, is especially striking in light of the fact that the Declarations of Rights of Pennsylvania and Vermont *did* expressly protect such civilian uses at the time. Article XIII of Pennsylvania's 1776 Declaration of Rights announced that "the people have a right to bear arms for the defence *of themselves* and the state," 1 Schwartz 266 (emphasis added); §43 of the Declaration assured that "the inhabitants of this state shall have the liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed," *id.,* at 274. And Article XV of the 1777 Vermont Declaration of Rights guaranteed "[t]hat the people have a right to bear arms for the defence *of themselves* and the State." *Id.,* at 324 (emphasis added). The contrast between those two declarations and the Second Amendment reinforces the clear statement of purpose announced in the Amendment's preamble. It

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and Security of all free States depends (under God) upon the Exertions of a well regulated Militia, and the Laws heretofore enacted have proved inadequate to the End designed." Conn. Acts and Laws p. 585 (hereinafter 1782 Conn. Acts).

These state militia statutes give content to the notion of a "well-regulated militia." They identify those persons who compose the State's militia; they create regiments, brigades, and divisions; they set forth command structures and provide for the appointment of officers; they describe how the militia will be assembled when necessary and provide for training; and they prescribe penalties for nonappearance, delinquency, and failure to keep the required weapons, ammunition, and other necessary equipment. The obligation of militia members to "keep" certain specified arms is detailed further, n. 14, *infra*, and accompanying text.

confirms that the Framers' single-minded focus in crafting the constitutional guarantee "to keep and bear arms" was on military uses of firearms, which they viewed in the context of service in state militias.

The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury* v. *Madison,* 1 Cranch 137, 174 (1803).

The Court today tries to denigrate the importance of this clause of the Amendment by beginning its analysis with the Amendment's operative provision and returning to the preamble merely "to ensure that our reading of the operative clause is consistent with the announced purpose." *Ante,* at 5. That is not how this Court ordinarily reads such texts, and it is not how the preamble would have been viewed at the time the Amendment was adopted. While the Court makes the novel suggestion that it need only find some "logical connection" between the preamble and the operative provision, it does acknowledge that a prefatory clause may resolve an ambiguity in the text. *Ante,* at 4.[7] Without identifying any language in the

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[7] The sources the Court cites simply do not support the proposition that some "logical connection" between the two clauses is all that is required. The Dwarris treatise, for example, merely explains that "[t]he general purview of a statute is not . . . *necessarily* to be restrained by any words introductory to the enacting clauses." F. Dwarris, A General Treatise on Statutes 268 (P. Potter ed. 1871) (emphasis added). The treatise proceeds to caution that "the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms, yet, if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it." *Id.,* at 269. Sutherland makes the same point. Explaining that "[i]n the United States preambles are not as important as they are in England," the treatise notes that in the United States "the settled principle of law is that the preamble cannot control the enacting part of the statute *in cases where the*

text that even mentions civilian uses of firearms, the Court proceeds to "find" its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble. Perhaps the Court's approach to the text is acceptable advocacy, but it is surely an unusual approach for judges to follow.

"The right of the people"

The centerpiece of the Court's textual argument is its insistence that the words "the people" as used in the Second Amendment must have the same meaning, and protect the same class of individuals, as when they are used in the First and Fourth Amendments. According to the Court, in all three provisions—as well as the Constitution's preamble, section 2 of Article I, and the Tenth Amendment—"the term unambiguously refers to all members of the political community, not an unspecified subset." *Ante,* at 6. But the Court *itself* reads the Second Amendment to protect a "subset" significantly narrower than the class of persons protected by the First and Fourth Amendments; when it finally drills down on the substantive meaning of the Second Amendment, the Court limits the protected class to "law-abiding, responsible citizens," *ante,* at 63. But the class of persons protected by the First and Fourth Amendments is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions. The Court offers no way to harmonize its conflicting pronouncements.

The Court also overlooks the significance of the way the

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enacting part is expressed in clear, unambiguous terms." 2A N. Singer, Sutherland on Statutory Construction §47.04, p. 146 (rev. 5th ed. 1992) (emphasis added). Surely not even the Court believes that the Amendment's operative provision, which, though only 14 words in length, takes the Court the better part of 18 pages to parse, is perfectly "clear and unambiguous."

Framers used the phrase "the people" in these constitutional provisions. In the First Amendment, no words define the class of individuals entitled to speak, to publish, or to worship; in that Amendment it is only the right peaceably to assemble, and to petition the Government for a redress of grievances, that is described as a right of "the people." These rights contemplate collective action. While the right peaceably to assemble protects the individual rights of those persons participating in the assembly, its concern is with action engaged in by members of a group, rather than any single individual. Likewise, although the act of petitioning the Government is a right that can be exercised by individuals, it is primarily collective in nature. For if they are to be effective, petitions must involve groups of individuals acting in concert.

Similarly, the words "the people" in the Second Amendment refer back to the object announced in the Amendment's preamble. They remind us that it is the collective action of individuals having a duty to serve in the militia that the text directly protects and, perhaps more importantly, that the ultimate purpose of the Amendment was to protect the States' share of the divided sovereignty created by the Constitution.

As used in the Fourth Amendment, "the people" describes the class of persons protected from unreasonable searches and seizures by Government officials. It is true that the Fourth Amendment describes a right that need not be exercised in any collective sense. But that observation does not settle the meaning of the phrase "the people" when used in the Second Amendment. For, as we have seen, the phrase means something quite different in the Petition and Assembly Clauses of the First Amendment. Although the abstract definition of the phrase "the people" could carry the same meaning in the Second Amendment as in the Fourth Amendment, the preamble of the Second Amendment suggests that the uses of the phrase in the

First and Second Amendments are the same in referring to a collective activity. By way of contrast, the Fourth Amendment describes a right *against* governmental interference rather than an affirmative right *to* engage in protected conduct, and so refers to a right to protect a purely individual interest. As used in the Second Amendment, the words "the people" do not enlarge the right to keep and bear arms to encompass use or ownership of weapons outside the context of service in a well-regulated militia.

"To keep and bear Arms"

Although the Court's discussion of these words treats them as two "phrases"—as if they read "to keep" and "to bear"—they describe a unitary right: to possess arms if needed for military purposes and to use them in conjunction with military activities.

As a threshold matter, it is worth pausing to note an oddity in the Court's interpretation of "to keep and bear arms." Unlike the Court of Appeals, the Court does not read that phrase to create a right to possess arms for "lawful, private purposes." *Parker* v. *District of Columbia,* 478 F. 3d 370, 382 (CADC 2007). Instead, the Court limits the Amendment's protection to the right "to possess and carry weapons in case of confrontation." *Ante,* at 19. No party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth. But although this novel limitation lacks support in the text of the Amendment, the Amendment's text *does* justify a different limitation: the "right to keep and bear arms" protects only a right to possess and use firearms in connection with service in a state-organized militia.

The term "bear arms" is a familiar idiom; when used unadorned by any additional words, its meaning is "to serve as a soldier, do military service, fight." 1 Oxford English Dictionary 634 (2d ed. 1989). It is derived from

the Latin *arma ferre,* which, translated literally, means "to bear *[ferre]* war equipment *[arma]*." Brief for Professors of Linguistics and English as *Amici Curiae* 19. One 18th-century dictionary defined "arms" as "weapons of offence, or armour of defence," 1 S. Johnson, A Dictionary of the English Language (1755), and another contemporaneous source explained that "[b]y *arms*, we understand those instruments of offence generally made use of in war; such as firearms, swords, & c. By *weapons,* we more particularly mean instruments of other kinds (exclusive of firearms), made use of as offensive, on special occasions." 1 J. Trusler, The Distinction Between Words Esteemed Synonymous in the English Language 37 (1794).[8] Had the Framers wished to expand the meaning of the phrase "bear arms" to encompass civilian possession and use, they could have done so by the addition of phrases such as "for the defense of themselves," as was done in the Pennsylvania and Vermont Declarations of Rights. The *unmodified* use of "bear arms," by contrast, refers most naturally to a military purpose, as evidenced by its use in literally dozens of contemporary texts.[9] The absence of any refer-

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[8] The Court's repeated citation to the dissenting opinion in *Muscarello* v. *United States,* 524 U. S. 125 (1998), *ante,* at 10, 13, as illuminating the meaning of "bear arms," borders on the risible. At issue in *Muscarello* was the proper construction of the word "carries" in 18 U. S. C. §924(c) (2000 ed. and Supp. V); the dissent in that case made passing reference to the Second Amendment only in the course of observing that both the Constitution and Black's Law Dictionary suggested that something more active than placement of a gun in a glove compartment might be meant by the phrase "'carries a firearm.'" 524 U. S., at 143.

[9] *Amici* professors of Linguistics and English reviewed uses of the term "bear arms" in a compilation of books, pamphlets, and other sources disseminated in the period between the Declaration of Independence and the adoption of the Second Amendment. See Brief for Professors of Linguistics and English as *Amici Curiae* 23–25. *Amici* determined that of 115 texts that employed the term, all but five usages were in a clearly military context, and in four of the remaining five instances, further qualifying language conveyed a different meaning.

ence to civilian uses of weapons tailors the text of the Amendment to the purpose identified in its preamble.[10]

The Court allows that the phrase "bear Arms" did have as an idiomatic meaning, " 'to serve as a soldier, do military service, fight,' " *ante,* at 12, but asserts that it "*unequivocally* bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities," *ante,* at 12–13. But contemporary sources make clear that the phrase "bear arms" was often used to convey a military meaning without those additional words. See, *e.g.,* To The Printer, Providence Gazette, (May 27, 1775) ("By the common estimate of three millions of people in America, allowing one in five to bear arms, there will be found 600,000 fighting men"); Letter of Henry Laurens to the Mass. Council (Jan. 21, 1778), in Letters of Delegates to Congress 1774–1789, p. 622 (P. Smith ed. 1981) ("Congress were yesterday informed . . . that those Canadians who returned from Saratoga . . . had been compelled by Sir Guy Carleton to bear Arms"); Of the Manner of Making War among the Indians of North-America, Connecticut Courant (May 23, 1785) ("The Indians begin to bear arms at the age of fifteen, and lay them aside when they arrive at the age of sixty. Some nations to the southward, I have been informed, do not continue their military exercises after they are fifty"); 28 Journals of the Continental Congress 1030 (G. Hunt ed. 1910) ("That hostages be mutually given as a security that the Convention troops and those received in exchange for them do not bear arms prior to the first day of May next"); H. R. J., 9th Cong., 1st Sess., 217 (Feb. 12, 1806) ("Whereas the commanders of British armed vessels have impressed many American seamen, and compelled them to bear arms on board said vessels, and assist in fighting their battles with nations in amity and peace with the United States"); H. R. J., 15th Cong., 2d Sess., 182–183 (Jan. 14, 1819) ("[The petitioners] state that they were residing in the British province of Canada, at the commencement of the late war, and that owing to their attachment to the United States, they refused to bear arms, when called upon by the British authorities . . .").

[10] *Aymette* v. *State,* 21 Tenn. 154, 156 (1840), a case we cited in *Miller,* further confirms this reading of the phrase. In *Aymette*, the Tennessee Supreme Court construed the guarantee in Tennessee's 1834 Constitution that " 'the free white men of this State, have a right to keep and bear arms for their common defence.' " Explaining that the provision was adopted with the same goals as the Federal Constitution's Second Amendment, the court wrote: "The words 'bear arms' . . . have reference to their military use, and were not employed to mean wearing them about the person as part of the dress. As the object for which the right

But when discussing these words, the Court simply ignores the preamble.

The Court argues that a "qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass." *Ante,* at 15. But this fundamentally fails to grasp the point. The stand-alone phrase "bear arms" most naturally conveys a military meaning *unless* the addition of a qualifying phrase signals that a different meaning is intended. When, as in this case, there is no such qualifier, the most natural meaning is the military one; and, in the absence of any qualifier, it is all the more appropriate to look to the preamble to confirm the natural meaning of the text.[11] The Court's objection is particularly

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to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence*, so the *arms,* the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." 21 Tenn., at 158. The court elaborated: "[W]e may remark, that the phrase *'bear arms'* is used in the Kentucky Constitution as well as our own, and implies, as has already been suggested, their military use. . . . A man in the pursuit of deer, elk, and buffaloes, might carry his rifle every day, for forty years, and, yet, it would never be said of him, that he had *borne arms,* much less could it be said, that a private citizen *bears arms,* because he has a dirk or pistol concealed under his clothes, or a spear in a cane." *Id.,* at 161.

[11] As lucidly explained in the context of a statute mandating a sentencing enhancement for any person who "uses" a firearm during a crime of violence or drug trafficking crime:

"To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of 'using a firearm' is to speak of using it for its distinctive purpose, *i.e.*, as a weapon. To be sure, one can use a firearm in a number of ways, including as an article of exchange, just as one can 'use' a cane as a hall decoration—but that is not the ordinary meaning of 'using' the one or the other. The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily* is used." *Smith* v. *United States*, 508 U. S. 223, 242 (1993) (SCALIA, J., dissenting) (some internal marks, footnotes, and citations

puzzling in light of its own contention that the addition of the modifier "against" changes the meaning of "bear arms." Compare *ante*, at 10 (defining "bear arms" to mean "carrying [a weapon] for a particular purpose—confrontation"), with *ante*, at 12 ("The phrase 'bear Arms' also had at the time of the founding an idiomatic meaning that was significantly different from its natural meaning: to serve as a soldier, do military service, fight or to wage war. But it unequivocally bore that idiomatic meaning only when followed by the preposition 'against.'" (citations and some internal quotation marks omitted)).

The Amendment's use of the term "keep" in no way contradicts the military meaning conveyed by the phrase "bear arms" and the Amendment's preamble. To the contrary, a number of state militia laws in effect at the time of the Second Amendment's drafting used the term "keep" to describe the requirement that militia members store their arms at their homes, ready to be used for service when necessary. The Virginia military law, for example, ordered that "every one of the said officers, non-commissioned officers, and privates, shall constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer." Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, §3, p. 2 (emphasis added).[12]

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omitted).

[12] See also Act for the regulating, training, and arraying of the Militia, . . . of the State, 1781 N. J. Laws, ch. XIII, §12, p. 43 ("And be it Enacted, That each Person enrolled as aforesaid, shall also *keep* at his Place of Abode one Pound of good merchantable Gunpowder and three Pounds of Ball sized to his Musket or Rifle" (emphasis added)); An Act for establishing a Militia, 1785 Del. Laws §7, p. 59 ("*And be it enacted,* That every person between the ages of eighteen and fifty . . . shall at his own expense, provide himself . . . with a musket or firelock, with a bayonet, a cartouch box to contain twenty three cartridges, a priming wire, a brush and six flints, all in good order, on or before the first day of April next, under the penalty of forty shillings, and shall *keep* the

"[K]eep and bear arms" thus perfectly describes the responsibilities of a framing-era militia member.

This reading is confirmed by the fact that the clause protects only one right, rather than two. It does not describe a right "to keep arms" and a separate right "to bear arms." Rather, the single right that it does describe is both a duty and a right to have arms available and ready for military service, and to use them for military purposes when necessary.[13] Different language surely would have been used to protect nonmilitary use and possession of weapons from regulation if such an intent had played any role in the drafting of the Amendment.

* * *

When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia. So far as appears, no more than that was contemplated by its drafters or is encompassed within its terms. Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and

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same by him at all times, ready and fit for service, under the penalty of two shillings and six pence for each neglect or default thereof on every muster day" (second emphasis added)); 1782 Conn. Acts 590 ("And it shall be the duty of the Regional Quarter-Master to provide and *keep* a sufficient quantity of Ammunition and warlike stores for the use of their respective regiments, to be *kept* in such place or places as shall be ordered by the Field Officers" (emphasis added)).

[13] The Court notes that the First Amendment protects two separate rights with the phrase "the 'right [singular] of the people peaceably to assemble, and to petition the Government for a redress of grievances.'" *Ante*, at 18. But this only proves the point: In contrast to the language quoted by the Court, the Second Amendment does not protect a "right to keep *and to* bear arms," but rather a "right to keep and bear arms." The state constitutions cited by the Court are distinguishable on the same ground.

from settled law to come forward with persuasive new arguments or evidence. The textual analysis offered by respondent and embraced by the Court falls far short of sustaining that heavy burden.[14] And the Court's emphatic reliance on the claim "that the Second Amendment . . . codified a *pre-existing* right," *ante,* at 19, is of course beside the point because the right to keep and bear arms for service in a state militia was also a pre-existing right.

Indeed, not a word in the constitutional text even arguably supports the Court's overwrought and novel description of the Second Amendment as "elevat[ing] above all other interests" "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Ante,* at 63.

II

The proper allocation of military power in the new Nation was an issue of central concern for the Framers. The compromises they ultimately reached, reflected in Article I's Militia Clauses and the Second Amendment, represent quintessential examples of the Framers' "splitting the atom of sovereignty."[15]

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[14] The Court's atomistic, word-by-word approach to construing the Amendment calls to mind the parable of the six blind men and the elephant, famously set in verse by John Godfrey Saxe. The Poems of John Godfrey Saxe 135–136 (1873). In the parable, each blind man approaches a single elephant; touching a different part of the elephant's body in isolation, each concludes that he has learned its true nature. One touches the animal's leg, and concludes that the elephant is like a tree; another touches the trunk and decides that the elephant is like a snake; and so on. Each of them, of course, has fundamentally failed to grasp the nature of the creature.

[15] By "'split[ting] the atom of sovereignty,'" the Framers created "'two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it

Two themes relevant to our current interpretive task ran through the debates on the original Constitution. "On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States." *Perpich* v. *Department of Defense,* 496 U. S. 334, 340 (1990).[16] Governor Edmund Randolph, reporting on the Constitutional Convention to the Virginia Ratification Convention, explained: "With respect to a standing army, I believe there was not a member in the federal Convention, who did not feel indignation at such an institution." 3 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 401 (2d ed. 1863) (hereinafter Elliot). On the other hand, the Framers recognized the dangers inherent in relying on inadequately trained militia members "as the primary means of providing for the common defense," *Perpich,* 496 U. S., at 340; during the Revolutionary War, "[t]his force, though armed, was largely untrained, and its deficiencies were the subject of bitter complaint." Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 182 (1940).[17] In order to respond to those twin concerns, a

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and are governed by it.'" *Saenz* v. *Roe,* 526 U. S. 489, 504, n. 17 (1999) (quoting *U. S. Term Limits, Inc.* v. *Thornton,* 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring)).

[16] Indeed, this was one of the grievances voiced by the colonists: Paragraph 13 of the Declaration of Independence charged of King George, "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures."

[17] George Washington, writing to Congress on September 24, 1776, warned that for Congress "[t]o place any dependance upon Militia, is, assuredly, resting upon a broken staff." 6 Writings of George Washington 106, 110 (J. Fitzpatrick ed. 1932). Several years later he reiterated this view in another letter to Congress: "Regular Troops alone are equal to the exigencies of modern war, as well for defence as offence . . . . *No Militia* will ever acquire the habits necessary to resist a regular force. . . . The firmness requisite for the real business of fighting is only to be attained by a constant course of discipline and service." 20 *id.,* at

compromise was reached: Congress would be authorized to raise and support a national Army[18] and Navy, and also to organize, arm, discipline, and provide for the calling forth of "the Militia." U. S. Const., Art. I, §8, cls. 12–16. The President, at the same time, was empowered as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Art. II, §2. But, with respect to the militia, a significant reservation was made to the States: Although Congress would have the power to call forth,[19] organize, arm, and discipline the militia, as well as to govern "such Part of them as may be employed in the Service of the United States," the States respectively would retain the right to appoint the officers and to train the militia in accordance with the discipline prescribed by Congress. Art. I, §8, cl. 16.[20]

49, 49–50 (Sept. 15, 1780). And Alexander Hamilton argued this view in many debates. In 1787, he wrote:

"Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defense. This doctrine, in substance, had like to have lost us our independence. . . . War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice." The Federalist No. 25, p. 166 (C. Rossiter ed. 1961).

[18] "[B]ut no Appropriation of Money to that Use [raising and supporting Armies] shall be for a longer Term than two Years." U. S. Const., Art I, §8, cl. 12

[19] This "calling forth" power was only permitted in order for the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions." *Id.,* Art. I, §8, cl. 15.

[20] The Court assumes—incorrectly, in my view—that even when a state militia was not called into service, Congress would have had the power to exclude individuals from enlistment in that state militia. See *ante*, at 27. That assumption is not supported by the text of the Militia Clauses of the original Constitution, which confer upon Congress the power to "organiz[e], ar[m], and disciplin[e], the Militia," Art. I, §8, cl. 16, but not the power to say who will be members of a state militia. It is also flatly inconsistent with the Second Amendment. The States' power to create their own militias provides an easy answer to the

But the original Constitution's retention of the militia and its creation of divided authority over that body did not prove sufficient to allay fears about the dangers posed by a standing army. For it was perceived by some that Article I contained a significant gap: While it empowered Congress to organize, arm, and discipline the militia, it did not prevent Congress from providing for the militia's *dis*armament. As George Mason argued during the debates in Virginia on the ratification of the original Constitution:

> "The militia may be here destroyed by that method which has been practiced in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretences, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has the exclusive right to arm them." Elliot 379.

This sentiment was echoed at a number of state ratification conventions; indeed, it was one of the primary objections to the original Constitution voiced by its opponents. The Anti-Federalists were ultimately unsuccessful in persuading state ratification conventions to condition their approval of the Constitution upon the eventual inclusion of any particular amendment. But a number of States did propose to the first Federal Congress amendments reflecting a desire to ensure that the institution of the militia would remain protected under the new Government. The proposed amendments sent by the States of Virginia, North Carolina, and New York focused on the importance of preserving the state militias and reiterated the dangers posed by standing armies. New Hampshire sent a proposal that differed significantly from the others; while also

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Court's complaint that the right as I have described it is empty because it merely guarantees "citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them." *Ante,* at 28.

invoking the dangers of a standing army, it suggested that the Constitution should more broadly protect the use and possession of weapons, without tying such a guarantee expressly to the maintenance of the militia. The States of Maryland, Pennsylvania, and Massachusetts sent no relevant proposed amendments to Congress, but in each of those States a minority of the delegates advocated related amendments. While the Maryland minority proposals were exclusively concerned with standing armies and conscientious objectors, the unsuccessful proposals in both Massachusetts and Pennsylvania would have protected a more broadly worded right, less clearly tied to service in a state militia. Faced with all of these options, it is telling that James Madison chose to craft the Second Amendment as he did.

The relevant proposals sent by the Virginia Ratifying Convention read as follows:

> "17th, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and be governed by the civil power." Elliot 659.
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> "19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead." *Ibid.*

North Carolina adopted Virginia's proposals and sent them to Congress as its own, although it did not actually ratify the original Constitution until Congress had sent the proposed Bill of Rights to the States for ratification. 2

Schwartz 932–933; see The Complete Bill of Rights 182–183 (N. Cogan ed. 1997) (hereinafter Cogan).

New York produced a proposal with nearly identical language. It read:

> "That the people have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural, and safe defence of a free State. . . . That standing Armies, in time of Peace, are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be kept under strict Subordination to the civil Power." 2 Schwartz 912.

Notably, each of these proposals used the phrase "keep and bear arms," which was eventually adopted by Madison. And each proposal embedded the phrase within a group of principles that are distinctly military in meaning.[21]

By contrast, New Hampshire's proposal, although it followed another proposed amendment that echoed the familiar concern about standing armies,[22] described the protection involved in more clearly personal terms. Its

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[21] In addition to the cautionary references to standing armies and to the importance of civil authority over the military, each of the proposals contained a guarantee that closely resembled the language of what later became the Third Amendment. The 18th proposal from Virginia and North Carolina read "That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the law directs." Elliott 659. And New York's language read: "That in time of Peace no Soldier ought to be quartered in any House without the consent of the Owner, and in time of War only by the Civil Magistrate in such manner as the Laws may direct." 2 Schwartz 912.

[22] "*Tenth,* That no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress, nor shall Soldiers in Time of Peace be quartered upon private Houses with out the consent of the Owners."

proposal read:

> *"Twelfth,* Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion." *Id.,* at 758, 761.

The proposals considered in the other three States, although ultimately rejected by their respective ratification conventions, are also relevant to our historical inquiry. First, the Maryland proposal, endorsed by a minority of the delegates and later circulated in pamphlet form, read:

> "4. That no standing army shall be kept up in time of peace, unless with the consent of two thirds of the members present of each branch of Congress.
>
> . . . . .
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> "10. That no person conscientiously scrupulous of bearing arms in any case, shall be compelled personally to serve as a soldier." *Id.,* at 729, 735.

The rejected Pennsylvania proposal, which was later incorporated into a critique of the Constitution titled "The Address and Reasons of Dissent of the Pennsylvania Minority of the Convention of the State of Pennsylvania to Their Constituents (1787)," signed by a minority of the State's delegates (those who had voted against ratification of the Constitution), *id.,* at 628, 662, read:

> 7. "That the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to, and be governed by the civil powers." *Id.,* at 665.

Finally, after the delegates at the Massachusetts Ratification Convention had compiled a list of proposed amendments and alterations, a motion was made to add to the list the following language: "[T]hat the said Constitution never be construed to authorize Congress to . . . prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Cogan 181. This motion, however, failed to achieve the necessary support, and the proposal was excluded from the list of amendments the State sent to Congress. 2 Schwartz 674–675.

Madison, charged with the task of assembling the proposals for amendments sent by the ratifying States, was the principal draftsman of the Second Amendment.[23] He had before him, or at the very least would have been aware of, all of these proposed formulations. In addition, Madison had been a member, some years earlier, of the committee tasked with drafting the Virginia Declaration of Rights. That committee considered a proposal by Thomas Jefferson that would have included within the Virginia Declaration the following language: "No freeman shall ever be debarred the use of arms [within his own lands or tenements]." 1 Papers of Thomas Jefferson 363 (J. Boyd ed. 1950). But the committee rejected that language, adopting instead the provision drafted by George Mason.[24]

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[23] Madison explained in a letter to Richard Peters, Aug. 19, 1789, the paramount importance of preparing a list of amendments to placate those States that had ratified the Constitution in reliance on a commitment that amendments would follow: "In many States the [Constitution] was adopted under a tacit compact in [favor] of some subsequent provisions on this head. In [Virginia]. It would have been *certainly* rejected, had no assurances been given by its advocates that such provisions would be pursued. As an honest man *I feel* my self bound by this consideration." Creating the Bill of Rights 281, 282 (H. Veit, K. Bowling, & C. Bickford eds. 1991) (hereinafter Veit).

[24] The adopted language, Virginia Declaration of Rights ¶13 (1776), read as follows: "That a well-regulated Militia, composed of the body of

With all of these sources upon which to draw, it is strikingly significant that Madison's first draft omitted any mention of nonmilitary use or possession of weapons. Rather, his original draft repeated the essence of the two proposed amendments sent by Virginia, combining the substance of the two provisions succinctly into one, which read: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." Cogan 169.

Madison's decision to model the Second Amendment on the distinctly military Virginia proposal is therefore revealing, since it is clear that he considered and rejected formulations that would have unambiguously protected civilian uses of firearms. When Madison prepared his first draft, and when that draft was debated and modified, it is reasonable to assume that all participants in the drafting process were fully aware of the other formulations that would have protected civilian use and possession of weapons and that their choice to craft the Amendment as they did represented a rejection of those alternative formulations.

Madison's initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment. It confirms an intent to describe a duty as well as a right, and it unequivocally identifies the military character of both. The objections voiced to the conscientious-objector clause only confirm the central meaning of the text. Although records of the debate in the Senate, which is where the conscientious-objector clause was

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the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power." 1 Schwartz 234.

removed, do not survive, the arguments raised in the House illuminate the perceived problems with the clause: Specifically, there was concern that Congress "can declare who are those religiously scrupulous, and prevent them from bearing arms."[25] The ultimate removal of the clause, therefore, only serves to confirm the purpose of the Amendment—to protect against congressional disarmament, by whatever means, of the States' militias.

The Court also contends that because "Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever," *ante,* at 17, the inclusion of a conscientious-objector clause in the original draft of the Amendment does not support the conclusion that the phrase "bear arms" was military in meaning. But that claim cannot be squared with the record. In the proposals cited *supra,* at 21–22, both Virginia and North Carolina included the following language: "That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent *to employ another to bear arms in his stead*" (emphasis added).[26] There is no plausible argument that the use of "bear arms" in those provisions was not unequivocally and exclusively military: The State simply does not compel its citizens to carry arms for the purpose of private "confrontation," *ante,* at 10, or for self-defense.

The history of the adoption of the Amendment thus describes an overriding concern about the potential threat to state sovereignty that a federal standing army would

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[25] Veit 182. This was the objection voiced by Elbridge Gerry, who went on to remark, in the next breath: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. . .. Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins." *Ibid.*

[26] The failed Maryland proposals contained similar language. See *supra,* at 23.

pose, and a desire to protect the States' militias as the means by which to guard against that danger. But state militias could not effectively check the prospect of a federal standing army so long as Congress retained the power to disarm them, and so a guarantee against such disarmament was needed.[27] As we explained in *Miller:* "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." 307 U. S., at 178. The evidence plainly refutes the claim that the Amendment was motivated by the Framers' fears that Congress might act to regulate any civilian uses of weapons. And even if the historical record were genuinely ambiguous, the burden would remain on the parties advocating a change in the law to introduce facts or arguments "'newly ascertained,'" *Vasquez,* 474 U. S., at 266; the Court is unable to identify any such facts or arguments.

III

Although it gives short shrift to the drafting history of the Second Amendment, the Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone's Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history.[28] All of these

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[27] The Court suggests that this historical analysis casts the Second Amendment as an "odd outlier," *ante,* at 30; if by "outlier," the Court means that the Second Amendment was enacted in a unique and novel context, and responded to the particular challenges presented by the Framers' federalism experiment, I have no quarrel with the Court's characterization.

[28] The Court's fixation on the last two types of sources is particularly puzzling, since both have the same characteristics as postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining the intent of any provision's drafters. As has been explained:

sources shed only indirect light on the question before us, and in any event offer little support for the Court's conclusion.[29]

"The legislative history of a statute is the history of its consideration and enactment. 'Subsequent legislative history'—which presumably means the *post*-enactment history of a statute's consideration and enactment—is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expression *not* of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law *previously enacted* means. . . . In my opinion, the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed." *Sullivan* v. *Finkelstein,* 496 U. S. 617, 631–632 (1990) (SCALIA, J., concurring in part).

[29] The Court stretches to derive additional support from scattered state-court cases primarily concerned with state constitutional provisions. See *ante,* at 38–41. To the extent that those state courts assumed that the Second Amendment was coterminous with their differently worded state constitutional arms provisions, their discussions were of course dicta. Moreover, the cases on which the Court relies were decided between 30 and 60 years after the ratification of the Second Amendment, and there is no indication that any of them engaged in a careful textual or historical analysis of the federal constitutional provision. Finally, the interpretation of the Second Amendment advanced in those cases is not as clear as the Court apparently believes. In *Aldridge* v. *Commonwealth*, 2 Va. Cas. 447 (Gen. Ct. 1824), for example, a Virginia court pointed to the restriction on free blacks' "right to bear arms" as evidence that the protections of the State and Federal Constitutions did not extend to free blacks. The Court asserts that "[t]he claim was obviously not that blacks were prevented from carrying guns in the militia.*"* *Ante*, at 39. But it is not obvious at all. For in many States, including Virginia, free blacks during the colonial period were prohibited from carrying guns in the militia, instead being required to "muste[r] without arms"; they were later barred from serving in the militia altogether. See Siegel, The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry, 92 Nw. U. L. Rev. 477, 497–498, and n. 120 (1998). But my point is not that the *Aldridge* court endorsed my view of the Amendment—plainly it did not, as the premise of the relevant passage was that the Second Amendment applied to the States. Rather, my point is simply that the court could have understood the Second Amendment to protect a

The English Bill of Rights

The Court's reliance on Article VII of the 1689 English Bill of Rights—which, like most of the evidence offered by the Court today, was considered in *Miller*[30]—is misguided both because Article VII was enacted in response to different concerns from those that motivated the Framers of the Second Amendment, and because the guarantees of the two provisions were by no means coextensive. Moreover, the English text contained no preamble or other provision identifying a narrow, militia-related purpose.

The English Bill of Rights responded to abuses by the Stuart monarchs; among the grievances set forth in the Bill of Rights was that the King had violated the law "[b]y causing several good Subjects being Protestants to be disarmed at the same time when Papists were both armed and Employed contrary to Law." Article VII of the Bill of Rights was a response to that selective disarmament; it guaranteed that "the Subjects which are Protestants may have Armes for their defence, Suitable to their condition and as allowed by Law." L. Schwoerer, The Declaration of Rights, 1689 (App. 1, pp. 295, 297) (1981). This grant did

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militia-focused right, and thus that its passing mention of the right to bear arms provides scant support for the Court's position.

[30] The Government argued in its brief that:

"[I]t would seem that the early English law did not guarantee an unrestricted right to bear arms. Such recognition as existed of a right in the people to keep and bear arms appears to have resulted from oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people. This right, however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense." Brief for United States in *United States* v. *Miller,* O. T. 1938, No. 696, pp. 11–12 (citations omitted). The Government then cited at length the Tennessee Supreme Court's opinion in *Aymette,* 21 Tenn. 154, which further situated the English Bill of Rights in its historical context. See n. 10, *supra.*

not establish a general right of all persons, or even of all Protestants, to possess weapons. Rather, the right was qualified in two distinct ways: First, it was restricted to those of adequate social and economic status ("suitable to their Condition"); second, it was only available subject to regulation by Parliament ("as allowed by Law").[31]

The Court may well be correct that the English Bill of Rights protected the right of *some* English subjects to use *some* arms for personal self-defense free from restrictions by the Crown (but not Parliament). But that right—adopted in a different historical and political context and framed in markedly different language—tells us little about the meaning of the Second Amendment.

Blackstone's Commentaries

The Court's reliance on Blackstone's Commentaries on the Laws of England is unpersuasive for the same reason as its reliance on the English Bill of Rights. Blackstone's invocation of "'the natural right of resistance and self-preservation,'" *ante*, at 20, and "'the right of having and using arms for self-preservation and defence'" *ibid.,* referred specifically to Article VII in the English Bill of Rights. The excerpt from Blackstone offered by the Court, therefore, is, like Article VII itself, of limited use in interpreting the very differently worded, and differently historically situated, Second Amendment.

What *is* important about Blackstone is the instruction he provided on reading the sort of text before us today. Blackstone described an interpretive approach that gave far more weight to preambles than the Court allows.

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[31] Moreover, it was the Crown, not Parliament, that was bound by the English provision; indeed, according to some prominent historians, Article VII is best understood not as announcing any individual right to unregulated firearm ownership (after all, such a reading would fly in the face of the text), but as an assertion of the concept of parliamentary supremacy. See Brief for Jack N. Rakove et al. as *Amici Curiae* 6–9.

Counseling that "[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable," Blackstone explained that "[i]f words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus, the proeme, or preamble, is often called in to help the construction of an act of parliament." 1 Commentaries on the Laws of England 59–60 (1765) (hereinafter Blackstone). In light of the Court's invocation of Blackstone as "'the preeminent authority on English law for the founding generation,'" *ante,* at 20 (quoting *Alden* v. *Maine*, 527 U. S. 706, 715 (1999)), its disregard for his guidance on matters of interpretation is striking.

Postenactment Commentary

The Court also excerpts, without any real analysis, commentary by a number of additional scholars, some near in time to the framing and others post-dating it by close to a century. Those scholars are for the most part of limited relevance in construing the guarantee of the Second Amendment: Their views are not altogether clear,[32]

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[32] For example, St. George Tucker, on whom the Court relies heavily, did not consistently adhere to the position that the Amendment was designed to protect the "Blackstonian" self-defense right, *ante,* at 33. In a series of unpublished lectures, Tucker suggested that the Amendment should be understood in the context of the compromise over military power represented by the original Constitution and the Second and Tenth Amendments:

"If a State chooses to incur the expense of putting arms into the Hands of its own Citizens for their defense, it would require no small ingenuity to prove that they have no right to do it, or that it could by any means contravene the Authority of the federal Govt. It may be alleged indeed that this might be done for the purpose of resisting the laws of the federal Government, or of shaking off the union: to which the plainest

they tended to collapse the Second Amendment with Article VII of the English Bill of Rights, and they appear to have been unfamiliar with the drafting history of the Second Amendment.[33]

The most significant of these commentators was Joseph Story. Contrary to the Court's assertions, however, Story actually supports the view that the Amendment was designed to protect the right of each of the States to maintain a well-regulated militia. When Story used the term "palladium" in discussions of the Second Amendment, he merely echoed the concerns that animated the Framers of the Amendment and led to its adoption. An excerpt from

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answer seems to be, that whenever the States think proper to adopt either of these measures, they will not be with-held by the fear of infringing any of the powers of the federal Government. But to contend that such a power would be dangerous for the reasons above maintained would be subversive of every principle of Freedom in our Government; of which the first Congress appears to have been sensible by proposing an Amendment to the Constitution, which has since been ratified and has become part of it, viz., 'That a well regulated militia being necessary to the Security of a free State, the right of the people to keep and bear arms shall not be infringed.' To this we may add that this power of arming the militia, is not one of those prohibited to the States by the Constitution, and, consequently, is reserved to them under the twelfth Article of the ratified aments." S. Tucker, Ten Notebooks of Law Lectures, 1790's, Tucker-Coleman Papers, pp. 127–128 (College of William and Mary).

See also Cornell, St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings, 47 Wm. & Mary L. Rev. 1123 (2006).

[33]The Court does acknowledge that at least one early commentator described the Second Amendment as creating a right conditioned upon service in a state militia. See *ante,* at 37–38 (citing B. Oliver, The Rights of an American Citizen (1832)). Apart from the fact that Oliver is the *only* commentator in the Court's exhaustive survey who appears to have inquired into the intent of the drafters of the Amendment, what is striking about the Court's discussion is its failure to refute Oliver's description of the meaning of the Amendment or the intent of its drafters; rather, the Court adverts to simple nose-counting to dismiss his view.

his 1833 Commentaries on the Constitution of the United States—the same passage cited by the Court in *Miller*[34]—merits reproducing at some length:

> "The importance of [the Second Amendment] will scarcely be doubted by any persons who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses with which they are attended and the facile means which they afford to ambitious and unprincipled rulers to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of rulers, and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well-regulated militia would seem so undeniable, it cannot be disguised that, among the American people, there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burdens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by the clause of our national bill of rights." 2 J. Story, Commentaries on the Constitution of the United

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[34] *Miller,* 307 U. S., at 182, n. 3.

States §1897, pp. 620–621 (4th ed. 1873) (footnote omitted).

Story thus began by tying the significance of the Amendment directly to the paramount importance of the militia. He then invoked the fear that drove the Framers of the Second Amendment—specifically, the threat to liberty posed by a standing army. An important check on that danger, he suggested, was a "well-regulated militia," *id.,* at 621, for which he assumed that arms would have to be kept and, when necessary, borne. There is not so much as a whisper in the passage above that Story believed that the right secured by the Amendment bore any relation to private use or possession of weapons for activities like hunting or personal self-defense.

After extolling the virtues of the militia as a bulwark against tyranny, Story went on to decry the "growing indifference to any system of militia discipline." *Ibid.* When he wrote, "[h]ow it is practicable to keep the people duly armed without some organization it is difficult to see," *ibid.*, he underscored the degree to which he viewed the arming of the people and the militia as indissolubly linked. Story warned that the "growing indifference" he perceived would "gradually undermine all the protection intended by this clause of our national bill of rights," *ibid.* In his view, the importance of the Amendment was directly related to the continuing vitality of an institution in the process of apparently becoming obsolete.

In an attempt to downplay the absence of any reference to nonmilitary uses of weapons in Story's commentary, the Court relies on the fact that Story characterized Article VII of the English Declaration of Rights as a "'similar provision,'" *ante,* at 36. The two provisions were indeed similar, in that both protected some uses of firearms. But Story's characterization in no way suggests that he believed that the provisions had the same scope. To the

contrary, Story's exclusive focus on the militia in his discussion of the Second Amendment confirms his understanding of the right protected by the Second Amendment as limited to military uses of arms.

Story's writings as a Justice of this Court, to the extent that they shed light on this question, only confirm that Justice Story did not view the Amendment as conferring upon individuals any "self-defense" right disconnected from service in a state militia. Justice Story dissented from the Court's decision in *Houston* v. *Moore,* 5 Wheat. 1, 24 (1820), which held that a state court "had a concurrent jurisdiction" with the federal courts "to try a militia man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent." *Id.,* at 31–32. Justice Story believed that Congress' power to provide for the organizing, arming, and disciplining of the militia was, when Congress acted, plenary; but he explained that in the absence of congressional action, "I am certainly not prepared to deny the legitimacy of such an exercise of [state] authority." *Id.,* at 52. As to the Second Amendment, he wrote that it "may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id.*, at 52–53. The Court contends that had Justice Story understood the Amendment to have a militia purpose, the Amendment would have had "enormous and obvious bearing on the point." *Ante,* at 38. But the Court has it quite backwards: If Story had believed that the purpose of the Amendment was to permit civilians to keep firearms for activities like personal self-defense, what "confirm[ation] and illustrat[ion]," *Houston,* 5 Wheat., at 53, could the Amendment possibly have provided for the point that States retained the power to organize, arm, and discipline their own militias?

Post-Civil War Legislative History

The Court suggests that by the post-Civil War period, the Second Amendment was understood to secure a right to firearm use and ownership for purely private purposes like personal self-defense. While it is true that some of the legislative history on which the Court relies supports that contention, see *ante,* at 41–44, such sources are entitled to limited, if any, weight. All of the statements the Court cites were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation.

What is more, much of the evidence the Court offers is decidedly less clear than its discussion allows. The Court notes that "[b]lacks were routinely disarmed by Southern States after the Civil War. Those who opposed these injustices frequently stated that they infringed blacks' constitutional right to keep and bear arms." *Ante,* at 42. The Court hastily concludes that "[n]eedless to say, the claim was not that blacks were being prohibited from carrying arms in an organized state militia," *ibid.* But some of the claims of the sort the Court cites may have been just that. In some Southern States, Reconstruction-era Republican governments created state militias in which both blacks and whites were permitted to serve. Because "[t]he decision to allow blacks to serve alongside whites meant that most southerners refused to join the new militia," the bodies were dubbed "Negro militia[s]." S. Cornell, A Well-Regulated Militia 176–177 (2006). The "arming of the Negro militias met with especially fierce resistance in South Carolina. . . . The sight of organized, armed freedmen incensed opponents of Reconstruction and led to an intensified campaign of Klan terror. Leading members of the Negro militia were beaten or lynched and their weapons stolen." *Id.,* at 177.

One particularly chilling account of Reconstruction-era Klan violence directed at a black militia member is recounted in the memoir of Louis F. Post, A "Carpetbagger" in South Carolina, 10 Journal of Negro History 10 (1925). Post describes the murder by local Klan members of Jim Williams, the captain of a "Negro militia company," *id.,* at 59, this way:

> "[A] cavalcade of sixty cowardly white men, completely disguised with face masks and body gowns, rode up one night in March, 1871, to the house of Captain Williams . . . in the wood [they] hanged [and shot] him . . . [and on his body they] then pinned a slip of paper inscribed, as I remember it, with these grim words: 'Jim Williams gone to his last muster.'" *Id.,* at 61.

In light of this evidence, it is quite possible that at least some of the statements on which the Court relies actually did mean to refer to the disarmament of black militia members.

IV

The brilliance of the debates that resulted in the Second Amendment faded into oblivion during the ensuing years, for the concerns about Article I's Militia Clauses that generated such pitched debate during the ratification process and led to the adoption of the Second Amendment were short lived.

In 1792, the year after the Amendment was ratified, Congress passed a statute that purported to establish "an Uniform Militia throughout the United States." 1 Stat. 271. The statute commanded every able-bodied white male citizen between the ages of 18 and 45 to be enrolled therein and to "provide himself with a good musket or

firelock" and other specified weaponry.[35] *Ibid.* The statute is significant, for it confirmed the way those in the founding generation viewed firearm ownership: as a duty linked to military service. The statute they enacted, however, "was virtually ignored for more than a century," and was finally repealed in 1901. See *Perpich,* 496 U. S., at 341.

The postratification history of the Second Amendment is strikingly similar. The Amendment played little role in any legislative debate about the civilian use of firearms for most of the 19th century, and it made few appearances in the decisions of this Court. Two 19th-century cases, however, bear mentioning.

In *United States* v. *Cruikshank,* 92 U. S. 542 (1876), the Court sustained a challenge to respondents' convictions under the Enforcement Act of 1870 for conspiring to deprive any individual of "'any right or privilege granted or secured to him by the constitution or laws of the United States.'" *Id.,* at 548. The Court wrote, as to counts 2 and 10 of respondents' indictment:

> "The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution. Neither is it in any manner dependent on that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government." *Id.,* at 553.

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[35] The additional specified weaponry included: "a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle and a quarter of a pound of powder." 1 Stat. 271.

The majority's assertion that the Court in *Cruikshank* "described the right protected by the Second Amendment as '"bearing arms for a lawful purpose,"'" *ante,* at 47 (quoting *Cruikshank,* 92 U. S., at 553), is not accurate. The *Cruikshank* Court explained that the defective *indictment* contained such language, but the Court did not itself describe the right, or endorse the indictment's description of the right.

Moreover, it is entirely possible that the basis for the indictment's counts 2 and 10, which charged respondents with depriving the victims of rights secured by the Second Amendment, was the prosecutor's belief that the victims—members of a group of citizens, mostly black but also white, who were rounded up by the Sheriff, sworn in as a posse to defend the local courthouse, and attacked by a white mob—bore sufficient resemblance to members of a state militia that they were brought within the reach of the Second Amendment. See generally C. Lane, The Day Freedom Died: The Colfax Massacre, The Supreme Court, and the Betrayal of Reconstruction (2008).

Only one other 19th-century case in this Court, *Presser* v. *Illinois,* 116 U. S. 252 (1886), engaged in any significant discussion of the Second Amendment. The petitioner in *Presser* was convicted of violating a state statute that prohibited organizations other than the Illinois National Guard from associating together as military companies or parading with arms. Presser challenged his conviction, asserting, as relevant, that the statute violated both the Second and the Fourteenth Amendments. With respect to the Second Amendment, the Court wrote:

> "We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and

> bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States." *Id.,* at 264–265.

And in discussing the Fourteenth Amendment, the Court explained:

> "The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offence for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred." *Id.,* at 266.

Presser, therefore, both affirmed *Cruikshank*'s holding that the Second Amendment posed no obstacle to regulation by state governments, and suggested that in any event nothing in the Constitution protected the use of arms outside the context of a militia "authorized by law" and organized by the State or Federal Government.[36]

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[36] In another case the Court endorsed, albeit indirectly, the reading of *Miller* that has been well settled until today. In *Burton* v. *Sills,* 394 U. S. 812 (1969) *(per curiam),* the Court dismissed for want of a substantial federal question an appeal from a decision of the New Jersey

In 1901 the President revitalized the militia by creating "'the National Guard of the several States,'" *Perpich,* 496 U. S., at 341, and nn. 9–10; meanwhile, the dominant understanding of the Second Amendment's inapplicability to private gun ownership continued well into the 20th century. The first two federal laws directly restricting civilian use and possession of firearms—the 1927 Act prohibiting mail delivery of "pistols, revolvers, and other firearms capable of being concealed on the person," Ch. 75, 44 Stat. 1059, and the 1934 Act prohibiting the possession of sawed-off shotguns and machine guns—were enacted over minor Second Amendment objections dismissed by the vast majority of the legislators who participated in the debates.[37] Members of Congress clashed over the wisdom and efficacy of such laws as crime-control measures. But since the statutes did not infringe upon the military use or possession of weapons, for most legislators they did not even raise the specter of possible conflict with the Second Amendment.

Thus, for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has

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Supreme Court upholding, against a Second Amendment challenge, New Jersey's gun control law. Although much of the analysis in the New Jersey court's opinion turned on the inapplicability of the Second Amendment as a constraint on the States, the court also quite correctly read *Miller* to hold that "Congress, though admittedly governed by the second amendment, may regulate interstate firearms so long as the regulation does not impair the maintenance of the active, organized militia of the states." *Burton* v. *Sills,* 53 N. J. 86, 98, 248 A. 2d 521, 527 (1968).

[37] The 1927 statute was enacted with no mention of the Second Amendment as a potential obstacle, although an earlier version of the bill had generated some limited objections on Second Amendment grounds; see 66 Cong. Rec. 725–735 (1924). And the 1934 Act featured just one colloquy, during the course of lengthy Committee debates, on whether the Second Amendment constrained Congress' ability to legislate in this sphere; see Hearings on House Committee on Ways and Means H. R. 9006, before the 73d Cong., 2d Sess., p. 19 (1934).

been well settled and uncontroversial.[38] Indeed, the Second Amendment was not even mentioned in either full House of Congress during the legislative proceedings that led to the passage of the 1934 Act. Yet enforcement of that law produced the judicial decision that confirmed the status of the Amendment as limited in reach to military usage. After reviewing many of the same sources that are discussed at greater length by the Court today, the *Miller* Court unanimously concluded that the Second Amendment did not apply to the possession of a firearm that did not have "some reasonable relationship to the preservation or efficiency of a well regulated militia." 307 U. S., at 178.

The key to that decision did not, as the Court belatedly suggests, *ante,* at 49–51, turn on the difference between

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[38] The majority appears to suggest that even if the meaning of the Second Amendment has been considered settled by courts and legislatures for over two centuries, that settled meaning is overcome by the "reliance of millions of Americans" "upon the true meaning of the right to keep and bear arms." *Ante,* at 52, n. 24. Presumably by this the Court means that many Americans own guns for self-defense, recreation, and other lawful purposes, and object to government interference with their gun ownership. I do not dispute the correctness of this observation. But it is hard to see how Americans have "relied," in the usual sense of the word, on the existence of a constitutional right that, until 2001, had been rejected by every federal court to take up the question. Rather, gun owners have "relied" on the laws passed by democratically elected legislatures, which have generally adopted only limited gun-control measures.

Indeed, reliance interests surely cut the other way: Even apart from the reliance of judges and legislators who properly believed, until today, that the Second Amendment did not reach possession of firearms for purely private activities, "millions of Americans," have relied on the power of government to protect their safety and well-being, and that of their families. With respect to the case before us, the legislature of the District of Columbia has relied on its ability to act to "reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia," H. Con. Res. 694, 94th Cong., 2d Sess., 25 (1976); see *post*, at 14–17 (BREYER, J., dissenting); so, too have the residents of the District.

muskets and sawed-off shotguns; it turned, rather, on the basic difference between the military and nonmilitary use and possession of guns. Indeed, if the Second Amendment were not limited in its coverage to military uses of weapons, why should the Court in *Miller* have suggested that some weapons but not others were eligible for Second Amendment protection? If use for self-defense were the relevant standard, why did the Court not inquire into the suitability of a particular weapon for self-defense purposes?

Perhaps in recognition of the weakness of its attempt to distinguish *Miller*, the Court argues in the alternative that *Miller* should be discounted because of its decisional history. It is true that the appellees in *Miller* did not file a brief or make an appearance, although the court below had held that the relevant provision of the National Firearms Act violated the Second Amendment (albeit without any reasoned opinion). But, as our decision in *Marbury* v. *Madison,* 1 Cranch 137, in which only one side appeared and presented arguments, demonstrates, the absence of adversarial presentation alone is not a basis for refusing to accord *stare decisis* effect to a decision of this Court. See Bloch, *Marbury* Redux, in Arguing *Marbury* v. *Madison* 59, 63 (M. Tushnet ed. 2005). Of course, if it can be demonstrated that new evidence or arguments were genuinely not available to an earlier Court, that fact should be given special weight as we consider whether to overrule a prior case. But the Court does not make that claim, because it cannot. Although it is true that the drafting history of the Amendment was not discussed in the Government's brief, see *ante,* at 51, it is certainly not the drafting history that the Court's decision today turns on. And those sources upon which the Court today relies most heavily *were* available to the *Miller* Court. The Government cited the English Bill of Rights and quoted a lengthy passage from *Aymette* detailing the history leading to the

English guarantee, Brief for United States in *United States* v. *Miller,* O. T. 1938, No. 696, pp 12–13; it also cited Blackstone, *id.,* at 9, n. 2, Cooley, *id.,* at 12, 15, and Story, *id.,* at 15. The Court is reduced to critiquing the number of *pages* the Government devoted to exploring the English legal sources. Only two (in a brief 21 pages in length)! Would the Court be satisfied with four? Ten?

The Court is simply wrong when it intones that *Miller* contained "*not a word*" about the Amendment's history. *Ante,* at 52. The Court plainly looked to history to construe the term "Militia," and, on the best reading of *Miller,* the entire guarantee of the Second Amendment. After noting the original Constitution's grant of power to Congress and to the States over the militia, the Court explained:

> "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.
>
> "The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.
>
> "The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators." *Miller,* 307 U. S., at 178–179.

The majority cannot seriously believe that the *Miller* Court did not consider any relevant evidence; the majority

simply does not approve of the conclusion the *Miller* Court reached on that evidence. Standing alone, that is insufficient reason to disregard a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.

V

The Court concludes its opinion by declaring that it is not the proper role of this Court to change the meaning of rights "enshrine[d]" in the Constitution. *Ante,* at 64. But the right the Court announces was not "enshrined" in the Second Amendment by the Framers; it is the product of today's law-changing decision. The majority's exegesis has utterly failed to establish that as a matter of text or history, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" is "elevate[d] above all other interests" by the Second Amendment. *Ante,* at 64.

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a "law-abiding, responsible citize[n]" the right to keep and use weapons in the home for self-defense is "off the table." *Ante,* at 64. Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be

knocked off the table.[39]

I do not know whether today's decision will increase the labor of federal judges to the "breaking point" envisioned by Justice Cardozo, but it will surely give rise to a far more active judicial role in making vitally important national policy decisions than was envisioned at any time in the 18th, 19th, or 20th centuries.

The Court properly disclaims any interest in evaluating the wisdom of the specific policy choice challenged in this case, but it fails to pay heed to a far more important policy choice—the choice made by the Framers themselves. The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilian uses of weapons, and to authorize this Court to use the common-law process of case-by-case judicial lawmaking to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere to be found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.

For these reasons, I respectfully dissent.

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[39] It was just a few years after the decision in *Miller* that Justice Frankfurter (by any measure a true judicial conservative) warned of the perils that would attend this Court's entry into the "political thicket" of legislative districting. *Colegrove* v. *Green,* 328 U. S. 549, 556 (1946) (plurality opinion). The equally controversial political thicket that the Court has decided to enter today is qualitatively different from the one that concerned Justice Frankfurter: While our entry into that thicket was justified because the political process was manifestly unable to solve the problem of unequal districts, no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control. What impact the Court's unjustified entry into *this* thicket will have on that ongoing debate—or indeed on the Court itself—is a matter that future historians will no doubt discuss at length. It is, however, clear to me that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today.

SUPREME COURT OF THE UNITED STATES

No. 07–290

DISTRICT OF COLUMBIA, ET AL., PETITIONERS *v.*
DICK ANTHONY HELLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 26, 2008]

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

We must decide whether a District of Columbia law that prohibits the possession of handguns in the home violates the Second Amendment. The majority, relying upon its view that the Second Amendment seeks to protect a right of personal self-defense, holds that this law violates that Amendment. In my view, it does not.

I

The majority's conclusion is wrong for two independent reasons. The first reason is that set forth by JUSTICE STEVENS—namely, that the Second Amendment protects militia-related, not self-defense-related, interests. These two interests are sometimes intertwined. To assure 18th-century citizens that they could keep arms for militia purposes would necessarily have allowed them to keep arms that they could have used for self-defense as well. But self-defense alone, detached from any militia-related objective, is not the Amendment's concern.

The second independent reason is that the protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves. Thus, irrespective of what those interests are—whether they do or do not include an independent interest

in self-defense—the majority's view cannot be correct unless it can show that the District's regulation is unreasonable or inappropriate in Second Amendment terms. This the majority cannot do.

In respect to the first independent reason, I agree with JUSTICE STEVENS, and I join his opinion. In this opinion I shall focus upon the second reason. I shall show that the District's law is consistent with the Second Amendment even if that Amendment is interpreted as protecting a wholly separate interest in individual self-defense. That is so because the District's regulation, which focuses upon the presence of handguns in high-crime urban areas, represents a permissible legislative response to a serious, indeed life-threatening, problem.

Thus I here assume that one objective (but, as the majority concedes, *ante*, at 26, not the *primary* objective) of those who wrote the Second Amendment was to help assure citizens that they would have arms available for purposes of self-defense. Even so, a legislature could reasonably conclude that the law will advance goals of great public importance, namely, saving lives, preventing injury, and reducing crime. The law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban; the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals; and at the same time, the law imposes a burden upon gun owners that seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted. In these circumstances, the District's law falls within the zone that the Second Amendment leaves open to regulation by legislatures.

II

The Second Amendment says that: "A well regulated

Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In interpreting and applying this Amendment, I take as a starting point the following four propositions, based on our precedent and today's opinions, to which I believe the entire Court subscribes:

(1) The Amendment protects an "individual" right—*i.e.*, one that is separately possessed, and may be separately enforced, by each person on whom it is conferred. See, *e.g.*, *ante*, at 22 (opinion of the Court); *ante*, at 1 (STEVENS, J., dissenting).

(2) As evidenced by its preamble, the Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces." *United States* v. *Miller*, 307 U. S. 174, 178 (1939); see *ante*, at 26 (opinion of the Court); *ante*, at 1 (STEVENS, J., dissenting).

(3) The Amendment "must be interpreted and applied with that end in view." *Miller*, *supra*, at 178.

(4) The right protected by the Second Amendment is not absolute, but instead is subject to government regulation. See *Robertson* v. *Baldwin*, 165 U. S. 275, 281–282 (1897); *ante*, at 22, 54 (opinion of the Court).

My approach to this case, while involving the first three points, primarily concerns the fourth. I shall, as I said, assume with the majority that the Amendment, in addition to furthering a militia-related purpose, also furthers an interest in possessing guns for purposes of self-defense, at least to some degree. And I shall then ask whether the Amendment nevertheless permits the District handgun restriction at issue here.

Although I adopt for present purposes the majority's position that the Second Amendment embodies a general concern about self-defense, I shall not assume that the Amendment contains a specific untouchable right to keep guns in the house to shoot burglars. The majority, which

presents evidence in favor of the former proposition, does not, because it cannot, convincingly show that the Second Amendment seeks to maintain the latter in pristine, unregulated form.

To the contrary, colonial history itself offers important examples of the kinds of gun regulation that citizens would then have thought compatible with the "right to keep and bear arms," whether embodied in Federal or State Constitutions, or the background common law. And those examples include substantial regulation of firearms in urban areas, including regulations that imposed obstacles to the use of firearms for the protection of the home.

Boston, Philadelphia, and New York City, the three largest cities in America during that period, all restricted the firing of guns within city limits to at least some degree. See Churchill, Gun Regulation, the Police Power, and the Right to Keep Arms in Early America, 25 Law & Hist. Rev. 139, 162 (2007); Dept. of Commerce, Bureau of Census, C. Gibson, Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990 (1998) (Table 2), online at http://www.census.gov/population/documentation/twps0027/tab02.txt (all Internet materials as visited June 19, 2008, and available in Clerk of Court's case file). Boston in 1746 had a law prohibiting the "discharge" of "any Gun or Pistol charged with Shot or Ball in the Town" on penalty of 40 shillings, a law that was later revived in 1778. See Act of May 28, 1746, ch. 10; An Act for Reviving and Continuing Sundry Laws that are Expired, and Near Expiring, 1778 Massachusetts Session Laws, ch. 5, pp. 193, 194. Philadelphia prohibited, on penalty of 5 shillings (or two days in jail if the fine were not paid), firing a gun or setting off fireworks in Philadelphia without a "governor's special license." See Act of Aug. 26, 1721, §4, in 3 Mitchell, Statutes at Large of Pennsylvania 253–254. And New York City banned, on penalty of a 20-shilling fine, the firing of guns (even in

houses) for the three days surrounding New Year's Day. 5 Colonial Laws of New York, ch. 1501, pp. 244–246 (1894); see also An Act to Suppress the Disorderly Practice of Firing Guns, & c., on the Times Therein Mentioned, 8 Statutes at Large of Pennsylvania 1770–1776, pp. 410–412 (1902) (similar law for all "inhabited parts" of Pennsylvania). See also An Act for preventing Mischief being done in the Town of *Newport*, or in any other Town in this Government, 1731, Rhode Island Session Laws (prohibiting, on penalty of 5 shillings for a first offense and more for subsequent offenses, the firing of "any Gun or Pistol . . . in the Streets of any of the Towns of this Government, or in any Tavern of the same, after dark, on any Night whatsoever").

Furthermore, several towns and cities (including Philadelphia, New York, and Boston) regulated, for fire-safety reasons, the storage of gunpowder, a necessary component of an operational firearm. See Cornell & DeDino, A Well Regulated Right, 73 Fordham L. Rev. 487, 510–512 (2004). Boston's law in particular impacted the use of firearms in the home very much as the District's law does today. Boston's gunpowder law imposed a £10 fine upon "any Person" who "shall take into any Dwelling-House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building, within the Town of Boston, any . . . Fire-Arm, loaded with, or having Gun-Powder." An Act in Addition to the several Acts already made for the prudent Storage of Gun-Powder within the Town of Boston, ch. XIII, 1783 Mass. Acts 218–219; see also 1 S. Johnson, A Dictionary of the English Language 751 (4th ed. 1773) (defining "firearms" as "[a]rms which owe their efficacy to fire; guns"). Even assuming, as the majority does, see *ante*, at 59–60, that this law included an implicit self-defense exception, it would nevertheless have prevented a homeowner from keeping in his home a gun that he could immediately pick up and use against an intruder. Rather, the homeowner

would have had to get the gunpowder and load it into the gun, an operation that would have taken a fair amount of time to perform. See Hicks, United States Military Shoulder Arms, 1795–1935, 1 Am. Military Hist. Foundation 23, 30 (1937) (experienced soldier could, with specially prepared cartridges as opposed to plain gunpowder and ball, load and fire musket 3-to-4 times per minute); *id.*, at 26–30 (describing the loading process); see also Grancsay, The Craft of the Early American Gunsmith, 6 Metropolitan Museum of Art Bulletin 54, 60 (1947) (noting that rifles were slower to load and fire than muskets).

Moreover, the law would, as a practical matter, have prohibited the carrying of loaded firearms anywhere in the city, unless the carrier had no plans to enter any building or was willing to unload or discard his weapons before going inside. And Massachusetts residents must have believed this kind of law compatible with the provision in the Massachusetts Constitution that granted "the people . . . a right to keep and to bear arms for the common defence"—a provision that the majority says was interpreted as "secur[ing] an individual right to bear arms for defensive purposes." Art. XVII (1780), in 3 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1888, 1892 (F. Thorpe ed. 1909) (hereinafter Thorpe); *ante*, at 28–29 (opinion of the Court).

The New York City law, which required that gunpowder in the home be stored in certain sorts of containers, and laws in certain Pennsylvania towns, which required that gunpowder be stored on the highest story of the home, could well have presented similar obstacles to in-home use of firearms. See Act of April 13, 1784, ch. 28, 1784 N. Y. Laws p. 627; An Act for Erecting the Town of Carlisle, in the County of Cumberland, into a Borough, ch. XIV, §XLII, 1782 Pa. Laws p. 49; An Act for Erecting the Town of Reading, in the County of Berks, into a Borough, ch. LXXVI, §XLII, 1783 Pa. Laws p. 211. Although it is un-

clear whether these laws, like the Boston law, would have prohibited the storage of gunpowder inside a firearm, they would at the very least have made it difficult to reload the gun to fire a second shot unless the homeowner happened to be in the portion of the house where the extra gunpowder was required to be kept. See 7 United States Encyclopedia of History 1297 (P. Oehser ed. 1967) ("Until 1835 all small arms [were] single-shot weapons, requiring reloading by hand after every shot"). And Pennsylvania, like Massachusetts, had at the time one of the self-defense-guaranteeing state constitutional provisions on which the majority relies. See *ante*, at 28 (citing Pa. Declaration of Rights, Art. XIII (1776), in 5 Thorpe 3083).

The majority criticizes my citation of these colonial laws. See *ante*, at 59–62. But, as much as it tries, it cannot ignore their existence. I suppose it is possible that, as the majority suggests, see *ante*, at 59–61, they all in practice contained self-defense exceptions. But none of them expressly provided one, and the majority's assumption that such exceptions existed relies largely on the preambles to these acts—an interpretive methodology that it elsewhere roundly derides. Compare *ibid.* (interpreting 18th-century statutes in light of their preambles), with *ante*, at 4–5, and n. 3 (contending that the operative language of an 18th-century enactment may extend beyond its preamble). And in any event, as I have shown, the gunpowder-storage laws would have *burdened* armed self-defense, even if they did not completely *prohibit* it.

This historical evidence demonstrates that a self-defense assumption is the *beginning*, rather than the *end*, of any constitutional inquiry. That the District law impacts self-defense merely raises *questions* about the law's constitutionality. But to answer the questions that are raised (that is, to see whether the statute is unconstitutional) requires us to focus on practicalities, the statute's rationale, the problems that called it into being, its rela-

tion to those objectives—in a word, the details. There are no purely logical or conceptual answers to such questions. All of which to say that to raise a self-defense question is not to answer it.

III

I therefore begin by asking a process-based question: How is a court to determine whether a particular firearm regulation (here, the District's restriction on handguns) is consistent with the Second Amendment? What kind of constitutional standard should the court use? How high a protective hurdle does the Amendment erect?

The question matters. The majority is wrong when it says that the District's law is unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Ante*, at 56. How could that be? It certainly would not be unconstitutional under, for example, a "rational basis" standard, which requires a court to uphold regulation so long as it bears a "rational relationship" to a "legitimate governmental purpose." *Heller* v. *Doe*, 509 U. S. 312, 320 (1993). The law at issue here, which in part seeks to prevent gun-related accidents, at least bears a "rational relationship" to that "legitimate" life-saving objective. And nothing in the three 19th-century state cases to which the majority turns for support mandates the conclusion that the present District law must fall. See *Andrews* v. *State*, 50 Tenn. 165, 177, 186–187, 192 (1871) (striking down, as violating a *state* constitutional provision adopted in 1870, a *statewide* ban on a carrying a broad class of weapons, insofar as it applied to revolvers); *Nunn* v. *State*, 1 Ga. 243, 246, 250–251 (1846) (striking down similarly broad ban on openly carrying weapons, based on erroneous view that the Federal Second Amendment applied to the States); *State* v. *Reid*, 1 Ala. 612, 614–615, 622 (1840) (*upholding* a concealed-weapon ban against a *state* constitutional challenge). These cases

were decided well (80, 55, and 49 years, respectively) after the framing; they neither claim nor provide any special insight into the intent of the Framers; they involve laws much less narrowly tailored that the one before us; and state cases in any event are not determinative of federal constitutional questions, see, *e.g.*, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 549 (1985) (citing *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816)).

Respondent proposes that the Court adopt a "strict scrutiny" test, which would require reviewing with care each gun law to determine whether it is "narrowly tailored to achieve a compelling governmental interest." *Abrams* v. *Johnson*, 521 U. S. 74, 82 (1997); see Brief for Respondent 54–62. But the majority implicitly, and appropriately, rejects that suggestion by broadly approving a set of laws—prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict scrutiny standard would be far from clear. See *ante*, at 54.

Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. That is because almost every gun-control regulation will seek to advance (as the one here does) a "primary concern of every government—a concern for the safety and indeed the lives of its citizens." *United States* v. *Salerno*, 481 U. S. 739, 755 (1987). The Court has deemed that interest, as well as "the Government's general interest in preventing crime," to be "compelling," see *id.,* at 750, 754, and the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties, see *e.g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) *(per curiam)* (First Amendment free speech rights); *Sherbert* v. *Verner*, 374 U. S. 398, 403 (1963) (First Amendment religious

rights); *Brigham City* v. *Stuart*, 547 U. S. 398, 403–404 (2006) (Fourth Amendment protection of the home); *New York* v. *Quarles*, 467 U. S. 649, 655 (1984) (Fifth Amendment rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966)); *Salerno*, *supra*, at 755 (Eighth Amendment bail rights). Thus, any attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

I would simply adopt such an interest-balancing inquiry explicitly. The fact that important interests lie on both sides of the constitutional equation suggests that review of gun-control regulation is not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny). Rather, "where a law significantly implicates competing constitutionally protected interests in complex ways," the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests. See *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 402 (2000) (BREYER, J., concurring). Any answer would take account both of the statute's effects upon the competing interests and the existence of any clearly superior less restrictive alternative. See *ibid.* Contrary to the majority's unsupported suggestion that this sort of "proportionality" approach is unprecedented, see *ante*, at 62, the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases. See 528 U. S., at 403 (citing examples where the Court has taken such an approach); see also, *e.g.*, *Thompson* v. *Western States Medical Center*, 535 U. S. 357, 388

(2002) (BREYER, J., dissenting) (commercial speech); *Burdick* v. *Takushi*, 504 U. S. 428, 433 (1992) (election regulation); *Mathews* v. *Eldridge*, 424 U. S. 319, 339–349 (1976) (procedural due process); *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968) (government employee speech).

In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity. See *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 195–196 (1997); see also *Nixon*, *supra,* at 403 (BREYER, J., concurring). Nonetheless, a court, not a legislature, must make the ultimate constitutional conclusion, exercising its "independent judicial judgment" in light of the whole record to determine whether a law exceeds constitutional boundaries. *Randall* v. *Sorrell*, 548 U. S. 230, 249 (2006) (opinion of BREYER, J.) (citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984)).

The above-described approach seems preferable to a more rigid approach here for a further reason. Experience as much as logic has led the Court to decide that in one area of constitutional law or another the interests are likely to prove stronger on one side of a typical constitutional case than on the other. See, *e.g.*, *United States* v. *Virginia*, 518 U. S. 515, 531–534 (1996) (applying heightened scrutiny to gender-based classifications, based upon experience with prior cases); *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955) (applying rational-basis scrutiny to economic legislation, based upon experience with prior cases). Here, we have little prior experience. Courts that *do* have experience in these matters have uniformly taken an approach that treats empirically-based legislative judgment with a degree of deference. See Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683, 687, 716–718 (2007) (describing hundreds of

gun-law decisions issued in the last half-century by Supreme Courts in 42 States, which courts with "surprisingly little variation," have adopted a standard more deferential than strict scrutiny). While these state cases obviously are not controlling, they are instructive. Cf., *e.g.*, *Bartkus* v. *Illinois*, 359 U. S. 121, 134 (1959) (looking to the "experience of state courts" as informative of a constitutional question). And they thus provide some comfort regarding the practical wisdom of following the approach that I believe our constitutional precedent would in any event suggest.

IV

The present suit involves challenges to three separate District firearm restrictions. The first requires a license from the District's Chief of Police in order to carry a "pistol," *i.e.*, a handgun, anywhere in the District. See D. C. Code §22–4504(a) (2001); see also §§22–4501(a), 22–4506. Because the District assures us that respondent could obtain such a license so long as he meets the statutory eligibility criteria, and because respondent concedes that those criteria are facially constitutional, I, like the majority, see no need to address the constitutionality of the licensing requirement. See *ante*, at 58–59.

The second District restriction requires that the lawful owner of a firearm keep his weapon "unloaded and disassembled or bound by a trigger lock or similar device" unless it is kept at his place of business or being used for lawful recreational purposes. See §7–2507.02. The only dispute regarding this provision appears to be whether the Constitution requires an exception that would allow someone to render a firearm operational when necessary for self-defense (*i.e.*, that the firearm may be operated under circumstances where the common law would normally permit a self-defense justification in defense against a criminal charge). See *Parker* v. *District of Columbia*, 478

F. 3d 370, 401 (2007) (case below); *ante*, at 57–58 (opinion of the Court); Brief for Respondent 52–54. The District concedes that such an exception exists. See Brief for Petitioners 56–57. This Court has final authority (albeit not often used) to definitively interpret District law, which is, after all, simply a species of federal law. See, *e.g.*, *Whalen* v. *United States*, 445 U. S. 684, 687–688 (1980); see also *Griffin* v. *United States*, 336 U. S. 704, 716–718 (1949). And because I see nothing in the District law that would *preclude* the existence of a background common-law self-defense exception, I would avoid the constitutional question by interpreting the statute to include it. See *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring).

I am puzzled by the majority's unwillingness to adopt a similar approach. It readily reads unspoken self-defense exceptions into every colonial law, but it refuses to accept the District's concession that this law has one. Compare *ante*, at 59–61, with *ante*, at 57–58. The one District case it cites to support that refusal, *McIntosh* v. *Washington*, 395 A. 2d 744, 755–756 (1978), merely concludes that the District Legislature had a rational basis for applying the trigger-lock law in homes but not in places of business. Nowhere does that case say that the statute precludes a self-defense exception of the sort that I have just described. And even if it did, we are not bound by a lower court's interpretation of federal law.

The third District restriction prohibits (in most cases) the registration of a handgun within the District. See §7–2502.02(a)(4). Because registration is a prerequisite to firearm possession, see §7–2502.01(a), the effect of this provision is generally to prevent people in the District from possessing handguns. In determining whether this regulation violates the Second Amendment, I shall ask how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests

that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests. The ultimate question is whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate. See *Nixon*, 528 U. S., at 402 (BREYER, J., concurring).

A

No one doubts the constitutional importance of the statute's basic objective, saving lives. See, *e.g.*, *Salerno*, 481 U. S., at 755. But there is considerable debate about whether the District's statute helps to achieve that objective. I begin by reviewing the statute's tendency to secure that objective from the perspective of (1) the legislature (namely, the Council of the District of Columbia) that enacted the statute in 1976, and (2) a court that seeks to evaluate the Council's decision today.

1

First, consider the facts as the legislature saw them when it adopted the District statute. As stated by the local council committee that recommended its adoption, the major substantive goal of the District's handgun restriction is "to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia." Hearing and Disposition before the House Committee on the District of Columbia, 94th Cong., 2d Sess., on H. Con. Res. 694, Ser. No. 94–24, p. 25 (1976) (herinafter DC Rep.) (reproducing, *inter alia,* the Council committee report). The committee concluded, on the basis of "extensive public hearings" and "lengthy research," that "[t]he easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 years." *Id.,* at 24, 25. It reported to the Council "startling statistics," *id.,* at 26, regarding gun-related crime, acci-

dents, and deaths, focusing particularly on the relation between handguns and crime and the proliferation of handguns within the District. See *id.,* at 25–26.

The committee informed the Council that guns were "responsible for 69 deaths in this country each day," for a total of "[a]pproximately 25,000 gun-deaths . . . each year," along with an additional 200,000 gun-related injuries. *Id.,* at 25. Three thousand of these deaths, the report stated, were accidental. *Ibid.* A quarter of the victims in those accidental deaths were children under the age of 14. *Ibid.* And according to the committee, "[f]or every intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home." *Ibid.*

In respect to local crime, the committee observed that there were 285 murders in the District during 1974—a record number. *Id.,* at 26. The committee also stated that, "[c]ontrary to popular opinion on the subject, firearms are more frequently involved in deaths and violence among relatives and friends than in premeditated criminal activities." *Ibid.* Citing an article from the American Journal of Psychiatry, the committee reported that "[m]ost murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion or intoxication, and where the killer and victim are acquainted." *Ibid.* "Twenty-five percent of these murders," the committee informed the Council, "occur within families." *Ibid.*

The committee report furthermore presented statistics strongly correlating handguns with crime. Of the 285 murders in the District in 1974, 155 were committed with handguns. *Ibid.* This did not appear to be an aberration, as the report revealed that "handguns [had been] used in roughly 54% of all murders" (and 87% of murders of law enforcement officers) nationwide over the preceding several years. *Ibid.* Nor were handguns only linked to murders, as statistics showed that they were used in roughly

60% of robberies and 26% of assaults. *Ibid.* "A crime committed with a pistol," the committee reported, "is 7 times more likely to be lethal than a crime committed with any other weapon." *Id.*, at 25. The committee furthermore presented statistics regarding the availability of handguns in the United States, *ibid.*, and noted that they had "become easy for juveniles to obtain," even despite then-current District laws prohibiting juveniles from possessing them, *id.,* at 26.

In the committee's view, the current District firearms laws were unable "to reduce the potentiality for gun-related violence," or to "cope with the problems of gun control in the District" more generally. *Ibid.* In the absence of adequate federal gun legislation, the committee concluded, it "becomes necessary for local governments to act to protect their citizens, and certainly the District of Columbia as the only totally urban statelike jurisdiction should be strong in its approach." *Id.,* at 27. It recommended that the Council adopt a restriction on handgun registration to reflect "a legislative decision that, at this point in time and due to the gun-control tragedies and horrors enumerated previously" in the committee report, "pistols . . . are no longer justified in this jurisdiction." *Id.,* at 31; see also *ibid.* (handgun restriction "denotes a policy decision that handguns . . . have no legitimate use in the purely urban environment of the District").

The District's special focus on handguns thus reflects the fact that the committee report found them to have a particularly strong link to undesirable activities in the District's exclusively urban environment. See *id.,* at 25–26. The District did not seek to prohibit possession of other sorts of weapons deemed more suitable for an "urban area." See *id.,* at 25. Indeed, an original draft of the bill, and the original committee recommendations, had sought to prohibit registration of shotguns as well as handguns, but the Council as a whole decided to narrow the prohibi-

tion. Compare *id.,* at 30 (describing early version of the bill), with D. C. Code §7–2502.02).

2

Next, consider the facts as a court must consider them looking at the matter as of today. See, *e.g.*, *Turner*, 520 U. S., at 195 (discussing role of court as factfinder in a constitutional case). Petitioners, and their *amici,* have presented us with more recent statistics that tell much the same story that the committee report told 30 years ago. At the least, they present nothing that would permit us to second-guess the Council in respect to the numbers of gun crimes, injuries, and deaths, or the role of handguns.

From 1993 to 1997, there were 180,533 firearm-related deaths in the United States, an average of over 36,000 per year. Dept. of Justice, Bureau of Justice Statistics, M. Zawitz & K. Strom, Firearm Injury and Death from Crime, 1993–97, p. 2 (Oct. 2000), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/fidc9397.pdf (hereinafter Firearm Injury and Death from Crime). Fifty-one percent were suicides, 44% were homicides, 1% were legal interventions, 3% were unintentional accidents, and 1% were of undetermined causes. See *ibid.* Over that same period there were an additional 411,800 nonfatal firearm-related injuries treated in U. S. hospitals, an average of over 82,000 per year. *Ibid.* Of these, 62% resulted from assaults, 17% were unintentional, 6% were suicide attempts, 1% were legal interventions, and 13% were of unknown causes. *Ibid.*

The statistics are particularly striking in respect to children and adolescents. In over one in every eight firearm-related deaths in 1997, the victim was someone under the age of 20. American Academy of Pediatrics, Firearm-Related Injuries Affecting the Pediatric Population, 105 Pediatrics 888 (2000) (hereinafter Firearm-Related Injuries). Firearm-related deaths account for 22.5% of all

injury deaths between the ages of 1 and 19. *Ibid.* More male teenagers die from firearms than from all natural causes combined. Dresang, Gun Deaths in Rural and Urban Settings, 14 J. Am. Bd. Family Practice 107 (2001). Persons under 25 accounted for 47% of hospital-treated firearm injuries between June 1, 1992 and May 31, 1993. Firearm-Related Injuries 891.

Handguns are involved in a majority of firearm deaths and injuries in the United States. *Id.,* at 888. From 1993 to 1997, 81% of firearm-homicide victims were killed by handgun. Firearm Injury and Death from Crime 4; see also Dept. of Justice, Bureau of Justice Statistics, C. Perkins, Weapon Use and Violent Crime, p. 8 (Sept. 2003), (Table 10), http://www.ojp.usdoj.gov/bjs/pub/pdf/wuvc01.pdf (hereinafter Weapon Use and Violent Crime) (statistics indicating roughly the same rate for 1993–2001). In the same period, for the 41% of firearm injuries for which the weapon type is known, 82% of them were from handguns. Firearm Injury and Death From Crime 4. And among children under the age of 20, handguns account for approximately 70% of all unintentional firearm-related injuries and deaths. Firearm-Related Injuries 890. In particular, 70% of all firearm-related teenage suicides in 1996 involved a handgun. *Id.,* at 889; see also Zwerling, Lynch, Burmeister, & Goertz, The Choice of Weapons in Firearm Suicides in Iowa, 83 Am. J. Public Health 1630, 1631 (1993) (Table 1) (handguns used in 36.6% of all firearm suicides in Iowa from 1980–1984 and 43.8% from 1990–1991).

Handguns also appear to be a very popular weapon among criminals. In a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun. See Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Firearm Use by Offenders, p. 3 (Nov. 2001), online at http://

www.ojp.usdoj.gov/bjs/pub/pdf/fuo.pdf; see also Weapon Use and Violent Crime 2 (Table 2) (statistics indicating that handguns were used in over 84% of nonlethal violent crimes involving firearms from 1993 to 2001). And handguns are not only popular tools for crime, but popular objects of it as well: the FBI received on average over 274,000 reports of stolen guns for each year between 1985 and 1994, and almost 60% of stolen guns are handguns. Dept. of Justice, Bureau of Justice Statistics, M. Zawitz, Guns Used in Crime, p. 3 (July 1995), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf. Department of Justice studies have concluded that stolen handguns in particular are an important source of weapons for both adult and juvenile offenders. *Ibid.*

Statistics further suggest that urban areas, such as the District, have different experiences with gun-related death, injury, and crime, than do less densely populated rural areas. A disproportionate amount of violent and property crimes occur in urban areas, and urban criminals are more likely than other offenders to use a firearm during the commission of a violent crime. See Dept. of Justice, Bureau of Justice Statistics, D. Duhart, Urban, Suburban, and Rural Victimization, 1993–98, pp. 1, 9 (Oct. 2000), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/usrv98.pdf. Homicide appears to be a much greater issue in urban areas; from 1985 to 1993, for example, "half of all homicides occurred in 63 cities with 16% of the nation's population." Wintemute, The Future of Firearm Violence Prevention, 282 JAMA 475 (1999). One study concluded that although the overall rate of gun death between 1989 and 1999 was roughly the same in urban than rural areas, the urban homicide rate was three times as high; even after adjusting for other variables, it was still twice as high. Branas, Nance, Elliott, Richmond, & Schwab, Urban-Rural Shifts in Intentional Firearm Death, 94 Am. J. Public Health 1750, 1752 (2004); see also *ibid.* (noting that

rural areas appear to have a higher rate of firearm suicide). And a study of firearm injuries to children and adolescents in Pennsylvania between 1987 and 2000 showed an injury rate in urban counties 10 times higher than in nonurban counties. Nance & Branas, The Rural-Urban Continuum, 156 Archives of Pediatrics & Adolescent Medicine 781, 782 (2002).

Finally, the linkage of handguns to firearms deaths and injuries appears to be much stronger in urban than in rural areas. "[S]tudies to date generally support the hypothesis that the greater number of rural gun deaths are from rifles or shotguns, whereas the greater number of urban gun deaths are from handguns." Dresang, *supra*, at 108. And the Pennsylvania study reached a similar conclusion with respect to firearm injuries—they are much more likely to be caused by handguns in urban areas than in rural areas. See Nance & Branas, *supra*, at 784.

3

Respondent and his many *amici* for the most part do not disagree about the *figures* set forth in the preceding subsection, but they do disagree strongly with the District's *predictive judgment* that a ban on handguns will help solve the crime and accident problems that those figures disclose. In particular, they disagree with the District Council's assessment that "freezing the pistol . . . population within the District," DC Rep., at 26, will reduce crime, accidents, and deaths related to guns. And they provide facts and figures designed to show that it has not done so in the past, and hence will not do so in the future.

First, they point out that, since the ban took effect, violent crime in the District has increased, not decreased. See Brief for Criminologists et al. as *Amici Curiae* 4–8, 3a (hereinafter Criminologists' Brief); Brief for Congress of Racial Equality as *Amicus Curiae* 35–36; Brief for National Rifle Assn. et al. as *Amici Curiae* 28–30 (hereinafter

NRA Brief). Indeed, a comparison with 49 other major cities reveals that the District's homicide rate is actually substantially *higher* relative to these other cities than it was before the handgun restriction went into effect. See Brief for Academics as *Amici Curiae* 7–10 (hereinafter Academics' Brief); see also Criminologists' Brief 6–9, 3a–4a, 7a. Respondent's *amici* report similar results in comparing the District's homicide rates during that period to that of the neighboring States of Maryland and Virginia (neither of which restricts handguns to the same degree), and to the homicide rate of the Nation as a whole. See Academics' Brief 11–17; Criminologists' Brief 6a, 8a.

Second, respondent's *amici* point to a statistical analysis that regresses murder rates against the presence or absence of strict gun laws in 20 European nations. See Criminologists' Brief 23 (citing Kates & Mauser, Would Banning Firearms Reduce Murder and Suicide? 30 Harv. J. L. & Pub. Pol'y 649, 651–694 (2007)). That analysis concludes that strict gun laws are correlated with *more* murders, not fewer. See Criminologists' Brief 23; see also *id.,* at 25–28. They also cite domestic studies, based on data from various cities, States, and the Nation as a whole, suggesting that a reduction in the number of guns does not lead to a reduction in the amount of violent crime. See *id.,* at 17–20. They further argue that handgun bans do not reduce suicide rates, see *id.,* at 28–31, 9a, or rates of accidents, even those involving children, see Brief for International Law Enforcement Educators and Trainers Assn. et al. as *Amici Curiae* App. 7–15 (hereinafter ILEETA Brief).

Third, they point to evidence indicating that firearm ownership does have a beneficial self-defense effect. Based on a 1993 survey, the authors of one study estimated that there were 2.2-to-2.5 million defensive uses of guns (mostly brandishing, about a quarter involving the actual firing of a gun) annually. See Kleck & Gertz,

Armed Resistance to Crime, 86 J. Crim. L. & C. 150, 164 (1995); see also ILEETA Brief App. 1–6 (summarizing studies regarding defensive uses of guns). Another study estimated that for a period of 12 months ending in 1994, there were 503,481 incidents in which a burglar found himself confronted by an armed homeowner, and that in 497,646 (98.8%) of them, the intruder was successfully scared away. See Ikida, Dahlberg, Sacks, Mercy, & Powell, Estimating Intruder-Related Firearms Retrievals in U. S. Households, 12 Violence & Victims 363 (1997). A third study suggests that gun-armed victims are substantially less likely than non-gun-armed victims to be injured in resisting robbery or assault. Barnett & Kates, Under Fire, 45 Emory L. J. 1139, 1243–1244, n. 478 (1996). And additional evidence suggests that criminals are likely to be deterred from burglary and other crimes if they know the victim is likely to have a gun. See Kleck, Crime Control Through the Private Use of Armed Force, 35 Social Problems 1, 15 (1988) (reporting a substantial drop in the burglary rate in an Atlanta suburb that required heads of households to own guns); see also ILEETA Brief 17–18 (describing decrease in sexual assaults in Orlando when women were trained in the use of guns).

Fourth, respondent's *amici* argue that laws criminalizing gun possession are self-defeating, as evidence suggests that they will have the effect only of restricting law-abiding citizens, but not criminals, from acquiring guns. See, *e.g.*, Brief for President *Pro Tempore* of Senate of Pennsylvania as *Amicus Curiae* 35, 36, and n. 15. That effect, they argue, will be especially pronounced in the District, whose proximity to Virginia and Maryland will provide criminals with a steady supply of guns. See Brief for Heartland Institute as *Amicus Curiae* 20.

In the view of respondent's *amici*, this evidence shows that other remedies—such as *less* restriction on gun ownership, or liberal authorization of law-abiding citizens to

carry concealed weapons—better fit the problem. See, *e.g.*, Criminologists' Brief 35–37 (advocating easily obtainable gun licenses); Brief for Southeastern Legal Foundation, Inc. et al. as *Amici Curiae* 15 (hereinafter SLF Brief) (advocating "widespread gun ownership" as a deterrent to crime); see also J. Lott, More Guns, Less Crime (2d ed. 2000). They further suggest that at a minimum the District fails to show that its *remedy,* the gun ban, bears a reasonable relation to the crime and accident *problems* that the District seeks to solve. See, *e.g.*, Brief for Respondent 59–61.

These empirically based arguments may have proved strong enough to convince many legislatures, as a matter of legislative policy, not to adopt total handgun bans. But the question here is whether they are strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them. And that they are not. For one thing, they can lead us more deeply into the uncertainties that surround any effort to reduce crime, but they cannot prove either that handgun possession diminishes crime or that handgun bans are ineffective. The statistics do show a soaring District crime rate. And the District's crime rate went up after the District adopted its handgun ban. But, as students of elementary logic know, *after it* does not mean *because of it.* What would the District's crime rate have looked like without the ban? Higher? Lower? The same? Experts differ; and we, as judges, cannot say.

What about the fact that foreign nations with strict gun laws have higher crime rates? Which is the cause and which the effect? The proposition that strict gun laws *cause* crime is harder to accept than the proposition that strict gun laws in part grow out of the fact that a nation already has a higher crime rate. And we are then left with the same question as before: What would have happened to crime without the gun laws—a question that respon-

dent and his *amici* do not convincingly answer.

Further, suppose that respondent's *amici* are right when they say that householders' possession of loaded handguns help to frighten away intruders. On that assumption, one must still ask whether that benefit is worth the potential death-related cost. And that is a question without a directly provable answer.

Finally, consider the claim of respondent's *amici* that handgun bans *cannot* work; there are simply too many illegal guns already in existence for a ban on legal guns to make a difference. In a word, they claim that, given the urban sea of pre-existing legal guns, criminals can readily find arms regardless. Nonetheless, a legislature might respond, we want to make an effort to try to dry up that urban sea, drop by drop. And none of the studies can show that effort is not worthwhile.

In a word, the studies to which respondent's *amici* point raise policy-related questions. They succeed in proving that the District's predictive judgments are controversial. But they do not by themselves show that those judgments are incorrect; nor do they demonstrate a consensus, academic or otherwise, supporting that conclusion.

Thus, it is not surprising that the District and its *amici* support the District's handgun restriction with studies of their own. One in particular suggests that, statistically speaking, the District's law has indeed had positive life-saving effects. See Loftin, McDowall, Weirsema, & Cottey, Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia, 325 New England J. Med. 1615 (1991) (hereinafter Loftin study). Others suggest that firearm restrictions as a general matter reduce homicides, suicides, and accidents in the home. See, *e.g.*, Duggan, More Guns, More Crime, 109 J. Pol. Econ. 1086 (2001); Kellerman, Somes, Rivara, Lee, & Banton, Injuries and Deaths Due to Firearms in the Home, 45 J. Trauma, Infection & Critical Care 263 (1998);

Miller, Azrael, & Hemenway, Household Firearm Ownership and Suicide Rates in the United States, 13 Epidemiology 517 (2002). Still others suggest that the defensive uses of handguns are not as great in number as respondent's *amici* claim. See, *e.g.*, Brief for American Public Health Assn. et al. as *Amici Curiae* 17–19 (hereinafter APHA Brief) (citing studies).

Respondent and his *amici* reply to these responses; and in doing so, they seek to discredit as methodologically flawed the studies and evidence relied upon by the District. See, *e.g.*, Criminologists' Brief 9–17, 20–24; Brief for Assn. Am. Physicians and Surgeons, Inc. as *Amicus Curiae* 12–18; SLF Brief 17–22; Britt, Kleck, & Bordua, A Reassessment of the D.C. Gun Law, 30 Law & Soc. Rev. 361 (1996) (criticizing the Loftin study). And, of course, the District's *amici* produce counter-rejoinders, referring to articles that defend their studies. See, *e.g.*, APHA Brief 23, n. 5 (citing McDowall, Loftin, & Wiersema et al., Using Quasi-Experiments to Evaluate Firearm Laws, 30 Law & Soc. Rev. 381 (1996)).

The upshot is a set of studies and counterstudies that, at most, could leave a judge uncertain about the proper policy conclusion. But from respondent's perspective any such uncertainty is not good enough. That is because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical fact. And, given that constitutional allocation of decisionmaking responsibility, the empirical evidence presented here is sufficient to allow a judge to reach a firm *legal* conclusion.

In particular this Court, in First Amendment cases applying intermediate scrutiny, has said that our "sole obligation" in reviewing a legislature's "predictive judgments" is "to assure that, in formulating its judgments," the legislature "has drawn reasonable inferences based on substantial evidence." *Turner*, 520 U. S., at 195 (internal quotation marks omitted). And judges, looking at the

evidence before us, should agree that the District legislature's predictive judgments satisfy that legal standard. That is to say, the District's judgment, while open to question, is nevertheless supported by "substantial evidence."

There is no cause here to depart from the standard set forth in *Turner,* for the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. See *Nixon*, 528 U. S., at 402 (BREYER, J., concurring). In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions. See *Los Angeles* v. *Alameda Books, Inc.*, 535 U. S. 425, 440 (2002) (plurality opinion) ("[W]e must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather an evaluate data on local problems"); cf. DC Rep., at 67 (statement of Rep. Gude) (describing District's law as "a decision made on the local level after extensive debate and deliberations"). Different localities may seek to solve similar problems in different ways, and a "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 52 (1986) (internal quotation marks omitted). "The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 575, n. 18 (1985) (Powell, J., dissenting) (citing The Federalist No. 17, p. 107 (J. Cooke ed. 1961) (A. Hamilton)). We owe that democratic process some substantial weight in the constitutional calculus.

For these reasons, I conclude that the District's statute properly seeks to further the sort of life-preserving and

public-safety interests that the Court has called "compelling." *Salerno*, 481 U. S., at 750, 754.

B

I next assess the extent to which the District's law burdens the interests that the Second Amendment seeks to protect. Respondent and his *amici*, as well as the majority, suggest that those interests include: (1) the preservation of a "well regulated Militia"; (2) safeguarding the use of firearms for sporting purposes, *e.g.*, hunting and marksmanship; and (3) assuring the use of firearms for self-defense. For argument's sake, I shall consider all three of those interests here.

1

The District's statute burdens the Amendment's first and primary objective hardly at all. As previously noted, there is general agreement among the Members of the Court that the principal (if not the only) purpose of the Second Amendment is found in the Amendment's text: the preservation of a "well regulated Militia." See *supra*, at 3. What scant Court precedent there is on the Second Amendment teaches that the Amendment was adopted "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces" and "must be interpreted and applied with that end in view." *Miller*, 307 U. S., at 178. Where that end is implicated only minimally (or not at all), there is substantially less reason for constitutional concern. Compare *ibid.* ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument").

To begin with, the present case has nothing to do with *actual* military service. The question presented presumes that respondent is "*not* affiliated with any state-regulated militia." 552 U. S. __ (2007) (emphasis added). I am aware of no indication that the District either now or in the recent past has called up its citizenry to serve in a militia, that it has any inkling of doing so anytime in the foreseeable future, or that this law must be construed to prevent the use of handguns during legitimate militia activities. Moreover, even if the District were to call up its militia, respondent would not be among the citizens whose service would be requested. The District does not consider him, at 66 years of age, to be a member of its militia. See D. C. Code §49–401 (2001) (militia includes only male residents ages 18 to 45); App. to Pet. for Cert. 120a (indicating respondent's date of birth).

Nonetheless, as some *amici* claim, the statute might interfere with training in the use of weapons, training useful for military purposes. The 19th-century constitutional scholar, Thomas Cooley, wrote that the Second Amendment protects "learning to handle and use [arms] in a way that makes those who keep them ready for their efficient use" during militia service. General Principles of Constitutional Law 271 (1880); *ante*, at 45 (opinion of the Court); see also *ante*, at 45–46 (citing other scholars agreeing with Cooley on that point). And former military officers tell us that "private ownership of firearms makes for a more effective fighting force" because "[m]ilitary recruits with previous firearms experience and training are generally better marksmen, and accordingly, better soldiers." Brief for Retired Military Officers as *Amici Curiae* 1–2 (hereinafter Military Officers' Brief). An *amicus* brief filed by retired Army generals adds that a "well-regulated militia—whether *ad hoc* or as part of our organized military—depends on recruits who have familiarity and training with firearms—rifles, pistols, and shotguns." Brief for

Major General John D. Altenburg, Jr., et al. as *Amici Curiae* 4 (hereinafter Generals' Brief). Both briefs point out the importance of handgun training. Military Officers' Brief 26–28; Generals' Brief 4. Handguns are used in military service, see *id.,* at 26, and "civilians who are familiar with handgun marksmanship and safety are much more likely to be able to safely and accurately fire a rifle or other firearm with minimal training upon entering military service," *id.,* at 28.

Regardless, to consider the military-training objective a modern counterpart to a similar militia-related colonial objective and to treat that objective as falling within the Amendment's primary purposes makes no difference here. That is because the District's law does not seriously affect military training interests. The law permits residents to engage in activities that will increase their familiarity with firearms. They may register (and thus possess in their homes) weapons other than handguns, such as rifles and shotguns. See D. C. Code §§7–2502.01, 7–2502.02(a) (only weapons that cannot be registered are sawed-off shotguns, machine guns, short-barreled rifles, and pistols not registered before 1976); compare Generals' Brief 4 (listing "*rifles*, pistols, and *shotguns*" as useful military weapons; emphasis added). And they may operate those weapons within the District "for lawful recreational purposes." §7–2507.02; see also §7–2502.01(b)(3) (nonresidents "participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction" may carry even weapons not registered in the District). These permissible recreations plainly include actually using and firing the weapons, as evidenced by a specific D. C. Code provision contemplating the existence of local firing ranges. See §7–2507.03.

And while the District law prevents citizens from training with handguns *within the District*, the District consists

of only 61.4 square miles of urban area. See Dept. of Commerce, Bureau of Census, United States: 2000 (pt. 1), p. 11 (2002) (Table 8). The adjacent States do permit the use of handguns for target practice, and those States are only a brief subway ride away. See Md. Crim. Law Code Ann. §4–203(b)(4) (Lexis Supp. 2007) (general handgun restriction does not apply to "the wearing, carrying, or transporting by a person of a handgun used in connection with," *inter alia,* "a target shoot, formal or informal target practice, sport shooting event, hunting, [or] a Department of Natural Resources-sponsored firearms and hunter safety class"); Va. Code Ann. §18.2–287.4 (Lexis Supp. 2007) (general restriction on carrying certain loaded pistols in certain public areas does not apply "to any person actually engaged in lawful hunting or lawful recreational shooting activities at an established shooting range or shooting contest"); Washington Metropolitan Area Transit Authority, Metrorail System Map, http://www.wmata.com/metrorail/systemmmap.cfm.

Of course, a subway rider must buy a ticket, and the ride takes time. It also costs money to store a pistol, say, at a target range, outside the District. But given the costs already associated with gun ownership and firearms training, I cannot say that a subway ticket and a short subway ride (and storage costs) create more than a minimal burden. Compare *Crawford* v. *Marion County Election Bd.*, 553 U. S. ___, ___ (2008) (slip op., at 3) (BREYER, J., dissenting) (acknowledging travel burdens on indigent persons in the context of voting where public transportation options were limited). Indeed, respondent and two of his coplaintiffs below may well use handguns outside the District on a regular basis, as their declarations indicate that they keep such weapons stored there. See App. to Pet. for Cert. 77a (respondent); see also *id.,* at 78a, 84a (coplaintiffs). I conclude that the District's law burdens the Second Amendment's primary objective little, or not at

all.

2

The majority briefly suggests that the "right to keep and bear Arms" might encompass an interest in hunting. See, *e.g.*, *ante*, at 26. But in enacting the present provisions, the District sought "to take nothing away from sportsmen." DC Rep., at 33. And any inability of District residents to hunt near where they live has much to do with the jurisdiction's exclusively urban character and little to do with the District's firearm laws. For reasons similar to those I discussed in the preceding subsection—that the District's law does not prohibit possession of rifles or shotguns, and the presence of opportunities for sporting activities in nearby States—I reach a similar conclusion, namely, that the District's law burdens any sports-related or hunting-related objectives that the Amendment may protect little, or not at all.

3

The District's law does prevent a resident from keeping a loaded handgun in his home. And it consequently makes it more difficult for the householder to use the handgun for self-defense in the home against intruders, such as burglars. As the Court of Appeals noted, statistics suggest that handguns are the most popular weapon for self defense. See 478 F. 3d, at 400 (citing Kleck & Gertz, 86 J. Crim. L. & C., at 182–183). And there are some legitimate reasons why that would be the case: *Amici* suggest (with some empirical support) that handguns are easier to hold and control (particularly for persons with physical infirmities), easier to carry, easier to maneuver in enclosed spaces, and that a person using one will still have a hand free to dial 911. See ILEETA Brief 37–39; NRA Brief 32–33; see also *ante*, at 57. But see Brief for Petitioners 54–55 (citing sources preferring shotguns and rifles to hand-

guns for purposes of self-defense). To that extent the law burdens to some degree an interest in self-defense that for present purposes I have assumed the Amendment seeks to further.

C

In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive alternatives. Are there *other* potential measures that might similarly promote the same goals while imposing lesser restrictions? See *Nixon*, 528 U. S., at 402 (BREYER, J., concurring) ("existence of a clearly superior, less restrictive alternative" can be a factor in determining whether a law is constitutionally proportionate). Here I see none.

The reason there is no clearly superior, less restrictive alternative to the District's handgun ban is that the ban's very objective is to reduce significantly the number of handguns in the District, say, for example, by allowing a law enforcement officer immediately to assume that *any* handgun he sees is an *illegal* handgun. And there is no plausible way to achieve that objective other than to ban the guns.

It does not help respondent's case to describe the District's objective more generally as an "effort to diminish the dangers associated with guns." That is because the very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous. That they are easy to hold and control means that they are easier for children to use. See Brief for American Academy of Pediatrics et al. as *Amici Curiae* 19 ("[C]hildren as young as three are able to pull the trigger of most handguns"). That they are maneuverable and permit a free hand likely contributes to the fact that they are by far the firearm of choice for crimes such as rape and robbery. See Weapon Use and Violent Crime 2 (Table 2).

That they are small and light makes them easy to steal, see *supra*, at 19, and concealable, cf. *ante*, at 54 (opinion of the Court) (suggesting that concealed-weapon bans are constitutional).

This symmetry suggests that any measure less restrictive in respect to the use of handguns for self-defense will, to that same extent, prove less effective in preventing the use of handguns for illicit purposes. If a resident has a handgun in the home that he can use for self-defense, then he has a handgun in the home that he can use to commit suicide or engage in acts of domestic violence. See *supra*, at 18 (handguns prevalent in suicides); Brief for National Network to End Domestic Violence et al. as *Amici Curiae* 27 (handguns prevalent in domestic violence). If it is indeed the case, as the District believes, that the number of guns contributes to the number of gun-related crimes, accidents, and deaths, then, although there may be less restrictive*, less effective* substitutes for an outright ban, there is no less restrictive *equivalent* of an outright ban.

Licensing restrictions would not similarly reduce the handgun population, and the District may reasonably fear that even if guns are initially restricted to law-abiding citizens, they might be stolen and thereby placed in the hands of criminals. See *supra*, at 19. Permitting certain types of handguns, but not others, would affect the commercial market for handguns, but not their availability. And requiring safety devices such as trigger locks, or imposing safe-storage requirements would interfere with any self-defense interest while simultaneously leaving operable weapons in the hands of owners (or others capable of acquiring the weapon and disabling the safety device) who might use them for domestic violence or other crimes.

The absence of equally effective alternatives to a complete prohibition finds support in the empirical fact that other States and urban centers prohibit particular types of

weapons. Chicago has a law very similar to the District's, and many of its suburbs also ban handgun possession under most circumstances. See Chicago, Ill., Municipal Code §§8–20–030(k), 8–20–40, 8–20–50(c) (2008); Evanston, Ill., City Code §9–8–2 (2007); Morton Grove, Ill., Village Code §6–2–3(C) (2008); Oak Park, Ill., Village Code §27–2–1 (2007); Winnetka, Ill., Village Ordinance §9.12.020(B) (2008); Wilmette, Ill., Ordinance §12–24(b) (2008). Toledo bans certain types of handguns. Toledo, Ohio, Municipal Code, ch. 549.25 (2007). And San Francisco in 2005 enacted by popular referendum a ban on most handgun possession by city residents; it has been precluded from enforcing that prohibition, however, by state-court decisions deeming it pre-empted by state law. See *Fiscal* v. *City and County of San Francisco*, 158 Cal. App. 4th 895, 900–901, 70 Cal. Rptr. 3d 324, 326–328 (2008). (Indeed, the fact that as many as 41 States may pre-empt local gun regulation suggests that the absence of more regulation like the District's may perhaps have more to do with state law than with a lack of locally perceived need for them. See Legal Community Against Violence, Regulating Guns in America 14 (2006), http://www.lcav.org/Library/reports_analyses/National_Audit_Total_8.16.06.pdf.

In addition, at least six States and Puerto Rico impose general bans on certain types of weapons, in particular assault weapons or semiautomatic weapons. See Cal. Penal Code §12280(b) (West Supp. 2008); Conn. Gen. Stat. §§53–202c (2007); Haw. Rev. Stat. §134–8 (1993); Md. Crim. Law Code Ann. §4–303(a) (Lexis 2002); Mass. Gen. Laws, ch. 140, §131M (West 2006); N. Y. Penal Law Ann. §265.02(7) (West Supp. 2008); 25 Laws P. R. Ann. §456m (Supp. 2006); see also 18 U. S. C. §922(o) (federal machinegun ban). And at least 14 municipalities do the same. See Albany, N. Y., Municipal Code §193–16(A) (2005); Aurora, Ill., Ordinance §29–49(a) (2007); Buffalo,

N. Y., City Code §180–1(F) (2000); Chicago, Ill., Municipal Code §8–24–025(a), 8–20–030(h); Cincinnati, Ohio, Admin. Code §708–37(a) (Supp. 2008); Cleveland, Ohio, Ordinance §628.03(a) (2008); Columbus, Ohio, City Code §2323.31 (2007); Denver, Colo., Municipal Code §38–130(e) (2008); Morton Grove, Ill., Village Code §6–2–3(B); N. Y. C. Admin. Code §10–303.1 (2007); Oak Park, Ill., Village Code §27–2-1; Rochester, N. Y., Code §47–5(f) (2008); South Bend, Ind., Ordinance §§13–97(b), 13–98 (2008); Toledo, Ohio, Municipal Code §549.23(a). These bans, too, suggest that there may be no substitute to an outright prohibition in cases where a governmental body has deemed a particular type of weapon especially dangerous.

D

The upshot is that the District's objectives are compelling; its predictive judgments as to its law's tendency to achieve those objectives are adequately supported; the law does impose a burden upon any self-defense interest that the Amendment seeks to secure; and there is no clear less restrictive alternative. I turn now to the final portion of the "permissible regulation" question: Does the District's law *disproportionately* burden Amendment-protected interests? Several considerations, taken together, convince me that it does not.

First, the District law is tailored to the life-threatening problems it attempts to address. The law concerns one class of weapons, handguns, leaving residents free to possess shotguns and rifles, along with ammunition. The area that falls within its scope is totally urban. Cf. *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 563 (2001) (varied effect of statewide speech restriction in "rural, urban, or suburban" locales "demonstrates a lack of narrow tailoring"). That urban area suffers from a serious handgun-fatality problem. The District's law directly aims at that compelling problem. And there is no less restrictive way

to achieve the problem-related benefits that it seeks.

Second, the self-defense interest in maintaining loaded handguns in the home to shoot intruders is not the *primary* interest, but at most a subsidiary interest, that the Second Amendment seeks to serve. The Second Amendment's language, while speaking of a "Militia," says nothing of "self-defense." As JUSTICE STEVENS points out, the Second Amendment's drafting history shows that the language reflects the Framers' primary, if not exclusive, objective. See *ante*, at 17–28 (dissenting opinion). And the majority itself says that "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was *the* reason that right . . . was codified in a written Constitution." *Ante*, at 26 (emphasis added). The *way* in which the Amendment's operative clause seeks to promote that interest—by protecting a right "to keep and bear Arms"—may *in fact* help further an interest in self-defense. But a factual connection falls far short of a primary objective. The Amendment itself tells us that militia preservation was first and foremost in the Framers' minds. See *Miller*, 307 U. S., at 178 ("With obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantee of the Second Amendment were made," and the amendment "must be interpreted and applied with that end in view").

Further, any self-defense interest at the time of the Framing could not have focused exclusively upon urban-crime related dangers. Two hundred years ago, most Americans, many living on the frontier, would likely have thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways. See Dept. of Commerce, Bureau of Census, Population: 1790 to 1990 (1998) (Table 4), online at http://www.census.gov/

population/censusdata/table-4.pdf (of the 3,929,214 Americans in 1790, only 201,655—about 5%—lived in urban areas). Insofar as the Framers focused at all on the tiny fraction of the population living in large cities, they would have been aware that these city dwellers were subject to firearm restrictions that their rural counterparts were not. See *supra*, at 4–7. They are unlikely then to have thought of a right to keep loaded handguns in homes to confront intruders in urban settings as *central*. And the subsequent development of modern urban police departments, by diminishing the need to keep loaded guns nearby in case of intruders, would have moved any such right even further away from the heart of the amendment's more basic protective ends. See, *e.g.*, Sklansky, The Private Police, 46 UCLA L. Rev. 1165, 1206–1207 (1999) (professional urban police departments did not develop until roughly the mid-19th century).

Nor, for that matter, am I aware of any evidence that *handguns* in particular were central to the Framers' conception of the Second Amendment. The lists of militia-related weapons in the late 18th-century state statutes appear primarily to refer to other sorts of weapons, muskets in particular. See *Miller*, 307 U. S., at 180–182 (reproducing colonial militia laws). Respondent points out in his brief that the Federal Government and two States at the time of the founding had enacted statutes that listed handguns as "acceptable" militia weapons. Brief for Respondent 47. But these statutes apparently found them "acceptable" only for certain special militiamen (generally, certain soldiers on horseback), while requiring muskets or rifles for the general infantry. See Act of May 8, 1792, ch. XXXIII, 1 Stat. 271; Laws of the State of North Carolina 592 (1791); First Laws of the State of Connecticut 150 (1784); see also 25 Journals of the Continental Congress, pp. 1774–1789 741–742 (1922).

Third, irrespective of what the Framers *could have*

thought, we know what they *did think.* Samuel Adams, who lived in Boston, advocated a constitutional amendment that would have precluded the Constitution from ever being "construed" to "prevent the people of the United States, who are peaceable citizens, from keeping their own arms." 6 Documentary History of the Ratification of the Constitution 1453 (J. Kaminski & G. Saladino eds. 2000). Samuel Adams doubtless knew that the Massachusetts Constitution contained somewhat similar protection. And he doubtless knew that Massachusetts law prohibited Bostonians from keeping loaded guns in the house. So how could Samuel Adams have advocated such protection *unless* he thought that the protection was *consistent* with local regulation that seriously impeded urban residents from using their arms against intruders? It seems unlikely that he meant to deprive the Federal Government of power (to enact Boston-type weapons regulation) that he know Boston had and (as far as we know) he would have thought constitutional under the Massachusetts Constitution. Indeed, since the District of Columbia (the subject of the Seat of Government Clause, U. S. Const., Art. I, §8, cl. 17) was the only *urban* area under direct federal control, it seems unlikely that the Framers thought about *urban* gun control at all. Cf. *Palmore* v. *United States*, 411 U. S. 389, 397–398 (1973) (Congress can "legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it").

Of course the District's law and the colonial Boston law are not identical. But the Boston law disabled an even wider class of weapons (indeed, all firearms). And its existence shows at the least that local legislatures could impose (as here) serious restrictions on the right to use firearms. Moreover, as I have said, Boston's law, though highly analogous to the District's, was not the *only* colo-

nial law that could have impeded a homeowner's ability to shoot a burglar. Pennsylvania's and New York's laws could well have had a similar effect. See *supra*, at 6–7. And the Massachusetts and Pennsylvania laws were not only thought consistent with an *unwritten* common-law gun-possession right, but also consistent with *written* state constitutional provisions providing protections similar to those provided by the Federal Second Amendment. See *supra*, at 6–7. I cannot agree with the majority that these laws are largely uninformative because the penalty for violating them was civil, rather than criminal. *Ante*, at 61–62. The Court has long recognized that the exercise of a constitutional right can be burdened by penalties far short of jail time. See, *e.g.*, *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943) (invalidating $7 per week solicitation fee as applied to religious group); see also *Forsyth County* v. *Nationalist Movement*, 505 U. S. 123, 136 (1992) ("A tax based on the content of speech does not become more constitutional because it is a small tax").

Regardless, why would the majority require a precise colonial regulatory analogue in order to save a modern gun regulation from constitutional challenge? After all, insofar as we look to history to discover how we can constitutionally regulate a right to self-defense, we must look, not to what 18th-century legislatures actually *did* enact, but to what they would have thought they *could* enact. There are innumerable policy-related reasons why a legislature might not act on a particular matter, despite having the power to do so. This Court has "frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States* v. *Wells*, 519 U. S. 482, 496 (1997). It is similarly "treacherous" to reason from the fact that colonial legislatures *did not* enact certain kinds of legislation an unalterable constitutional limitation on the power of a modern legislature *cannot* do so. The question should not

be whether a modern restriction on a right to self-defense *duplicates* a past one, but whether that restriction, when compared with restrictions originally thought possible, enjoys a similarly strong justification. At a minimum that similarly strong justification is what the District's modern law, compared with Boston's colonial law, reveals.

Fourth, a contrary view, as embodied in today's decision, will have unfortunate consequences. The decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. See *ante*, at 54, and n. 26. And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time.

As important, the majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems. The majority says that it leaves the District "a variety of tools for combating" such problems. *Ante*, at 64. It fails to list even one seemingly adequate replacement for the law it strikes down. I can understand how reasonable individuals can disagree about the merits of strict gun control as a crime-control measure, even in a totally urbanized area. But I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order.

V

The majority derides my approach as "judge-empowering." *Ante*, at 62. I take this criticism seriously, but I do not think it accurate. As I have previously ex-

plained, this is an approach that the Court has taken in other areas of constitutional law. See *supra*, at 10–11. Application of such an approach, of course, requires judgment, but the very nature of the approach—requiring careful identification of the relevant interests and evaluating the law's effect upon them—limits the judge's choices; and the method's necessary transparency lays bare the judge's reasoning for all to see and to criticize.

The majority's methodology is, in my view, substantially less transparent than mine. At a minimum, I find it difficult to understand the reasoning that seems to underlie certain conclusions that it reaches.

The majority spends the first 54 pages of its opinion attempting to rebut JUSTICE STEVENS' evidence that the Amendment was enacted with a purely militia-related purpose. In the majority's view, the Amendment also protects an interest in armed personal self-defense, at least to some degree. But the majority does not tell us precisely what that interest is. "Putting all of [the Second Amendment's] textual elements together," the majority says, "we find that they guarantee the individual right to possess and carry weapons in case of confrontation." *Ante*, at 19. Then, three pages later, it says that "we do not read the Second Amendment to permit citizens to carry arms for *any sort* of confrontation." *Ante,* at 22. Yet, with one critical exception, it does not explain which confrontations count. It simply leaves that question unanswered.

The majority does, however, point to one type of confrontation that counts, for it describes the Amendment as "elevat[ing] above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Ante*, at 63. What is its basis for finding that to be the core of the Second Amendment right? The only historical sources identified by the majority that even appear to touch upon that specific matter consist of an 1866 newspaper editorial discussing the

Freedmen's Bureau Act, see *ante*, at 43, two quotations from that 1866 Act's legislative history, see *ante*, at 43–44, and a 1980 state court opinion saying that in colonial times the same were used to defend the home as to maintain the militia, see *ante*, at 52. How can citations such as these support the far-reaching proposition that the Second Amendment's primary concern is not its stated concern about the militia, but rather a right to keep loaded weapons at one's bedside to shoot intruders?

Nor is it at all clear to me how the majority decides *which* loaded "arms" a homeowner may keep. The majority says that that Amendment protects those weapons "typically possessed by law-abiding citizens for lawful purposes." *Ante*, at 53. This definition conveniently excludes machineguns, but permits handguns, which the majority describes as "the most popular weapon chosen by Americans for self-defense in the home." *Ante*, at 57; see also *ante,* at 54–55. But what sense does this approach make? According to the majority's reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the Second Amendment *does*, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing that the Framers intended such circular reasoning.

I am similarly puzzled by the majority's list, in Part III of its opinion, of provisions that in its view would survive Second Amendment scrutiny. These consist of (1) "prohi-

bitions on carrying concealed weapons"; (2) "prohibitions on the possession of firearms by felons"; (3) "prohibitions on the possession of firearms by . . . the mentally ill"; (4) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (5) government "conditions and qualifications" attached "to the commercial sale of arms." *Ante*, at 54. Why these? Is it that similar restrictions existed in the late 18th century? The majority fails to cite any colonial analogues. And even were it possible to find analogous colonial laws in respect to all these restrictions, why should these colonial laws count, while the Boston loaded-gun restriction (along with the other laws I have identified) apparently does not count? See *supra*, at 5–6, 38–39.

At the same time the majority ignores a more important question: Given the purposes for which the Framers enacted the Second Amendment, how should it be applied to modern-day circumstances that they could not have anticipated? Assume, for argument's sake, that the Framers did intend the Amendment to offer a degree of self-defense protection. Does that mean that the Framers also intended to guarantee a right to possess a loaded gun near swimming pools, parks, and playgrounds? That they would not have cared about the children who might pick up a loaded gun on their parents' bedside table? That they (who certainly showed concern for the risk of fire, see *supra*, at 5–7) would have lacked concern for the risk of accidental deaths or suicides that readily accessible loaded handguns in urban areas might bring? Unless we believe that they intended future generations to ignore such matters, answering questions such as the questions in this case requires judgment—judicial judgment exercised within a framework for constitutional analysis that guides that judgment and which makes its exercise transparent. One cannot answer those questions by combining inconclusive historical research with judicial *ipse dixit*.

The argument about method, however, is by far the less important argument surrounding today's decision. Far more important are the unfortunate consequences that today's decision is likely to spawn. Not least of these, as I have said, is the fact that the decision threatens to throw into doubt the constitutionality of gun laws throughout the United States. I can find no sound legal basis for launching the courts on so formidable and potentially dangerous a mission. In my view, there simply is no untouchable constitutional right guaranteed by the Second Amendment to keep loaded handguns in the house in crime-ridden urban areas.

VI

For these reasons, I conclude that the District's measure is a proportionate, not a disproportionate, response to the compelling concerns that led the District to adopt it. And, for these reasons as well as the independently sufficient reasons set forth by JUSTICE STEVENS, I would find the District's measure consistent with the Second Amendment's demands.

With respect, I dissent.

142 S.Ct. 17
Supreme Court of the United States.

John DOES 1–3, et al.
v.
Janet T. MILLS, Governor of Maine, et al.

No. 21A90
|
October 29, 2021

ON APPLICATION FOR INJUNCTIVE RELIEF

The application for injunctive relief presented to Justice BREYER and by him referred to the Court is denied.

Justice BARRETT, with whom Justice KAVANAUGH joins, concurring in the denial of application for injunctive relief.

***18** When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant " 'is likely to succeed on the merits.' " *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case. See, *e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010) (*per curiam*); cf. Supreme Court Rule 10. Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument. In my view, this discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, dissenting from the denial of application for injunctive relief.

Maine has adopted a new regulation requiring certain healthcare workers to receive COVID–19 vaccines if they wish to keep their jobs. Unlike comparable rules in most other States, Maine's rule contains no exemption for those whose sincerely held religious beliefs preclude them from accepting the vaccination. The applicants before us are a physician who operates a medical practice and eight other healthcare workers. No one questions that these individuals have served patients

on the front line of the COVID–19 pandemic with bravery and grace for 18 months now. App. to Application for Injunctive Relief, Exh. 6, ¶8 (Complaint). Yet, with Maine's new rule coming into effect, one of the applicants has already lost her job for refusing to betray her faith; another risks the imminent loss of his medical practice. The applicants ask us to enjoin further enforcement of Maine's new rule as to them, at least until we can decide whether to accept their petition for certiorari. I would grant that relief.

Start with the first question confronting any injunction or stay request—whether the applicants are likely to succeed on the merits. The First Amendment protects the exercise of sincerely held religious beliefs. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U.S. ——, —— – ——, 138 S.Ct. 1719, 1728-1730, 201 L.Ed.2d 35 (2018). Laws that single out sincerely held religious beliefs or conduct based on them for sanction are "doubtless ... unconstitutional." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). But what about other laws? Under this Court's current jurisprudence, a law may survive First Amendment scrutiny if it is generally applicable and neutral toward religion. If the law fails either of those tests, it may yet survive but the State must satisfy strict scrutiny. To do that, the State must prove its law serves a compelling interest and employs the least restrictive means available for doing so. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Smith*, 494 U.S., at 879, 110 S.Ct. 1595.

Maine does not dispute that its rule burdens the exercise of sincerely held religious beliefs. The applicants explain that receiving the COVID–19 vaccines violates their faith because of what they view as an impermissible connection between the vaccines and the cell lines of aborted fetuses. ***19** More specifically, they allege that the Johnson & Johnson vaccine required the use of abortion-related materials in its production, and that Moderna and Pfizer relied on aborted fetal cell lines to develop their vaccines. Complaint ¶¶61–68. This much, the applicants say, violates foundational principles of their religious faith. For purposes of these proceedings, Maine has contested none of this.

That takes us to the question whether Maine's rule qualifies as neutral and generally applicable. Under this Court's precedents, a law fails to qualify as generally applicable, and thus triggers strict scrutiny, if it creates a mechanism for "individualized exemptions." *Lukumi*, 508 U.S., at 537, 113 S.Ct. 2217; see also *Fulton* v. *Philadelphia*, 593 U.S. ——, —— – ——, 141 S.Ct. 1868, 1876-1877, 210 L.Ed.2d 137 (2021).

That description applies to Maine's regulation. The State's vaccine mandate is not absolute; individualized exemptions are available, but only if they invoke certain preferred (nonreligious) justifications. Under Maine law, employees can avoid the vaccine mandate if they produce a "written statement" from a doctor or other care provider indicating that immunization "may be"

medically inadvisable. Me. Rev. Stat. Ann., Tit. 22, § 802(4–B) (2021). Nothing in Maine's law requires this note to contain an explanation why vaccination may be medically inadvisable, nor does the law limit what may qualify as a valid "medical" reason to avoid inoculation. So while COVID–19 vaccines have Food and Drug Administration labels describing certain contraindications for their use, individuals in Maine may refuse a vaccine for other reasons too. From all this, it seems Maine will respect even mere *trepidation* over vaccination as sufficient, but only so long as it is phrased in medical and not religious terms. That kind of double standard is enough to trigger at least a more searching (strict scrutiny) review.

Strict scrutiny applies to Maine's vaccine mandate for another related reason. This Court has explained that a law is not neutral and generally applicable if it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 593 U.S. ——, ——, 141 S.Ct. 1294, 1296, 209 L.Ed.2d 355 (2021) (*per curiam*); see also *Fulton*, 593 U.S., at ——, 141 S.Ct., at 1877; *Lukumi*, 508 U.S., at 542–546, 113 S.Ct. 2217. And again, this description applies to Maine's rule. The State allows those invoking medical reasons to avoid the vaccine mandate on the apparent premise that these individuals can take alternative measures (such as the use of protective gear and regular testing) to safeguard their patients and co-workers. But the State refuses to allow those invoking religious reasons to do the very same thing.

Unpack this point further. Maine has offered four justifications for its vaccination mandate:

> (1) Protecting individual patients from contracting COVID–19;
>
> (2) Protecting individual healthcare workers from contracting COVID–19;
>
> (3) Protecting the State's healthcare infrastructure, including the work force, by preventing COVID–caused absences that could cripple a facility's ability to provide care; and
>
> (4) Reducing the likelihood of outbreaks within healthcare facilities caused by an infected healthcare worker bringing the virus to work. App. to Brief for Respondents, Decl. of Nirav Shah, p. 43, ¶56 (Shah Decl.).

Now consider the first, second, and fourth of these. No one questions that protecting patients and healthcare workers from contracting COVID–19 is a laudable ***20** objective. But Maine does not suggest a worker who is unvaccinated for medical reasons is less likely to spread or contract the virus than someone who is unvaccinated for religious reasons. Nor may any government blithely assume those claiming a medical exemption will be more willing to wear protective gear, submit to testing, or take other precautions than someone seeking a religious exemption. A State may not assume "the best" of individuals engaged in their secular lives while assuming "the worst" about the habits of religious persons. *Roberts v. Neace*, 958 F.3d 409, 414 (C.A.6 2020). In fact,

the applicants before us have already demonstrated a serious commitment to public health during this pandemic and expressly stated that they, no less than those seeking a medical exemption, will abide by rules concerning protective gear, testing, or the like. Complaint ¶76.

That leaves Maine's third asserted interest: protecting the State's healthcare infrastructure. According to Maine, "[a]n outbreak among healthcare workers requiring them to quarantine, or to be absent ... as a result of illness caused by COVID–19, could cripple the facility's ability to provide care." Shah Decl. 44, ¶56. But as we have already seen, Maine does not dispute that unvaccinated religious objectors and unvaccinated medical objectors are equally at risk for contracting COVID–19 or spreading it to their colleagues. Nor is it any answer to say that, if the State required vaccination for medical objectors, they might suffer side effects resulting in fewer medical staff available to treat patients. If the State refuses religious exemptions, religious workers will be fired for refusing to violate their faith, which will *also* mean fewer healthcare workers available to care for patients. Slice it how you will, medical exemptions and religious exemptions are on comparable footing when it comes to the State's asserted interests.

The Court of Appeals found Maine's rule neutral and generally applicable due to an error this Court has long warned against—restating the State's interests on its behalf, and doing so at an artificially high level of generality. According to the court below, Maine's regulation sought to "protec[t] the health and safety of all Mainers, patients, and healthcare workers alike." *Does 1–6* v. *Mills*, —— F. 4th ——, ——, 2021 WL 4860328, *6 (C.A.1, Oct. 19, 2021). But when judging whether a law treats a religious exercise the same as comparable secular activity, this Court has made plain that only the government's *actually asserted* interests as applied to the parties before it count—not *post-hoc* reimaginings of those interests expanded to some society-wide level of generality. *Fulton*, 593 U.S., at ——, 141 S.Ct., at 1877; *Tandon*, 593 U.S., at ——, 141 S.Ct., at 1296-1297; *Lukumi*, 508 U.S., at 544–545, 113 S.Ct. 2217. "At some great height, after all, almost any state action might be said to touch on '... public health and safety' ... and measuring a highly particularized and individual interest" in the exercise of a civil right " 'directly against ... these rarified values inevitably makes the individual interest appear the less significant.' " *Yellowbear v. Lampert*, 741 F.3d 48, 57 (C.A.10 2014) (quoting J. Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 330–331 (1969)). This Court's precedents "do not support such a lopsided inquiry." 741 F.3d at 57.

That takes us to the application of strict scrutiny. Strict scrutiny requires the State to show that its challenged law serves a compelling interest and represents the least restrictive means for doing so. *Lukumi*, 508 U.S., at 546, 113 S.Ct. 2217. For purposes of resolving this application, I accept that what we said 11 months ago remains true today—that "[s]temming the spread of COVID–19" qualifies as "a compelling ***21** interest." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. ——, ——, 141 S.Ct. 63, 68-69, 208 L.Ed.2d 206 (2020) (*per curiam*). At the same

time, I would acknowledge that this interest cannot qualify as such forever. Back when we decided *Roman Catholic Diocese*, there were no widely distributed vaccines. [1] Today there are three. [2] At that time, the country had comparably few treatments for those suffering with the disease. Today we have additional treatments and more appear near. [3] If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.

Assuming for present purposes that its interest is a compelling one, Maine has not shown that its rule represents the least restrictive means available to achieve it. The State says that, to meet its four stated goals above, 90% of employees at covered health facilities must be vaccinated. Shah Decl. 43, ¶54; State Respondents' Brief in Opposition 9. The State doesn't offer evidence explaining the selection of its 90% figure. But even taking it as given, Maine does not explain how denying exemptions to religious objectors is essential to its achieving that threshold statewide, let alone in the applicants' actual workplaces. Had the State consulted its own website recently, it would have discovered that, as of last month, hospitals were already reporting a vaccination rate of more than 91%, ambulatory surgical centers 92%, and all other entities roughly 85% or greater. [4] Current numbers may be even higher. What's more, healthcare providers that employ four of the nine applicants in this case already told the media more than a week ago that they have reached 95% and 94% vaccination rates among their employees. [5] Many other States have made do with a religious exemption in comparable vaccine mandates. See Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 13 (observing that the overwhelming majority ***22** of States with similar mandates provide a religious exemption). Maine's decision to deny a religious exemption in these circumstances doesn't just fail the least restrictive means test, it borders on the irrational.

Looking to the other traditional factors also suggests relief is warranted. Before granting a stay or injunctive relief, we ask not only whether a litigant is likely to prevail on the merits but also whether denying relief would lead to irreparable injury and whether granting relief would harm the public interest. *Roman Catholic Diocese*, 592 U.S., at ——— – ———, 141 S.Ct., at 69-71; see also 28 U. S. C. § 1651(a). The answer to both questions is clear. This Court has long held that " [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. " *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion). And as we have seen, Maine has so far failed to present any evidence that granting religious exemptions to the applicants would threaten its stated public health interests any more than its medical exemption already does.

This case presents an important constitutional question, a serious error, and an irreparable injury. Where many other States have adopted religious exemptions, Maine has charted a different course. There, healthcare workers who have served on the front line of a pandemic for the last 18 months are now being fired and their practices shuttered. All for adhering to their constitutionally protected religious beliefs. Their plight is worthy of our attention. I would grant relief.

All Citations

142 S.Ct. 17 (Mem), 29 Fla. L. Weekly Fed. S 29

Footnotes

1 Our opinion in *Roman Catholic Diocese* was published on November 25, 2020. COVID–19 vaccines outside of clinical trials weren't available to the public until the following month. See P. Loftus & M. West, First Covid-19 Vaccine Given to U. S. Public, Wall Street J., Dec. 14, 2020, https://www.wsj.com/articles/covid-19-vaccinations-in-the-u-s-slated-to-begin-monday-11607941806.

2 Over 200 million Americans, nearly seven in ten, have received at least one dose of these vaccines. Nearly six in ten Americans have been fully vaccinated, including about 85% of those older than 65. See CDC, COVID–19 Vaccinations in the United States, COVID Data Tracker (Oct. 28, 2021), http://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total. Among States, Maine has particularly high vaccination rates: About 70% of its population has been fully vaccinated, good for fourth-best in the Nation. See Maine Coronavirus Vaccination Progress, USA Facts (Oct. 26, 2021), https://usafacts.org/visualizations/covid-vaccine-tracker-states/state/maine.

3 C. Johnson, Merck's Experimental Pill To Treat COVID–19 Cuts Risk of Hospitalization and Death in Half, the Pharmaceutical Company Reports, Washington Post, Oct. 1, 2021, https://www.washingtonpost.com/health/2021/10/01/pill-to-treat-covid/ (noting that as of October 1, 2021, "[t]he United States moved a major step closer ... to having an easy-to-take pill to treat covid-19 available in the nation's medicine cabinet").

4 Maine Center for Disease Control and Prevention, Maine Health Care Worker COVID–19 Vaccination Dashboard (Oct. 27, 2021), https://www.maine.gov/dhhs/mecdc/infectious-disease/immunization/publications/health-care-worker-covid-vaccination-rates.shtml.

5 J. Lawlor, Maine Sees Jump in Vaccinations Among Health Care Workers as Deadline Nears, Lewiston Sun J., Oct. 14, 2021, https://www.sunjournal.com/2021/10/13/maine-reports-893-cases-of-covid-19-over-a-4-day-period (Northern Light Health reporting 95.5% vaccination rate, MaineHealth reporting a 94% rate).

110 S.Ct. 1595
Supreme Court of the United States

EMPLOYMENT DIVISION, DEPARTMENT OF
HUMAN RESOURCES OF OREGON, et al., Petitioners
v.
Alfred L. SMITH et al.

No. 88–1213.
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Argued Nov. 6, 1989.
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Decided April 17, 1990.
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Rehearing Denied June 4, 1990.
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See 496 U.S. 913, 110 S.Ct. 2605.

Synopsis

Claimants sought review of determination that their religious use of peyote, which resulted in their dismissal from employment, was "misconduct" disqualifying them from receipt of Oregon unemployment compensation benefits. In one case, the Oregon Court of Appeals, 75 Or.App. 764, 709 P.2d 246, reversed and remanded. The Oregon Supreme Court, 301 Or. 209, 721 P.2d 445,affirmed as modified. In the second case, the Oregon Court of Appeals, 75 Or.App. 735, 707 P.2d 1274, reversed. The Oregon Supreme Court, 301 Or. 221, 721 P.2d 451, affirmed as modified and remanded. Petition for writ of certiorari was granted. The Supreme Court, Justice Stevens, 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753, vacated judgment and remanded for determination whether sacramental peyote use was proscribed by state's controlled substance law. On remand, the Oregon Supreme Court, 307 Or. 68, 763 P.2d 146, held that sacramental peyote use violated state drug laws, but concluded that prohibition was nonetheless invalid under free exercise clause. The Supreme Court, Scalia, J., held that: (1) free exercise clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote, and (2) thus state could, consistent with free exercise clause, deny claimants unemployment compensation for work-related misconduct based on use of drug.

Reversed.

Justice O'Connor filed opinion concurring in judgment, in which opinion Justices Brennan, Marshall and Blackmun joined as to Parts I and II only.

Justice Blackmun filed dissenting opinion, in which Justices Brennan and Marshall join.

Opinion on remand, 310 Or. 376, 799 P.2d 148.

**1596 *Syllabus* *

872 Respondents Smith and Black were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. Their applications for unemployment compensation were denied by the State of Oregon under a state law disqualifying employees discharged for work-related "misconduct." Holding that the denials violated respondents' First Amendment free exercise rights, the State Court of Appeals reversed. The State Supreme Court affirmed, but this Court vacated the judgment and remanded for a determination whether sacramental peyote use is proscribed by the State's controlled substance law, which makes it a felony to knowingly or intentionally possess the drug. Pending that determination, the Court refused to decide whether such use is protected by the Constitution. On remand, the State Supreme Court held that sacramental peyote use violated, and was not excepted from, the state-law prohibition, but concluded that that prohibition was invalid under the Free Exercise Clause.

Held: The Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use. Pp. 1598–1606.

(a) Although a State would be "prohibiting the free exercise [of religion]" in violation of the Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. See, *e.g.*, *Reynolds v. United States,* 98 U.S. 145, 166–167, 25 L.Ed. 244. The only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action are distinguished **1597 on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutionalprotections. **873** See, *e.g.*, *Cantwell v. Connecticut,* 310 U.S. 296, 304–307, 60 S.Ct. 900, 903–905, 84 L.Ed. 1213; *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15. Pp. 1598–1602.

(b) Respondents' claim for a religious exemption from the Oregon law cannot be evaluated under the balancing test set forth in the line of cases following *Sherbert v. Verner,* 374 U.S. 398, 402–403, 83 S.Ct. 1790, 1792–1794, 10 L.Ed.2d 965, whereby governmental actions that substantially burden a religious practice must be justified by a "compelling governmental interest." That test was developed in a context—unemployment compensation eligibility rules—that lent itself to individualized governmental assessment of the reasons for the relevant conduct. The test is inapplicable to an across-the-board criminal prohibition on a particular form of conduct. A holding to the contrary would create an extraordinary right to ignore generally applicable laws that are not supported by "compelling governmental interest" on the basis of religious belief. Nor could such a right be limited to situations in which the conduct prohibited is "central" to the individual's religion, since that would enmesh judges in an impermissible inquiry into the centrality of particular beliefs or practices to a faith. Cf. *Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 2148–2149, 104 L.Ed.2d 766. Thus, although it is constitutionally permissible to exempt sacramental peyote use from the operation of drug laws, it is not constitutionally required. Pp. 1602–1606.

307 Or. 68, 763 P.2d 146, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, STEVENS, and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in Parts I and II of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined without concurring in the judgment, *post,* p. 1606. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 1615.

Attorneys and Law Firms

Dave Frohnmayer, Attorney General of Oregon, argued the cause for petitioners. With him on the briefs were *James E. Mountain, Jr.,* Deputy Attorney General, *Virginia L. Linder,* Solicitor General, and *Michael D. Reynolds,* Assistant Solicitor General.

Craig J. Dorsay argued the cause and filed briefs for respondents.*

* Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro* and *John A. Powell;* for the American Jewish Congress by *Amy Adelson, Lois C. Waldman,* and *Marc D. Stern;* for the Association on American Indian Affairs et al. by *Steven C. Moore* and *Jack Trope;* and for the Council on Religious Freedom by *Lee Boothby* and *Robert W. Nixon.*

Opinion

***874** Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. Ore.Rev.Stat. § 475.992(4) (1987). The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. §§ 811–812, as modified by the State Board of Pharmacy. Ore.Rev.Stat. § 475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." § 475.992(4)(a). As compiled by the State Board of Pharmacy under its statutory authority, see, § 475.035, Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii Lemaire.* Ore.Admin.Rule 855–80–021(3)(s) (1988).

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which ****1598** both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents' free exercise rights under the First Amendment.

***875** On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents' consumption of peyote was a crime under Oregon law. The Oregon Supreme Court reasoned, however, that the criminality of respondents' peyote use was irrelevant to resolution of their constitutional claim—since the purpose of the "misconduct" provision under which respondents had been disqualified was not to enforce the State's criminal laws but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents' religious practice. Citing our decisions in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965

(1963), and *Thomas v. Review Bd., Indiana Employment Security Div.,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the court concluded that respondents were entitled to payment of unemployment benefits. *Smith v. Employment Div., Dept. of Human Resources,* 301 Or. 209, 217–219, 721 P.2d 445, 449–450 (1986). We granted certiorari. 480 U.S. 916, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987).

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents' peyote consumption was relevant to their constitutional claim. We agreed, concluding that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 485 U.S. 660, 670, 108 S.Ct. 1444, 1450, 99 L.Ed.2d 753 (1988) (*Smith I*). We noted, however, that the Oregon Supreme Court had not decided whether respondents' sacramental use of peyote was in fact proscribed by Oregon's controlled substance law, and that this issue was a matter of dispute between the parties. Being "uncertain about the legality of the religious use of peyote in Oregon," we determined that it would not be "appropriate for us to decide whether the practice is protected by the Federal Constitution." *Id.,* at 673, 108 S.Ct., at 1452. Accordingly, we ***876** vacated the judgment of the Oregon Supreme Court and remanded for further proceedings. *Id.,* at 674, 108 S.Ct., at 1452.

On remand, the Oregon Supreme Court held that respondents' religiously inspired use of peyote fell within the prohibition of the Oregon statute, which "makes no exception for the sacramental use" of the drug. 307 Or. 68, 72–73, 763 P.2d 146, 148 (1988). It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore reaffirmed its previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice.

We again granted certiorari. 489 U.S. 1077, 109 S.Ct. 1526, 103 L.Ed.2d 832 (1989).

II

Respondents' claim for relief rests on our decisions in *Sherbert v. Verner, supra, Thomas v. Review Bd. of Indiana Employment Security Div., supra,* and *Hobbie v. Unemployment Appeals Comm'n of Florida,* 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), in which we held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I,* however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for "if Oregon

does prohibit the religious **1599 use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon," and "the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation." 485 U.S., at 672, 108 S.Ct., at 1451. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into *877 the Fourteenth Amendment, see *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof....* " U.S. Const., Amdt. 1 (emphasis added.) The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." *Sherbert v. Verner, supra,* 374 U.S., at 402, 83 S.Ct., at 1793. The government may not compel affirmation of religious belief, see *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard,* 322 U.S. 78, 86–88, 64 S.Ct. 882, 886–87, 88 L.Ed. 1148 (1944), impose special disabilities on the basis of religious views or religious status, see *McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Fowler v. Rhode Island,* 345 U.S. 67, 69, 73 S.Ct. 526, 527, 97 L.Ed. 828 (1953); cf. *Larson v. Valente,* 456 U.S. 228, 245, 102 S.Ct. 1673, 1683–84, 72 L.Ed.2d 33 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, see *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 445 452, 89 S.Ct. 601, 604–608, 21 L.Ed.2d 658 (1969); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 95–119, 73 S.Ct. 143, 143–56, 97 L.Ed. 120 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 708–725, 96 S.Ct. 2372, 2380–2388, 49 L.Ed.2d 151 (1976).

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting

of "statues that are to be used ***878** for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom ... of the press" of ****1600** those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. Compare *Citizen Publishing Co. v. United States,* 394 U.S. 131, 139, 89 S.Ct. 927, 931–32, 22 L.Ed.2d 148 (1969) (upholding application of antitrust laws to press), with *Grosjean v. American Press Co.,* 297 U.S. 233, 250–251, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level); see generally *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 581, 103 S.Ct. 1365, 1369–70, 75 L.Ed.2d 295 (1983).

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs ***879** excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis,* 310 U.S. 586, 594–595, 60 S.Ct. 1010, 1012–1013, 84 L.Ed. 1375 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1878), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.... Can

a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.,* at 166–167.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *United States v. Lee,* 455 U.S. 252, 263, n. 3, 102 S.Ct. 1051, 1058, n. 3, 71 L.Ed.2d 127 (1982) (STEVENS, J., concurring in judgment); see *Minersville School Dist. Bd. of Ed. v. Gobitis, supra,* 310 U.S., at 595, 60 S.Ct., at 1013 (collecting cases). In *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), we held that a mother could be prosecuted under the child labor laws ***880** for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." *Id.,* at 171, 64 S.Ct., at 444. In *Braunfeld v. Brown,* 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States,* 401 U.S. 437, 461, 91 S.Ct. 828, 842, 28 L.Ed.2d 168 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

****1601** Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States v. Lee,* 455 U.S., at 258–261, 102 S.Ct., at 1055–1057. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.,* at 260, 102 S.Ct., at 1056–57. Cf. *Hernandez v. Commissioner,* 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

***881** The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free

Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut,* 310 U.S., at 304–307, 60 S.Ct., at 903–905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). [1] ***882** Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating ****1602** compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. *Cf. Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 3251–52, 82 L.Ed.2d 462 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." *Gillette v. United States, supra,* 401 U.S., at 461, 91 S.Ct., at 842.

B

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a ***883** religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. See *id.,* at 402–403, 83 S.Ct., at 1792–1794; see also *Hernandez v. Commissioner,* 490 U.S., at 699, 109 S.Ct., at 2148. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. See *Sherbert v. Verner, supra; Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida,* 480 U.S. 136, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987). We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied, see *United States v. Lee,* 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982); *Gillette v. United States,* 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. In *Bowen v. Roy,* 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. See 476 U.S., at 699–701, 106 S.Ct., at 2151–53. In *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities ****1603** "could have devastating effects on traditional Indian religious practices," 485 U.S., at 451, 108 S.Ct., at 1326. ***884** In *Goldman v. Weinberger,* 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), we sustained, without mentioning the *Sherbert* test, a prison's refusal to excuse inmates from work requirements to attend worship services.

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality

of the Court noted in *Roy,* a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen v. Roy, supra,* 476 U.S., at 708, 106 S.Ct., at 2156 (opinion of Burger, C.J., joined by Powell and REHNQUIST, JJ.). See also *Sherbert, supra,* 374 U.S., at 401, n. 4, 83 S.Ct., at 1792, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy,* our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Bowen v. Roy, supra,* 476 U.S., at 708, 106 S.Ct., at 2156–57.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, see *United States v.* ***885** *Lee, supra,* 455 U.S., at 257–260, 102 S.Ct., at 1055–1057; *Gillette v. United States, supra,* 401 U.S., at 462, 91 S.Ct., at 842–43, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng, supra,* 485 U.S., at 451, 108 S.Ct., at 1326. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds v. United States,* 98 U.S., at 167—contradicts both constitutional tradition and common sense. [2]

****1604** The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, see, *e.g.,* ***886** *Palmore v. Sidoti,* 466 U.S. 429, 432, 104 S.Ct. 1879, 1881–82, 80 L.Ed.2d 421 (1984), or before the government may regulate the content of speech, see, *e.g.,* *Sable Communications of California v. FCC,* 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989), is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly. [3]

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. Cf. *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S., at 474–476, 108 S.Ct., at 1338–1339 (BRENNAN, J., dissenting). It is no ***887** more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." *United States v. Lee,* 455 U.S., at 263 n. 2, 102 S.Ct., at 1058 n. 2 (STEVENS, J., concurring). As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner,* 490 U.S., at 699, 109 S.Ct., at 2148. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. See, *e.g., Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S., at 716, 101 S.Ct., at 1431; *Presbyterian Church in U.S. v. Mary Elizabeth* ****1605** *Blue Hull Memorial Presbyterian Church,* 393 U.S., at 450, 89 S.Ct., at 606–07; *Jones v. Wolf,* 443 U.S. 595, 602–606, 99 S.Ct. 3020, 3024–3027, 61 L.Ed.2d 775 (1979); *United States v. Ballard,* 322 U.S. 78, 85–87, 64 S.Ct. 882, 885–87, 88 L.Ed. 1148 (1944).[4]

***888** If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown,* 366 U.S., at 606, 81 S.Ct., at 1147, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from ***889** compulsory military service, see, *e.g., Gillette v. United States,* 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), to the payment of taxes, see, *e.g., United States v. Lee, supra;* to health and safety regulation such as manslaughter and child neglect laws, see, *e.g., Funkhouser v. State,* 763 P.2d 695 (Okla.Crim.App.1988), compulsory vaccination laws, see, *e.g., Cude v.*

State, 237 Ark. 927, 377 S.W.2d 816 (1964), drug laws, see, *e.g.,* *Olsen v. Drug Enforcement Administration,* 279 U.S.App.D.C. 1, 878 F.2d 1458 (1989), and traffic laws, see *Cox v. New Hampshire,* 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); to social welfare legislation such as minimum wage laws, see *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985), child labor laws, see *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), animal cruelty laws, see, *e.g.,* *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah,* 723 F.Supp. 1467 (SD Fla.1989), cf. *State v. Massey,* 229 N.C. 734, 51 S.E.2d 179, appeal dism'd, 336 U.S. 942, 69 S.Ct. 813, 93 L.Ed. 1099 (1949), environmental protection laws, ****1606** see *United States v. Little,* 638 F.Supp. 337 (Mont.1986), and laws providing for equality of opportunity for the races, see, *e.g.,* *Bob Jones University v. United States,* 461 U.S. 574, 603–604, 103 S.Ct. 2017, 2034–2035, 76 L.Ed.2d 157 (1983). The First Amendment's protection of religious liberty does not require this. [5]

***890** Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. See, *e.g.,* Ariz.Rev.Stat.Ann. §§ 13–3402(B)(1)–(3) (1989); Colo.Rev.Stat. § 12–22–317(3) (1985); N.M.Stat.Ann. § 30–31–6(D) (Supp.1989). But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

* * *

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed.

It is so ordered.

***891** Justice O'CONNOR, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join as to Parts I and II, concurring in the judgment. [*]

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.

I

At the outset, I note that I agree with the Court's implicit determination that the constitutional ****1607** question upon which we granted review—whether the Free Exercise Clause protects a person's religiously motivated use of peyote from the reach of a State's general criminal law prohibition—is properly presented in this case. As the Court recounts, respondents Alfred Smith and Galen Black (hereinafter respondents) were denied unemployment compensation benefits because their sacramental use of peyote constituted work-related "misconduct," not because they violated Oregon's general criminal prohibition against possession of peyote. We held, however, in *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988) (*Smith I*), that whether a State may, consistent with federal law, deny unemployment compensation benefits to persons for their religious use of peyote depends on whether the State, as a matter of state law, has criminalized the underlying conduct. See *id.,* at 670–672, 108 S.Ct., at 1450–51. The Oregon Supreme Court, on remand from this Court, concluded that "the Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote." 307 Or. 68, 72–73, 763 P.2d 146, 148 (1988) (footnote omitted).

***892** Respondents contend that, because the Oregon Supreme Court declined to decide whether the Oregon Constitution prohibits criminal prosecution for the religious use of peyote, see *id.,* at 73, n. 3, 763 P.2d, at 148, n. 3, any ruling on the federal constitutional question would be premature. Respondents are of course correct that the Oregon Supreme Court may eventually decide that the Oregon Constitution requires the State to provide an exemption from its general criminal prohibition for the religious use of peyote. Such a decision would then reopen the question whether a State may nevertheless deny unemployment compensation benefits to claimants who are discharged for engaging in such conduct. As the case comes to us today, however, the Oregon Supreme Court has plainly ruled that Oregon's prohibition against possession of controlled substances does not contain an exemption for the religious use of peyote. In light of our decision in *Smith I,* which makes this finding a "necessary predicate to a correct evaluation of respondents'

federal claim," 485 U.S., at 672, 108 S.Ct., at 1451, the question presented and addressed is properly before the Court.

II

The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion ... is ... merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Ante,* at 1600 (citations omitted). Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. *Ante,* at 1603. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

***893** A

The Free Exercise Clause of the First Amendment commands that "Congress shall make no law ... prohibiting the free exercise [of religion]." In *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), we held that this prohibition applies to the States by incorporation into the Fourteenth Amendment and that it categorically forbids government regulation of religious beliefs. *Id.,* at 303, 60 S.Ct., at 903. As the Court recognizes, however, the "free *exercise* " of religion often, if not invariably, requires the performance of (or abstention from) certain acts. *Ante,* at 1599; cf. 3 A New English Dictionary on Historical Principles 401–402 (J. Murray ed. 1897) (defining "exercise" to include "[t]he practice and performance of rites and ceremonies, worship, ****1608** etc.; the right or permission to celebrate the observances (of a religion)" and religious observances such as acts of public and private worship, preaching, and prophesying). "[B]elief and action cannot be neatly confined in logic-tight compartments." *Wisconsin v. Yoder,* 406 U.S. 205, 220, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.

The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. *Ante,* at 1599. But a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion

regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits ***894** religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are "one large step" removed from laws aimed at specific religious practices. *Ibid.* The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, " '[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides.' " *Hobbie v. Unemployment Appeals Comm'n of Florida,* 480 U.S. 136, 141–142, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987) (quoting *Bowen v. Roy,* 476 U.S. 693, 727, 106 S.Ct. 2147, 2166–67, 90 L.Ed.2d 735 (1986) (O'CONNOR, J., concurring in part and dissenting in part)).

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. See, *e.g.,* *Cantwell, supra,* 310 U.S., at 304, 60 S.Ct., at 903–04; *Reynolds v. United States,* 98 U.S. 145, 161–167, 25 L.Ed. 244 (1878). Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. See ***895** *Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 2148, 104 L.Ed.2d 766 1989); *Hobbie, supra,* 480 U.S., at 141, 107 S.Ct., at 1049; *United States v. Lee,* 455 U.S. 252, 257–258 (1982); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981); *McDaniel v. Paty,* 435 U.S. 618, 626–629, 98 S.Ct. 1322, 1327–1329, 55 L.Ed.2d 593 (1978) (plurality opinion); *Yoder, supra,* 406 U.S., at 215, 92 S.Ct., at 1533; *Gillette v. United States,* 401 U.S. 437, 462, 91 S.Ct. 828, 842, 28 L.Ed.2d 168 (1971); *Sherbert v. Verner,* 374 U.S. 398, 403, 83 S.Ct. 1790, 1793–94, 10 L.Ed.2d 965 (1963); see also ****1609** *Bowen v. Roy, supra,* 476 U.S., at 732, 106 S.Ct., at 2169 (opinion concurring in part and dissenting in part); *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628 (1943). The compelling interest test effectuates the First Amendment's

command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order," *Yoder, supra,* 406 U.S., at 215, 92 S.Ct., at 1533. "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Roy, supra,* 476 U.S., at 728, 106 S.Ct., at 2167 (opinion concurring in part and dissenting in part).

The Court attempts to support its narrow reading of the Clause by claiming that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Ante,* at 1600. But as the Court later notes, as it must, in cases such as *Cantwell* and *Yoder* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. See *Cantwell,* 310 U.S., at 304–307, 60 S.Ct., at 903–905; *Yoder,* 406 U.S., at 214–234, 92 S.Ct., at 1532–1542. Indeed, in *Yoder* we expressly rejected the interpretation the Court now adopts:

> "[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject ***896** to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*....
>
> "... A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Id.,* at 219–220, 92 S.Ct., at 1535–36 (emphasis added; citations omitted).

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, *ante,* at 1607, but there is no denying that both cases expressly relied on the Free Exercise Clause, see *Cantwell,* 310 U.S., at 303–307, 60 S.Ct., at 903–905; *Yoder, supra,* 406 U.S., at 219–229, 92 S.Ct., at 1535–1540, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, *ante,* at 1600–1601, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. See *Prince v. Massachusetts,* 321 U.S. 158, 168–170, 64 S.Ct. 438, 443–444, 88 L.Ed. 645 (1944) (state interest in regulating children's activities justifies denial of religious exemption from child labor laws); *Braunfeld v. Brown,* 366 U.S. 599, 608–609, 81 S.Ct. 1144, 1148–1149, 6 L.Ed.2d

563 (1961) (plurality opinion) (state interest in uniform day of rest justifies denial of religious exemption from Sunday closing law); *Gillette, supra,* 401 U.S., at 462, 91 S.Ct., at 842–43 (state interest in military affairs justifies denial of religious exemption from conscription laws); *Lee, supra,* 455 U.S., at 258–259, 102 S.Ct., at 1055–1056 (state interest in comprehensive Social Security system justifies denial of religious exemption from mandatory participation requirement). That we rejected the free exercise ***897** claims in those cases hardly ****1610** calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

B

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court's rejection of that argument, *ante,* at 1602, might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions. *Ante,* at 1603.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As we explained in *Thomas:*

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." 450 U.S., at 717–718, 101 S.Ct., at 1432.

***898** See also *Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 832, 109 S.Ct. 1514, 1516–1517, 103 L.Ed.2d 914 (1989); *Hobbie,* 480 U.S., at 141, 107 S.Ct., at 1049. A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." *Braunfeld, supra,* 366

U.S., at 605, 81 S.Ct., at 1147. I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases. See, *e.g.*, *Lee,* 455 U.S., at 257–260, 102 S.Ct., at 1055–1057 (applying *Sherbert* to uphold Social Security tax liability); *Gillette,* 401 U.S., at 462, 91 S.Ct., at 842–43 (applying *Sherbert* to uphold military conscription requirement); *Yoder,* 406 U.S., at 215–234, 92 S.Ct., at 1533–1538 (applying *Sherbert* to strike down criminal convictions for violation of compulsory school attendance law). As I noted in *Bowen v. Roy* :

> "The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution....
>
> "... The fact that appellees seek exemption from a precondition that the Government attaches to an award of benefits does not, therefore, generate a meaningful distinction between this case and one where appellees seek an exemption from the Government's imposition of penalties upon them." 476 U.S., at 731–732, 106 S.Ct., at 2168–2169 (opinion concurring in part and dissenting in part).

****1611** See also *Hobbie, supra,* 480 U.S., at 141–142, 107 S.Ct., at 1049–1050; *Sherbert,* 374 U.S., at 404, 83 S.Ct., at 1794. I would reaffirm that principle today: A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil ***899** statute placing legitimate conditions on the award of a state benefit.

Legislatures, of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." *Reynolds,* 98 U.S., at 164; see also *Yoder, supra*, at 219–220, 92 S.Ct., at 1535–1536; *Braunfeld,* 366 U.S., at 603–604, 81 S.Ct., at 1145–1146. Yet because of the close relationship between conduct and religious belief, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell,* 310 U.S., at 304, 60 S.Ct., at 903. Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," *Lee, supra,* 455 U.S., at 257–258, 102 S.Ct., at 1055, or represents "the least restrictive means of achieving some compelling state interest," *Thomas, supra,* 450 U.S., at 718, 101 S.Ct., at 1432. See, *e.g.*, *Braunfeld, supra,* 366 U.S. at 607, 81 S.Ct., at 1148; *Sherbert, supra,* 374 U.S., at 406, 83 S.Ct., at 1795; *Yoder,*

supra, 406 U.S., at 214–215, 92 S.Ct., at 1532–1533; *Roy,* 476 U.S., at 728–732, 106 S.Ct., at 2167–2169 (opinion concurring in part and dissenting in part). To me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. Cf. *McDaniel,* 435 U.S., at 628, n. 8, 98 S.Ct., at 1328, n. 8 (plurality opinion) (noting application of *Sherbert* to general criminal prohibitions and the "delicate balancing required by our decisions in" *Sherbert* and *Yoder*). Given the range of conduct that a State might legitimately make ***900** criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Moreover, we have not "rejected" or "declined to apply" the compelling interest test in our recent cases. *Ante,* at 1602–1603. Recent cases have instead affirmed that test as a fundamental part of our First Amendment doctrine. See, *e.g., Hernandez,* 490 U.S., at 699, 109 S.Ct., at 2148–2149; *Hobbie, supra,* 480 U.S., at 141–142, 107 S.Ct., at 1049–1050 (rejecting Chief Justice Burger's suggestion in *Roy, supra,* 476 U.S., at 707–708, 106 S.Ct., at 2156–2157, that free exercise claims be assessed under a less rigorous "reasonable means" standard). The cases cited by the Court signal no retreat from our consistent adherence to the compelling interest test. In both *Bowen v. Roy, supra,* and *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development.... The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy, supra,* 476 U.S., at 699, 106 S.Ct., at 2152; see *Lyng, supra,* 485 U.S., at 449, 108 S.Ct., at 1325. This distinction makes sense because "the Free Exercise Clause is written in ****1612** terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert, supra,* 374 U.S., at 412, 83 S.Ct., at 1798 (Douglas, J., concurring). Because the case *sub judice,* like the other cases in which we have applied *Sherbert,* plainly falls into the former category, I would apply those established precedents to the facts of this case.

Similarly, the other cases cited by the Court for the proposition that we have rejected application of the *Sherbert* test outside the unemployment compensation field, *ante,* at 1603, are distinguishable because they arose in the narrow, specialized contexts in which we have not traditionally required

***901** the government to justify a burden on religious conduct by articulating a compelling interest. See *Goldman v. Weinberger,* 475 U.S. 503, 507, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349, 107 S.Ct. 2400, 2404, 96 L.Ed.2d 282 (1987) ("[P]rison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights") (citation omitted). That we did not apply the compelling interest test in these cases says nothing about whether the test should continue to apply in paradigm free exercise cases such as the one presented here.

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," *ante,* at 1604, the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor [m]," not an "anomaly." *Ibid.* Nor would application of our established free exercise doctrine to this case necessarily be incompatible with our equal protection cases. Cf. *Rogers v. Lodge,* 458 U.S. 613, 618, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) (race-neutral law that " 'bears more heavily on one race than another' " may violate equal protection) (citation omitted); *Castaneda v. Partida,* 430 U.S. 482, 492–495, 97 S.Ct. 1272, 1278–1281, 51 L.Ed.2d 498 (1977) (grand jury selection). We have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. See *Hobbie,* 480 U.S., at 141–142, 107 S.Ct., at 1049. As the language of the ***902** Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. See, *e.g.,* McConnell, Accommodation of Religion, 1985 S.Ct.Rev. 1, 9 ("[T]he text of the First Amendment itself 'singles out' religion for special protections"); P. Kauper, Religion and the Constitution 17 (1964). A law that makes criminal such an activity therefore triggers constitutional concern—and heightened judicial scrutiny—even if it does not target the particular religious conduct at issue. Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach. See, *e.g., United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46–47, 106 S.Ct. 925, 928–929, 89 L.Ed.2d 29 (1986); cf. *Anderson v. Celebrezze,* 460 U.S. 780, 792–794, 103 S.Ct. 1564, 1571–1573, 75 L.Ed.2d 547 (1983) (generally applicable laws may impinge on free association concerns). The Court's parade of horribles, *ante,* at 1605–1606, not only fails as a reason for discarding the compelling interest ****1613** test, it instead demonstrates just the

opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government and that accommodation of such religions must be left to the political process. *Ante,* at 1606. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish. Indeed, the words of Justice Jackson in *West Virginia State Bd. of Ed. v. Barnette* (overruling *Minersville School Dist. v. Gobitis,* 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)) are apt:

> ***903** "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U.S., at 638, 63 S.Ct., at 1185.

See also *United States v. Ballard,* 322 U.S. 78, 87, 64 S.Ct. 882, 886–87, 88 L.Ed. 1148 (1944) ("The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views"). The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury," *ante,* at 1605, is to denigrate "[t]he very purpose of a Bill of Rights."

III

The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.

A

There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. See O. Stewart, Peyote Religion: A History 327–336 (1987) (describing modern status of peyotism); E. Anderson, Peyote: The Divine Cactus 41–65 (1980) (describing peyote ceremonies); Teachings from ***904** the American Earth: Indian Religion and Philosophy 96–104 (D. Tedlock & B. Tedlock eds. 1975) (same); see also *People v. Woody,* 61 Cal.2d 716, 721–722, 40 Cal.Rptr. 69, 73–74, 394 P.2d 813, 817–818 (1964). As we noted in *Smith I,* the Oregon Supreme Court concluded that "the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held." 485 U.S., at 667, 108 S.Ct., at 1449. Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is, in my view, more than sufficient to trigger First Amendment scrutiny.

There is also no dispute that Oregon has a significant interest in enforcing laws that ****1614** control the possession and use of controlled substances by its citizens. See, *e.g., Sherbert,* 374 U.S., at 403, 83 S.Ct., at 1793–94 (religiously motivated conduct may be regulated where such conduct "pose[s] some substantial threat to public safety, peace or order"); *Yoder,* 406 U.S., at 220, 92 S.Ct., at 1535 ("[A]ctivities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare"). As we recently noted, drug abuse is "one of the greatest problems affecting the health and welfare of our population" and thus "one of the most serious problems confronting our society today." *Treasury Employees v. Von Raab,* 489 U.S. 656, 668, 674, 109 S.Ct. 1384, 1395, 103 L.Ed.2d 685 (1989). Indeed, under federal law (incorporated by Oregon law in relevant part, see Ore.Rev.Stat. § 475.005(6) (1987)), peyote is specifically regulated as a Schedule I controlled substance, which means that Congress has found that it has a high potential for abuse, that there is no currently accepted medical use, and that there is a lack of accepted safety for use of the drug under medical supervision. See 21 U.S.C. § 812(b)(1). See generally R. Julien, A Primer of Drug Action 149 (3d ed. 1981). In light of our recent decisions holding that the governmental ***905** interests in the collection of income tax, *Hernandez,* 490 U.S., at 699–700, 109 S.Ct., at 2148–2149, a comprehensive Social Security system, see *Lee,* 455 U.S., at 258–259, 102 S.Ct., at 1055–1056, and military conscription, see *Gillette,* 401 U.S., at 460, 91 S.Ct., at 841, are compelling, respondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.

B

Thus, the critical question in this case is whether exempting respondents from the State's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest." *Lee, supra,* 455 U.S. at 259, 102 S.Ct., at 1056; see also *Roy,* 476 U.S., at 727, 106 S.Ct., at 2166 ("[T]he Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means"); *Yoder, supra,* 406 U.S., at 221, 92 S.Ct., at 1536; *Braunfeld,* 366 U.S., at 605–607, 81 S.Ct., at 1146–1148. Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish," *Lee, supra,* at 455 U.S., at 257, 102 S.Ct., at 1055, its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Cf. *State v. Massey,* 229 N.C. 734, 51 S.E.2d 179 (denying religious exemption to municipal ordinance prohibiting handling of poisonous reptiles), appeal dism'd *sub nom. Bunn v. North Carolina,* 336 U.S. 942, 69 S.Ct. 813, 93 L.Ed. 1099 (1949). Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote. Cf. *Jacobson v.* ***906** *Massachusetts,* 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (denying exemption from small pox vaccination requirement).

For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct. See, *e.g., Thomas,* 450 U.S., at 719, 101 S.Ct., at 1432–33. Unlike in *Yoder,* where we noted that "[t]he record strongly indicates that accommodating the ****1615** religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society," 406 U.S., at 234, 92 S.Ct., at 1542; see also *id.,* at 238–240, 92 S.Ct., at 1544–1545 (WHITE, J., concurring), a religious exemption in this case would be incompatible with the State's interest in controlling use and possession of illegal drugs.

Respondents contend that any incompatibility is belied by the fact that the Federal Government and several States provide exemptions for the religious use of peyote, see 21 CFR § 1307.31 (1989); 307 Or., at 73, n. 2, 763 P.2d, at 148, n. 2 (citing 11 state statutes that expressly exempt sacramental peyote use from criminal proscription). But other governments may surely choose to grant an exemption without Oregon, with its specific asserted interest in uniform application of

its drug laws, being *required* to do so by the First Amendment. Respondents also note that the sacramental use of peyote is central to the tenets of the Native American Church, but I agree with the Court, *ante,* at 1604, that because " '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith,' " quoting *Hernandez, supra,* at 699, 109 S.Ct., at 2148, our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular ***907** religious practice at issue. This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine, see *Ballard,* 322 U.S., at 85–88, 64 S.Ct., at 885–87, and one that courts are capable of making. See *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 303–305, 105 S.Ct.1953, 1962–1963, 85 L.Ed.2d 278 (1985).

I would therefore adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct "will unduly interfere with fulfillment of the governmental interest." *Lee, supra,* 455 U.S., at 259, 102 S.Ct., at 1056. Accordingly, I concur in the judgment of the Court.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means. [1]

****1616** ***908** Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." *Ante,* at 1604. As carefully detailed in Justice O'CONNOR's concurring opinion, *ante,* p. 1606, the majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading free exercise cases such as *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), as "hybrid." *Ante,* at 1602. The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions (as opposed to conditions on the receipt of benefits), and to state laws of general applicability (as opposed, presumably, to laws that expressly single out religious practices). *Ante,* at 1603–1604. The Court cites cases in which, due to various

exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. *Ante,* at 1602–1603. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.

This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society ***909** cannot afford, *ante,* at 1605, and that the repression of minority religions is an "unavoidable consequence of democratic government." *Ante,* at 1606. I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty—and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

For these reasons, I agree with Justice O'CONNOR's analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion.[2] As she points out, "the critical question in this case is whether exempting respondents from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.' " *Ante,* at 1614, quoting *United States v. Lee,* 455 U.S. 252, 259, 102 S.Ct. 1051, 1056, 71 L.Ed.2d 127 (1982). I do disagree, however, with her specific answer to that question.

I

In weighing the clear interest of respondents Smith and Black (hereinafter respondents) in the free exercise of their religion ****1617** against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State's broad interest ***910** in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. See *Bowen v. Roy,* 476 U.S. 693, 728, 106 S.Ct. 2147, 2167, 90 L.Ed.2d 735 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector 'is essential to accomplish an overriding governmental interest,' " quoting *Lee,* 455 U.S., at 257–258, 102 S.Ct., at 1055); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 719, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981) ("focus of the inquiry" concerning State's asserted interest must be "properly narrowed"); *Yoder,* 406 U.S., at 221, 92 S.Ct., at 1536 ("Where fundamental claims of religious freedom are at stake," the Court will not accept a State's "sweeping claim" that its interest in compulsory education is compelling; despite the validity of this interest "in the generality of cases, we must searchingly examine the interests that the State

seeks to promote ... and the impediment to those objectives that would flow from recognizing the claimed Amish exemption"). Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor. See Clark, Guidelines for the Free Exercise Clause, 83 Harv.L.Rev. 327, 330–331 (1969) ("The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant"); Pound, A Survey of Social Interests, 57 Harv.L.Rev. 1, 2 (1943) ("When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane ... [or else] we may decide the question in advance in our very way of putting it").

The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, ***911** cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote.[3] The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs," *Treasury Employees v. Von Raab,* 489 U.S. 656, 687, 109 S.Ct. 1384, 1402, 103 L.Ed.2d 685 (1989) (SCALIA, J., dissenting), cannot suffice to abrogate the constitutional rights of individuals.

Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. See *Thomas,* 450 U.S., at 719, 101 S.Ct., at 1432 (rejecting State's reasons for refusing religious exemption, for lack of "evidence in the record"); *Yoder,* 406 U.S., at 224–229, 92 S.Ct., at 1537–38 (rejecting State's argument concerning the dangers of a religious exemption as speculative, and unsupported by the record); *Sherbert v. Verner,* 374 U.S. 398, 407, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963) ****1618** ("[T]here is no proof whatever to warrant such fears ... as those which the [State] now advance[s]"). In this case, the State's justification for refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative.

The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote ***912** has ever harmed anyone.[4] The factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful. See *State v. Whittingham,* 19 Ariz.App. 27, 30, 504 P.2d 950, 953 (1973) ("[T]he State failed to prove that the quantities of peyote used in the sacraments of the

Native American Church are sufficiently harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State's police power"); *People v. Woody,* 61 Cal.2d 716, 722–723, 40 Cal.Rptr. 69, 74, 394 P.2d 813, 818 (1964) ("[A]s the Attorney General ... admits, ... the opinion of scientists and other experts is 'that peyote ... works no permanent deleterious injury to the Indian' ").

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use.[5] Moreover, ***913** other Schedule I drugs have lawful uses. See *Olsen v. Drug Enforcement Admin.,* 279 U.S.App.D.C. 1, 6, n. 4, 878 F.2d 1458, 1463, n. 4 (medical and research uses of marijuana).

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs.[6] The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns. See *Olsen, id.,* at 10, 878 F.2d, at 1467 (" 'The Administrator [of the Drug Enforcement Administration ****1619** (DEA)] finds that ... the Native American Church's use of peyote is isolated to specific ceremonial occasions,' " and so " 'an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies' " (quoting DEA Final Order)); *id.,* at 7, 878 F.2d, at 1464 ("[F]or members of the Native American Church, use of peyote outside the ritual is sacrilegious"); *Woody,* 61 Cal.2d, at 721, 394 P.2d, at 817 ("[T]o use peyote for nonreligious purposes is sacrilegious"); R. Julien, A Primer of Drug Action 148 (3d ed. 1981) ("[P]eyote is seldom abused by members of the Native American ***914** Church"); Slotkin, The Peyote Way, in Teachings from the American Earth 96, 104 (D. Tedlock & B. Tedlock eds. 1975) ("[T]he Native American Church ... refuses to permit the presence of curiosity seekers at its rites, and vigorously opposes the sale or use of Peyote for non-sacramental purposes"); Bergman, Navajo Peyote Use: Its Apparent Safety, 128 Am.J. Psychiatry 695 (1971) (Bergman).[7]

Moreover, just as in *Yoder,* the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws. See *Yoder,* 406 U.S., at 224, 228–229, 92 S.Ct., at 1540 (since the Amish accept formal schooling up to 8th grade, and then provide "ideal" vocational education, State's interest in enforcing its law against the Amish is "less substantial than ... for children generally"); *id.,* at 238, 92 S.Ct., at 1544 (WHITE, J., concurring). Not only does the church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from

alcohol. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 33–34 (the church's "ethical code" has four parts: brotherly love, care of family, self-reliance, and avoidance of alcohol (quoting from the church membership card)); *Olsen,* 279 U.S.App.D.C., at 7, 878 F.2d, at 1464 (the Native American Church, "for all purposes other than the special, stylized ceremony, reinforced the state's prohibition"); *915* *Woody,* 61 Cal.2d, at 721–722, n. 3, 394 P.2d, at 818, n. 3 ("[M]ost anthropological authorities hold Peyotism to be a positive, rather than negative, force in the lives of its adherents ... the church forbids the use of alcohol ..."). There is considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population. Two noted experts on peyotism, Dr. Omer C. Stewart and Dr. Robert Bergman, testified by affidavit to this effect on behalf of respondent Smith before the Employment Appeal Board. Smith Tr., Exh. 7; see also E. Anderson, Peyote: The Divine Cactus 165–166 (1980) (research by Dr. Bergman suggests "that the religious use of peyote seemed to be directed in an ego-strengthening direction with an emphasis on interpersonal relationships where each individual is assured of his own significance as well as the support of the group"; many people have " 'come through difficult crises with the help of this religion.... It provides real help in seeing themselves not as people whose place and way in the world is gone, but as people whose way can be strong enough to change and meet new challenges' " (quoting Bergman 698)); Pascarosa & Futterman, Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church, 8 J. of Psychedelic Drugs, No. 3, p. 215 (1976) (religious peyote use has been helpful in overcoming alcoholism); Albaugh & Anderson, Peyote in the Treatment of Alcoholism among American Indians, 131 Am.J. Psychiatry 1247, 1249 (1974) ("[T]he ****1620** philosophy, teachings, and format of the [Native American Church] can be of great benefit to the Indian alcoholic"); see generally O. Stewart, Peyote Religion 75 *et seq.* (1987) (noting frequent observations, across many tribes and periods in history, of correlation between peyotist religion and abstinence from alcohol). Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual ***916** code exemplifies values that Oregon's drug laws are presumably intended to foster.

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. See *Olsen,* 279 U.S.App.D.C., at 6, 7, 878 F.2d, at 1463, 1467 (quoting DEA Final Order to the effect that total amount of peyote seized and analyzed by federal authorities between 1980 and 1987 was 19.4 pounds; in contrast, total amount of marijuana seized during that period was over 15 million pounds). Also, the availability of peyote for religious use, even if Oregon were to allow an exemption from its criminal laws, would still be strictly controlled by federal regulations, see 21 U.S.C. §§ 821–823 (registration requirements for distribution of controlled substances); 21 CFR § 1307.31 (1989) (distribution of peyote to Native American Church subject to registration requirements), and by the State of Texas, the only State in which peyote grows in significant quantities. See Texas Health & Safety Code Ann. § 481.111 (1990 pamphlet); Texas

Admin.Code, Tit. 37, pt. 1, ch. 13, Controlled Substances Regulations, §§ 13.35–13.41 (1989); *Woody,* 61 Cal.2d, at 720, 394 P.2d, at 816 (peyote is "found in the Rio Grande Valley of Texas and northern Mexico"). Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risking a violation of the Establishment Clause by arbitrarily limiting its religious exemptions. This ***917** argument, however, could be made in almost any free exercise case. See Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv.L.Rev. 933, 947 (1989) ("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe"). This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well. See *Frazee v. Illinois Dept. of Employment Security,* 489 U.S. 829, 835, 109 S.Ct. 1514, 1518, 103 L.Ed.2d 914 (1989) (rejecting State's speculation concerning cumulative effect of many similar claims); *Thomas,* 450 U.S., at 719, 101 S.Ct., at 1432 (same); *Sherbert,* 374 U.S., at 407, 83 S.Ct., at 1795.

The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions.[8] Allowing an exemption for religious ****1621** peyote use ***918** would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. See, *e.g., Olsen,* 279 U.S.App.D.C., at 7, 878 F.2d, at 1464 ("[T]he Ethiopian Zion Coptic Church ... teaches that marijuana is properly smoked 'continually all day' "). Some religious claims, see n. 8, *supra,* involve drugs such as marijuana and heroin, in which there is significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts.[9] That the State might grant an exemption for religious peyote use, but deny other religious claims arising in different circumstances, would not violate the Establishment Clause. Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" *test* to all free exercise claims, not by reaching

uniform *results* as to all claims. A showing that religious peyote use does not unduly interfere with the State's interests is "one that probably few other religious groups or sects could make," *Yoder,* 406 U.S., at 236, 92 S.Ct., at 1543; this does not mean that an exemption limited to peyote use is tantamount to an establishment of religion. See *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 144–145, 107 S.Ct. 1046, 1051, 94 L.Ed.2d 190 (1987) ("[T]he government may (and ***919** sometimes must) accommodate religious practices and ... may do so without violating the Establishment Clause"); *Yoder,* 406 U.S., at 220–221, 92 S.Ct., at 1536 ("Court must not ignore the danger that an exception from a general [law] ... may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise"); *id.,* at 234, n. 22, 92 S.Ct., at 1542, n. 22.

II

Finally, although I agree with Justice O'CONNOR that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is "central" to the religion, *ante,* at 1614, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion. Cf. *Yoder,* 406 U.S., at 219, 92 S.Ct., at 1535 (since "education is inseparable from and a part of the basic tenets of their religion ... [, just as] baptism, ****1622** the confessional, or a sabbath may be for others," enforcement of State's compulsory education law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs").

Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 5–6 ("To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit"). See also O. Stewart, Peyote Religion 327–330 (1987) (description of peyote ritual); ***920** T. Hillerman, People of Darkness 153 (1980) (description of Navajo peyote ritual).

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be "forced to migrate to some other and more tolerant region." *Yoder,* 406 U.S., at 218, 92 S.Ct., at 1534–1535. This potentially devastating impact must be viewed in light of the federal policy — reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans. See American Indian Religious Freedom Act, 92 Stat. 469,

42 U.S.C. § 1996 (1982 ed.) ("[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions ..., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites"). [10] Congress recognized that certain substances, such as peyote, "have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of ***921** the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival." H.R.Rep. No. 95–1308, p. 2 (1978), U.S.Code Cong. & Admin.News 1978, pp. 1262, 1263.

The American Indian Religious Freedom Act, in itself, may not create rights enforceable against government action restricting religious freedom, but this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise, both the First Amendment and the stated policy of Congress will offer to Native Americans merely an unfulfilled and hollow promise.

III

For these reasons, I conclude that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion. Since the State could not constitutionally enforce its criminal prohibition against respondents, ****1623** the interests underlying the State's drug laws cannot justify its denial of unemployment benefits. Absent such justification, the State's regulatory interest in denying benefits for religiously motivated "misconduct," see *ante,* at 1598, is indistinguishable from the state interests this Court has rejected in *Frazee, Hobbie, Thomas,* and *Sherbert.* The State of Oregon cannot, consistently with the Free Exercise Clause, deny respondents unemployment benefits.

I dissent.

All Citations

494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, 52 Fair Empl.Prac.Cas. (BNA) 855, 53 Empl. Prac. Dec. P 39,826, 58 USLW 4433, Unempl.Ins.Rep. (CCH) P 21,933

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 237, 50 L.Ed. 499.

1 Both lines of cases have specifically adverted to the non-free-exercise principle involved. *Cantwell,* for example, observed that "[t]he fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." 310 U.S., at 307, 60 S.Ct., at 905. *Murdock* said:

"We do not mean to say that religious groups and the press are free from all financial burdens of government.... We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.... Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation." 319 U.S., at 112, 63 S.Ct., at 874.

Yoder said that "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." 406 U.S., at 233, 92 S.Ct., at 1542.

2 Justice O'CONNOR seeks to distinguish *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), and *Bowen v. Roy,* 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), on the ground that those cases involved the government's conduct of "its own internal affairs," which is different because, as Justice Douglas said in *Sherbert,* " 'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Post,* at 1611–1612 (O'CONNOR, J., concurring in judgment), quoting *Sherbert v. Verner,* 374 U.S. 398, 412, 83 S.Ct. 1790, 1798, 10 L.Ed.2d 965 (1963) (Douglas, J., concurring). But since Justice Douglas voted with the majority in *Sherbert,* that quote obviously envisioned that what "the government cannot do to the individual" includes not just the prohibition of an individual's freedom of action through criminal laws but also the running of its programs (in *Sherbert,* state unemployment compensation) in such fashion as to harm the individual's religious interests. Moreover, it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng, supra,* or its administration of welfare programs, *Roy, supra.*

3 Justice O'CONNOR suggests that "[t]here is nothing talismanic about neutral laws of general applicability," and that all laws burdening religious practices should be subject to compelling-interest scrutiny because "the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a 'constitutional nor[m],' not an 'anomaly.' " *Post,* at 1612 (opinion concurring in judgment). But this comparison with other fields supports, rather than undermines, the conclusion we draw today. Just as we subject to the most exacting scrutiny laws that make classifications based on race, see *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), or on the content of speech, see *Sable Communications of California v. FCC,* 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), so too we strictly scrutinize governmental classifications based on religion, see *McDaniel v. Paty,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); see also *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (police employment examination); and we have held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment, see *Citizen Publishing Co. v. United States,* 394 U.S. 131, 139, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969) (antitrust laws). Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

4 While arguing that we should apply the compelling interest test in this case, Justice O'CONNOR nonetheless agrees that "our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue," *post,* at 1615 (opinion concurring in judgment). This means, presumably, that compelling interest scrutiny must be applied to generally applicable laws that regulate or prohibit *any* religiously motivated activity, no matter how unimportant to the claimant's religion. Earlier in her opinion, however, Justice O'CONNOR appears to contradict this, saying that the proper approach is "to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling." *Post,* at 1611. "Constitutionally significant burden" would seem to be "centrality" under another name. In any case, dispensing with a "centrality" inquiry is utterly unworkable. It would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church. There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception,

both the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered.

Nor is this difficulty avoided by Justice BLACKMUN's assertion that "although ... courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the religion, ... I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion." *Post,* at 1621 (dissenting opinion). As Justice BLACKMUN's opinion proceeds to make clear, inquiry into "severe impact" is no different from inquiry into centrality. He has merely substituted for the question "How important is X to the religious adherent?" the question "How great will be the harm to the religious adherent if X is taken away?" There is no material difference.

5 Justice O'CONNOR contends that the "parade of horribles" in the text only "demonstrates ... that courts have been quite capable of ... strik [ing] sensible balances between religious liberty and competing state interests." *Post,* at 1612–1613 (opinion concurring in judgment). But the cases we cite have struck "sensible balances" only because they have all applied the general laws, despite the claims for religious exemption. In any event, Justice O'CONNOR mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use Justice BLACKMUN's terminology *post,* at 1621) or the "constitutiona[l] significan[ce]" of the "burden on the specific plaintiffs" (to use Justice O'CONNOR's terminology *post,* at 1611) suffices to permit us to confer an exemption. It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.

* Although Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join Parts I and II of this opinion, they do not concur in the judgment.

1 See *Hernandez v. Commissioner,* 490 U.S. 680, 699, 109 S.Ct. 2136, 2149, 104 L.Ed.2d 766 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden"); *Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987) (state laws burdening religions "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); *Bowen v. Roy,* 476 U.S. 693, 732, 106 S.Ct. 2147, 2169, 90 L.Ed.2d 735 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption"); *United States v. Lee,* 455 U.S. 252, 257–258, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest"); *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450

U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *Sherbert v. Verner,* 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963) (question is "whether some compelling state interest ... justifies the substantial infringement of appellant's First Amendment right").

2 I reluctantly agree that, in light of this Court's decision in *Employment Division, Dept. of Human Resources of Ore. v. Smith,* 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988), the question on which certiorari was granted is properly presented in this case. I have grave doubts, however, as to the wisdom or propriety of deciding the constitutionality of a criminal prohibition which the State has not sought to enforce, which the State did not rely on in defending its denial of unemployment benefits before the state courts, and which the Oregon courts could, on remand, either invalidate on state constitutional grounds, or conclude that it remains irrelevant to Oregon's interest in administering its unemployment benefits program. It is surprising, to say the least, that this Court which so often prides itself about principles of judicial restraint and reduction of federal control over matters of state law would stretch its jurisdiction to the limit in order to reach, in this abstract setting, the constitutionality of Oregon's criminal prohibition of peyote use.

3 The only reported case in which the State of Oregon has sought to prosecute a person for religious peyote use is *State v. Soto,* 21 Ore.App. 794, 537 P.2d 142 (1975), cert. denied, 424 U.S. 955, 96 S.Ct. 1431, 47 L.Ed.2d 361 (1976).

4 This dearth of evidence is not surprising, since the State never asserted this health and safety interest before the Oregon courts; thus, there was no opportunity for factfinding concerning the alleged dangers of peyote use. What has now become the State's principal argument for its view that the criminal prohibition is enforceable against religious use of peyote rests on no evidentiary foundation at all.

5 See 21 CFR § 1307.31 (1989) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law"); see *Olsen v. Drug Enforcement Admin.,* 279 U.S.App.D.C. 1, 6–7, 878 F.2d 1458, 1463–1464 (1989) (explaining DEA's rationale for the exception).

Moreover, 23 States, including many that have significant Native American populations, have statutory or judicially crafted exemptions in their drug laws for religious use of peyote. See 307 Ore. 68, 73, n. 2, 763 P.2d 146, 148, n. 2 (1988) (case below). Although this does

not prove that Oregon must have such an exception too, it is significant that these States, and the Federal Government, all find their (presumably compelling) interests in controlling the use of dangerous drugs compatible with an exemption for religious use of peyote. Cf. *Boos v. Barry,* 485 U.S. 312, 329, 108 S.Ct. 1157, 1168, 99 L.Ed.2d 333 (1988) (finding that an ordinance restricting picketing near a foreign embassy was not the least restrictive means of serving the asserted government interest; existence of an analogous, but more narrowly drawn, federal statute showed that "a less restrictive alternative is readily available").

6 In this respect, respondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol. See National Prohibition Act, Title II, § 3, 41 Stat. 308. However compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion.

7 The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use. See *State v. Whittingham,* 19 Ariz.App. 27, 30, 504 P.2d 950, 953 (1973) (" '[P]eyote can cause vomiting by reason of its bitter taste' "); E. Anderson, Peyote: The Divine Cactus 161 (1980) ("[T]he eating of peyote usually is a difficult ordeal in that nausea and other unpleasant physical manifestations occur regularly. Repeated use is likely, therefore, only if one is a serious researcher or is devoutly involved in taking peyote as part of a religious ceremony"); Slotkin, The Peyote Way, in Teachings from the American Earth 96, 98 (D. Tedlock & B. Tedlock eds. 1975) ("[M]any find it bitter, inducing indigestion or nausea").

8 Over the years, various sects have raised free exercise claims regarding drug use. In no reported case, except those involving claims of religious peyote use, has the claimant prevailed. See, *e.g., Olsen v. Iowa,* 808 F.2d 652 (CA8 1986) (marijuana use by Ethiopian Zion Coptic Church); *United States v. Rush,* 738 F.2d 497 (CA1 1984) (same), cert. denied, 470 U.S. 1004, 105 S.Ct. 1355, 84 L.Ed.2d 378 (1985); *United States v. Middleton,* 690 F.2d 820 (CA11 1982) (same), cert. denied, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983) (same); *United States v. Hudson,* 431 F.2d 468 (CA5 1970) (marijuana and heroin use by Moslems), cert. denied, 400 U.S. 1011, 91 S.Ct. 575, 577, 27 L.Ed.2d 624 (1971); *Leary v. United States,* 383 F.2d 851 (CA5 1967) (marijuana use by Hindu), rev'd on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Commonwealth v. Nissenbaum,* 404 Mass. 575, 536 N.E.2d 592 (1989) (marijuana use by Ethiopian Zion Coptic Church); *State v. Blake,* 5 Haw.App. 411, 695 P.2d 336 (1985) (marijuana use in practice of Hindu Tantrism); *Whyte v. United States,* 471 A.2d 1018 (D.C.App.1984) (marijuana use by Rastafarian); *State v. Rocheleau,* 142 Vt. 61, 451 A.2d 1144 (1982) (marijuana use by Tantric Buddhist); *State v. Brashear,* 92 N.M. 622, 593 P.2d 63 (1979) (marijuana use by nondenominational Christian); *State v. Randall,* 540 S.W.2d 156 (Mo.App.1976) (marijuana, LSD, and hashish use by Aquarian Brotherhood Church).

See generally Annotation, Free Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense, 35 A.L.R.3d 939 (1971 and Supp.1989).

9 Thus, this case is distinguishable from *United States v. Lee,* 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), in which the Court concluded that there was "no principled way" to distinguish other exemption claims, and the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.,* at 260, 102 S.Ct., at 1056.

10 See Federal Agencies Task Force, Report to Congress on American Indian Religious Freedom Act of 1978, pp. 1–8 (Aug. 1979) (history of religious persecution); Barsh, The Illusion of Religious Freedom for Indigenous Americans, 65 Ore.L.Rev. 363, 369–374 (1986).

Indeed, Oregon's attitude toward respondents' religious peyote use harkens back to the repressive federal policies pursued a century ago:

"In the government's view, traditional practices were not only morally degrading, but unhealthy. 'Indians are fond of gatherings of every description,' a 1913 public health study complained, advocating the restriction of dances and 'sings' to stem contagious diseases. In 1921, Commissioner of Indian Affairs Charles Burke reminded his staff to punish any Indian engaged in 'any dance which involves ... the reckless giving away of property ... frequent or prolonged periods of celebration ... in fact, any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.' Two years later, he forbid Indians under the age of 50 from participating in any dances of any kind, and directed federal employees 'to educate public opinion' against them." *Id.,* at 370–371 (footnotes omitted).

141 S.Ct. 1868
Supreme Court of the United States.

Sharonell FULTON, et al., Petitioners
v.
CITY OF PHILADELPHIA, PENNSYLVANIA, et al.

No. 19-123
|
Argued November 4, 2020
|
Decided June 17, 2021

Synopsis

Background: State-licensed foster care agency affiliated with Roman Catholic Archdiocese, together with three foster parents affiliated with the agency, brought § 1983 action against city and city departments, alleging the city's refusal to contract with the agency unless it agreed to certify same-sex couples as foster parents violated the Free Exercise and Free Speech Clauses of the First Amendment. After organizations intervened as defendants, the United States District Court for the Eastern District of Pennsylvania, Petrese B. Tucker, J., 320 F.Supp.3d 661, denied the motions for a temporary restraining order (TRO) and preliminary injunction filed by the agency and foster parents, and they appealed. The United States Court of Appeals for the Third Circuit, Ambro, Circuit Judge, 922 F.3d 140, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

city burdened agency's religious exercise by putting agency to choice of curtailing its mission or approving relationships inconsistent with its beliefs;

non-discrimination requirement in city's standard foster care contract was not generally applicable, and thus was subject to strict scrutiny;

agency was not a public accommodation subject to city ordinance's prohibition on discrimination on the basis of sexual orientation when agency certified foster parents;

maximizing the number of foster families was not a compelling interest that justified city's burdening of agency's free exercise rights;

protecting city from liability was not a compelling interest that justified city's burdening of agency's free exercise rights; and

city's interest in the equal treatment of prospective foster parents and foster children, though weighty, was not a compelling interest that justified city's burdening of agency's free exercise rights.

Reversed and remanded.

Justice Barrett filed a concurring opinion, in which Justice Kavanaugh joined, and in which Justice Breyer joined in part.

Justice Alito filed an opinion concurring in the judgment, in which Justice Thomas and Justice Gorsuch joined.

Justice Gorsuch filed an opinion concurring in the judgment, in which Justice Thomas and Justice Alito joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Preliminary Injunction; Motion for Temporary Restraining Order (TRO).

***1871** *Syllabus* [*]

Philadelphia's foster care system relies on cooperation between the City and private foster care agencies. The City enters standard annual contracts with the agencies to place children with foster families. One of the responsibilities of the agencies is certifying prospective foster families under state statutory criteria. Petitioner Catholic Social Services has contracted with the City to provide foster care services for over 50 years, continuing the centuries-old mission of the Catholic Church to serve Philadelphia's needy children. CSS holds the religious belief that marriage is a sacred bond between a man and a woman. Because CSS believes that certification of prospective foster families is an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. But other private foster agencies in Philadelphia will certify same-sex couples, and no same-sex couple has sought certification from CSS. Against this backdrop, a 2018 newspaper story recounted the Archdiocese of Philadelphia's position that CSS could not consider prospective foster parents in same-sex marriages. Calls for investigation followed, and the City ultimately informed CSS that unless it agreed to certify same-sex couples

the City would no longer refer children to the agency or enter a full foster care contract with it in the future. The City explained that the refusal of CSS to certify same-sex couples violated both a non-discrimination provision in the agency's contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.

CSS and three affiliated foster parents filed suit seeking to enjoin the City's referral freeze on the grounds that the City's actions violated the Free Exercise and Free Speech Clauses of the First Amendment. The District Court denied preliminary relief. It reasoned that the contractual non-discrimination requirement and the Fair Practices Ordinance were both neutral and generally applicable under *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, and that CSS's free exercise claim was therefore unlikely to succeed. The Court of Appeals for the Third Circuit affirmed. Given the expiration of the parties' contract, the Third Circuit examined whether the City could condition contract renewal on the inclusion of new language forbidding discrimination on the basis of sexual orientation. The court concluded that the City's proposed contractual terms stated a neutral and generally applicable policy under *Smith*. CSS and the foster parents challenge the Third Circuit's determination that the City's actions were permissible under *Smith* and also ask the Court to reconsider that decision.

Held: The refusal of Philadelphia to contract with CSS for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment. Pp. 1876 – 1882.

(a) The City's actions burdened CSS's religious exercise by forcing it either to curtail its mission or to certify same-sex couples as foster parents in violation of its religious beliefs. *Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable. 494 U.S. at 878–882, 110 S.Ct. 1595. This case falls outside *Smith* because the City has burdened CSS's religious exercise through policies that do not satisfy the threshold requirement of being neutral and generally applicable. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217, 124 L.Ed.2d 472. A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions. *Smith*, 494 U.S. at 884, 110 S.Ct. 1595. Where such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason. *Ibid.* Pp. 1876 – 1878.

(1) The non-discrimination requirement of the City's standard foster care contract is not generally applicable. Section 3.21 of the contract requires an agency to provide services defined in the

contract to prospective foster parents without regard to their sexual orientation. But section 3.21 also permits exceptions to this requirement at the "sole discretion" of the Commissioner. This inclusion of a mechanism for entirely discretionary exceptions renders the non-discrimination provision not generally applicable. *Smith*, 494 U.S. at 884, 110 S.Ct. 1595. The City maintains that greater deference should apply to its treatment of private contractors, but the result here is the same under any level of deference. Similarly unavailing is the City's recent contention that section 3.21 does not even apply to CSS's refusal to certify same-sex couples. That contention ignores the broad sweep of section 3.21's text, as well as the fact that the City adopted the current version of section 3.21 shortly after declaring that it would make CSS's obligation to certify same-sex couples "explicit" in future contracts. Finally, because state law makes clear that the City's authority to grant exceptions from section 3.21 also governs section 15.1's general prohibition on sexual orientation discrimination, the contract as a whole contains no generally applicable non-discrimination requirement. Pp. 1877 – 1880.

(2) Philadelphia's Fair Practices Ordinance, which as relevant forbids interfering with the public accommodations opportunities of an individual based on sexual orientation, does not apply to CSS's actions here. The Ordinance defines a public accommodation in relevant part to include a provider "whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." Phila. Code § 9–1102(1)(w). Certification is not "made available to the public" in the usual sense of the words. Certification as a foster parent is not readily accessible to the public; the process involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The District Court's contrary conclusion did not take into account the uniquely selective nature of foster care certification. Pp. 1879 – 1881.

(b) The contractual non-discrimination requirement burdens CSS's religious exercise and is not generally applicable, so it is subject to "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217. A government policy can survive strict scrutiny only if it advances compelling interests and is narrowly tailored to achieve those interests. *Ibid*. The question is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS. Under the circumstances here, the City does not have a compelling interest in refusing to contract with CSS. CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless the agency agrees to certify same-sex couples as foster parents cannot survive strict scrutiny and violates the Free Exercise Clause of the First Amendment. The Court does not consider whether the City's actions also violate the Free Speech Clause. Pp. 1881 – 1882.

922 F.3d 140, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, KAGAN, KAVANAUGH, and BARRETT, JJ., joined. BARRETT, J., filed a concurring opinion, in which KAVANAUGH, J., joined, and in which BREYER, J., joined as to all but the first paragraph. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS and GORSUCH, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS and ALITO, JJ., joined.

Attorneys and Law Firms

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***1874** Catholic Social Services is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples. The question presented is whether the actions of Philadelphia violate the First Amendment.

I

The Catholic Church has served the needy children of Philadelphia for over two centuries. In 1798, a priest in the City organized an association to care for orphans whose parents had died in a yellow fever epidemic. H. Folks, The Care of Destitute, Neglected, and Delinquent Children 10 (1902). During the 19th century, nuns ran asylums for orphaned and destitute ***1875** youth. T. Hacsi, Second Home: Orphan Asylums and Poor Families in America 24 (1997). When criticism of asylums mounted in the Progressive Era, see *id.*, at 37–40, the Church established the Catholic Children's Bureau to place children in foster homes. Petitioner CSS continues that mission today.

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families.

The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS. 55 Pa. Code § 3700.61 (2020). Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's "ability to provide care, nurturing and supervision to children," "[e]xisting family relationships," and ability "to work in partnership" with a foster agency. § 3700.64. The agency must decide whether to "approve, disapprove or provisionally approve the foster family." § 3700.69.

When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work in this system. CSS believes that "marriage is a sacred bond between a man and a woman." App. 171. Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.

But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages. The City Council called for an investigation, saying that the City had "laws in place to protect its people from discrimination that occurs under the guise of religious freedom." App. to Pet. for Cert. 147a. The Philadelphia Commission on Human Relations launched an inquiry. And the Commissioner of the Department of Human Services held a meeting with the leadership of CSS. She remarked that "things have changed since 100 years ago," and "it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church." App. 366. Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance. The City stated that it would not enter a full foster care contract ***1876** with CSS in the future unless the agency agreed to certify same-sex couples.

CSS and three foster parents affiliated with the agency filed suit against the City, the Department, and the Commission. The Support Center for Child Advocates and Philadelphia Family Pride intervened as defendants. As relevant here, CSS alleged that the referral freeze violated the Free Exercise and Free Speech Clauses of the First Amendment. CSS sought a temporary restraining order and preliminary injunction directing the Department to continue referring children to CSS without requiring the agency to certify same-sex couples.

The District Court denied preliminary relief. It concluded that the contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and that the free exercise claim was therefore unlikely to succeed. 320 F.Supp.3d 661, 680–690 (E.D. Pa. 2018). The court also determined that the free speech claims were unlikely to succeed because CSS performed certifications as part of a government program. *Id.*, at 695–700.

The Court of Appeals for the Third Circuit affirmed. Because the contract between the parties had expired, the court focused on whether the City could insist on the inclusion of new language forbidding discrimination on the basis of sexual orientation as a condition of contract renewal. 922 F.3d 140, 153 (2019). The court concluded that the proposed contractual terms were a neutral and generally applicable policy under *Smith*. 922 F.3d at 152–159. The court rejected the agency's free speech claims on the same grounds as the District Court. *Id.*, at 160–162.

CSS and the foster parents sought review. They challenged the Third Circuit's determination that the City's actions were permissible under *Smith* and also asked this Court to reconsider that precedent.

We granted certiorari. 589 U. S. ——, 140 S.Ct. 1104, 206 L.Ed.2d 177 (2020).

II

A

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law ... prohibiting the free exercise" of religion. As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. 494 U.S. at 878–882, 110 S.Ct. 1595. CSS urges us to overrule *Smith*, and the concurrences in the judgment argue in favor of doing so, see *post*, pp. 1883 – 1884 (opinion of ALITO, J.); *post*, p. 1926 (opinion of GORSUCH, J.). ***1877** But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not

meet the requirement of being neutral and generally applicable. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ——, —— – ——, 138 S.Ct. 1719, 1730–1732, 201 L.Ed.2d 35 (2018); *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.

A law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing " 'a mechanism for individualized exemptions.' " *Smith*, 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Bowen v. Roy*, 476 U.S. 693, 708, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (opinion of BURGER, C. J., joined by POWELL AND REHNQUIST, JJ.)). For example, in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), a Seventh-day Adventist was fired because she would not work on Saturdays. Unable to find a job that would allow her to keep the Sabbath as her faith required, she applied for unemployment benefits. *Id.*, at 399–400, 83 S.Ct. 1790. The State denied her application under a law prohibiting eligibility to claimants who had "failed, without good cause ... to accept available suitable work." *Id.*, at 401, 83 S.Ct. 1790 (internal quotation marks omitted). We held that the denial infringed her free exercise rights and could be justified only by a compelling interest. *Id.*, at 406, 83 S.Ct. 1790.

Smith later explained that the unemployment benefits law in *Sherbert* was not generally applicable because the "good cause" standard permitted the government to grant exemptions based on the circumstances underlying each application. See 494 U.S. at 884, 110 S.Ct. 1595 (citing *Roy*, 476 U.S. at 708, 106 S.Ct. 2147; *Sherbert*, 374 U.S. at 401, n. 4, 83 S.Ct. 1790). *Smith* went on to hold that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Roy*, 476 U.S. at 708, 106 S.Ct. 2147); see also *Lukumi*, 508 U.S. at 537, 113 S.Ct. 2217 (same).

A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. See *id.*, at 542–546, 113 S.Ct. 2217. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, for instance, the City of Hialeah adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. *Id.*, at 524–528, 113 S.Ct. 2217. The City claimed that the ordinances were necessary in part to

protect public health, which was "threatened by the disposal of animal carcasses in open public places." *Id.*, at 544, 113 S.Ct. 2217. But the ordinances did not regulate hunters' disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard. *Id.*, at 544–545, 113 S.Ct. 2217. The Court concluded that this and other forms of underinclusiveness meant that the ordinances were not generally applicable. *Id.*, at 545–546, 113 S.Ct. 2217.

***1878** B

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by *Smith*. The current version of section 3.21 specifies in pertinent part:

> "**Rejection of Referral**. Provider shall not reject a child or family including, but not limited to, ... prospective foster or adoptive parents, for Services based upon ... their ... sexual orientation ... unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." Supp. App. to Brief for City Respondents 16–17.

This provision requires an agency to provide "Services," defined as "the work to be performed under this Contract," App. 560, to prospective foster parents regardless of their sexual orientation.

Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available in this case at the "sole discretion" of the Commissioner. The City has made clear that the Commissioner "has no intention of granting an exception" to CSS. App. to Pet. for Cert. 168a. But the City "may not refuse to extend that [exemption] system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Roy*, 476 U.S. at 708, 106 S.Ct. 2147).

The City and intervenor-respondents resist this conclusion on several grounds. They first argue that governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public. The government, they observe, commands heightened powers when managing its internal operations. See *NASA v. Nelson*, 562 U.S. 134, 150, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011); *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 598–600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). And when individuals enter into government employment or contracts, they accept certain restrictions on their freedom as part of the deal. See *Garcetti v. Ceballos*, 547 U.S. 410, 418–420, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 677–678, 116 S.Ct. 2342,

135 L.Ed.2d 843 (1996). Given this context, the City and intervenor-respondents contend, the government should have a freer hand when dealing with contractors like CSS.

These considerations cannot save the City here. As Philadelphia rightly acknowledges, "principles of neutrality and general applicability still constrain the government in its capacity as manager." Brief for City Respondents 11–12. We have never suggested that the government may discriminate against religion when acting in its managerial role. And *Smith* itself drew support for the neutral and generally applicable standard from cases involving internal government affairs. See 494 U.S. at 883–885, and n. 2, 110 S.Ct. 1595 (citing *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); *Roy*, 476 U.S. 693, 106 S.Ct. 2147). The City and intervenor-respondents accordingly ask only that courts apply a more deferential approach in determining whether a policy is neutral and generally applicable in the contracting context. We find no need to resolve that narrow issue in this case. No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.

Perhaps all this explains why the City now contends that section 3.21 does not ***1879** apply to CSS's refusal to certify same-sex couples after all. Contrast App. to Pet. for Cert. 167a–168a with Brief for City Respondents 35–36. Instead, the City says that section 3.21 addresses only "an agency's right to refuse 'referrals' to place a child with a certified foster family." Brief for City Respondents 36. We think the City had it right the first time. Although the section is titled "Rejection of Referral," the text sweeps more broadly, forbidding the rejection of "prospective foster ... parents" for "Services," without limitation. Supp. App. to Brief for City Respondents 16. The City maintains that certification is one of the services foster agencies are hired to perform, so its attempt to backtrack on the reach of section 3.21 is unavailing. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 222 (2012) ("[A] title or heading should never be allowed to override the plain words of a text."). Moreover, the City adopted the current version of section 3.21 shortly after declaring that it would make CSS's obligation to certify same-sex couples "explicit" in future contracts, App. to Pet. for Cert. 170a, confirming our understanding of the text of the provision.

The City and intervenor-respondents add that, notwithstanding the system of exceptions in section 3.21, a separate provision in the contract independently prohibits discrimination in the certification of foster parents. That provision, section 15.1, bars discrimination on the basis of sexual orientation, and it does not on its face allow for exceptions. See Supp. App. to Brief for City Respondents 31. But state law makes clear that "one part of a contract cannot be so interpreted as to annul another part." *Shehadi v. Northeastern Nat. Bank of Pa.*, 474 Pa. 232, 236, 378 A.2d 304, 306 (1977); see *Commonwealth ex rel. Kane v. UPMC*, 634 Pa. 97, 135, 129 A.3d 441, 464 (2015). Applying that "fundamental" rule here, *Shehadi*, 474 Pa. at 236, 378 A.2d at 306, an exception

from section 3.21 also must govern the prohibition in section 15.1, lest the City's reservation of the authority to grant such an exception be a nullity. As a result, the contract as a whole contains no generally applicable non-discrimination requirement.

Finally, the City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it "invite[s]" the government to decide which reasons for not complying with the policy are worthy of solicitude, *Smith*, 494 U.S. at 884, 110 S.Ct. 1595—here, at the Commissioner's "sole discretion."

The concurrence objects that no party raised these arguments in this Court. *Post*, at 1928 – 1929 (opinion of GORSUCH, J.). But CSS, supported by the United States, contended that the City's "made-for-CSS Section 3.21 permits discretionary 'exception[s]' from the requirement 'not [to] reject a child or family' based upon 'their ... sexual orientation,' " which "alone triggers strict scrutiny." Reply Brief 5 (quoting Supp. App. to Brief for City Respondents 16; some alterations in original); see also Brief for Petitioners 26–27 (section 3.21 triggers strict scrutiny); Brief for United States as *Amicus Curiae* 21–22 (same). The concurrence favors the City's reading of section 3.21, see *post*, at 1928 – 1929, but we find CSS's position more persuasive.

C

In addition to relying on the contract, the City argues that CSS's refusal ***1880** to certify same-sex couples constitutes an "Unlawful Public Accommodations Practice[ ]" in violation of the Fair Practices Ordinance. That ordinance forbids "deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her race, ethnicity, color, sex, sexual orientation, ... disability, marital status, familial status," or several other protected categories. Phila. Code § 9–1106(1) (2016). The City contends that foster care agencies are public accommodations and therefore forbidden from discriminating on the basis of sexual orientation when certifying foster parents.

CSS counters that "foster care has never been treated as a 'public accommodation' in Philadelphia." Brief for Petitioners 13. In any event, CSS adds, the ordinance cannot qualify as generally applicable because the City allows exceptions to it for secular reasons despite denying one for CSS's religious exercise. But that constitutional issue arises only if the ordinance applies to CSS in the first place. We conclude that it does not because foster care agencies do not act as public accommodations in performing certifications.

The ordinance defines a public accommodation in relevant part as "[a]ny place, provider or public conveyance, whether licensed or not, which solicits or accepts the patronage or trade of the public or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." § 9–1102(1)(w). Certification is not "made available to the public" in the usual sense of the words. To make a service "available" means to make it "accessible, obtainable." Merriam-Webster's Collegiate Dictionary 84 (11th ed. 2005); see also 1 Oxford English Dictionary 812 (2d ed. 1989) ("capable of being made use of, at one's disposal, within one's reach"). Related state law illustrates the same point. A Pennsylvania antidiscrimination statute similarly defines a public accommodation as an accommodation that is "open to, accepts or solicits the patronage of the general public." Pa. Stat. Ann., Tit. 43, § 954(*l*) (Purdon Cum. Supp. 2009). It fleshes out that definition with examples like hotels, restaurants, drug stores, swimming pools, barbershops, and public conveyances. *Ibid.* The "common theme" is that a public accommodation must "provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire." *Blizzard v. Floyd*, 149 Pa.Commw. 503, 506, 613 A.2d 619, 621 (1992).

Certification as a foster parent, by contrast, is not readily accessible to the public. It involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The process takes three to six months. Applicants must pass background checks and a medical exam. Foster agencies are required to conduct an intensive home study during which they evaluate, among other things, applicants' "mental and emotional adjustment," "community ties with family, friends, and neighbors," and "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships." 55 Pa. Code § 3700.64. Such inquiries would raise eyebrows at the local bus station. And agencies understandably approach this sensitive process from different angles. As the City itself explains to prospective foster parents, "[e]ach agency has slightly different requirements, specialties, and training programs." App. to Pet. for Cert. 197a. All of this confirms that the one-size-fits-all public accommodations model is a poor match for the foster care system.

***1881** The City asks us to adhere to the District Court's contrary determination that CSS qualifies as a public accommodation under the ordinance. The concurrence adopts the City's argument, seeing no incongruity in deeming a private religious foster agency a public accommodation. See *post*, at 1927 (opinion of GORSUCH, J.). We respectfully disagree with the view of the City and the concurrence. Although "we ordinarily defer to lower court constructions of state statutes, we do not invariably do so." *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (citation omitted). Deference would be inappropriate here. The District Court did not take into account the uniquely selective nature of the certification process, which must inform the applicability of the ordinance. We agree with CSS's position, which it has maintained from the beginning of this dispute, that its "foster services do not constitute a 'public accommodation' under

the City's Fair Practices Ordinance, and therefore it is not bound by that ordinance." App. to Pet. for Cert. 159a. We therefore have no need to assess whether the ordinance is generally applicable.

III

The contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable. The concurrence protests that the "Court granted certiorari to decide whether to overrule [*Smith*]," and chides the Court for seeking to "sidestep the question." *Post*, at 1926 (opinion of GORSUCH, J.). But the Court also granted review to decide whether Philadelphia's actions were permissible under our precedents. See Pet. for Cert. i. CSS has demonstrated that the City's actions are subject to "the most rigorous of scrutiny" under those precedents. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217. Because the City's actions are therefore examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.

A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217 (internal quotation marks omitted). Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430–432, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (discussing the compelling interest test applied in *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)). Rather than rely on "broadly formulated interests," courts must "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211. The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.

Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals ***1882** at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is

insufficient to satisfy strict scrutiny, see *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 799–800, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011), particularly because the authority to certify foster families is delegated to agencies by the State, not the City, see 55 Pa. Code § 3700.61.

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct., at 1727. On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. See *Lukumi*, 508 U.S. at 546–547, 113 S.Ct. 2217. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

* * *

As Philadelphia acknowledges, CSS has "long been a point of light in the City's foster-care system." Brief for City Respondents 1. CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.

In view of our conclusion that the actions of the City violate the Free Exercise Clause, we need not consider whether they also violate the Free Speech Clause.

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

It is so ordered.

Justice BARRETT, with whom Justice KAVANAUGH joins, and with whom Justice BREYER joins as to all but the first paragraph, concurring.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), this Court held that a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise. Petitioners, their *amici*, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled. While history looms large in this debate, I find

the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.

Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a ***1883** neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if *Smith* were overruled. To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Cf. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). Should there be a distinction between indirect and direct burdens on religious exercise? Cf. *Braunfeld v. Brown*, 366 U.S. 599, 606–607, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion). What forms of scrutiny should apply? Compare *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (assessing whether government's interest is " 'compelling' "), with *Gillette v. United States*, 401 U.S. 437, 462, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (assessing whether government's interest is "substantial"). And if the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way? See *Smith*, 494 U.S. at 888–889, 110 S.Ct. 1595.

We need not wrestle with these questions in this case, though, because the same standard applies regardless whether *Smith* stays or goes. A longstanding tenet of our free exercise jurisprudence —one that both pre-dates and survives *Smith*—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. See *id.*, at 884, 110 S.Ct. 1595 (law not generally applicable "where the State has in place a system of individual exemptions" (citing *Sherbert*, 374 U.S. at 401, n. 4, 83 S.Ct. 1790)); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303–307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (subjecting statute to heightened scrutiny because exemptions lay in discretion of government official). As the Court's opinion today explains, the government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny. And all nine Justices agree that the City cannot satisfy strict scrutiny. I therefore see no reason to decide in this case

whether *Smith* should be overruled, much less what should replace it. I join the Court's opinion in full.

Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, concurring in the judgment.

This case presents an important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Court abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.

I

There is no question that *Smith*'s interpretation can have startling consequences. ***1884** Here are a few examples. Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. See Pub. L. 66, § 3, 41 Stat. 308–309. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States. [1] Or suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. [2] That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter. [3] Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. [4] A San Francisco ballot initiative in 2010 proposed just that. [5] A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice. [6] Or suppose that this Court or some other court enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy *Smith* even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added.

We may hope that legislators and others with rulemaking authority will not go as far as *Smith* allows, but the present case shows that the dangers posed by *Smith* are not hypothetical. The city of Philadelphia (City) has issued an ultimatum to an arm of the Catholic Church: Either engage in conduct that the Church views as contrary to the traditional Christian understanding of marriage or abandon a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children.

Many people believe they have a religious obligation to assist such children. Jews and Christians regard this as a scriptural ***1885** command,[7] and it is a mission that the Catholic Church has undertaken since ancient times. One of the first known orphanages is said to have been founded by St. Basil the Great in the fourth century,[8] and for centuries, the care of orphaned and abandoned children was carried out by religious orders.[9]

In the New World, religious groups continued to take the lead. The first known orphanage in what is now the United States was founded by an order of Catholic nuns in New Orleans around 1729.[10] In the 1730s, the first two orphanages in what became the United States at the founding were established in Georgia by Lutherans and by Rev. George Whitefield, a leader in the "First Great Awakening."[11] In the late 18th and early 19th centuries, Protestants and Catholics established orphanages in major cities. One of the first orphanages in Philadelphia was founded by a Catholic priest in 1798.[12] The Jewish Society for the Relief of Orphans and Children of Indigent Parents began its work in Charleston in 1801.[13]

During the latter part of the 19th century and continuing into the 20th century, the care of children was shifted from orphanages to foster families,[14] but for many years, state and local government participation in this field was quite limited. As one of Philadelphia's *amici* puts it, "[i]nto the early twentieth century, the care of orphaned and abandoned children in the United States remained largely in the hands of private charitable and religious organizations."[15] In later years, an influx of federal money[16] spurred States and local governments to take a more active role, and today many governments administer what is essentially a licensing system. As is typical in other jurisdictions, no private charitable group may recruit, vet, or support foster parents in Philadelphia without the City's approval.

Whether with or without government participation, Catholic foster care agencies in Philadelphia and other cities have a long record of finding homes for children whose parents are unable or unwilling to care for them. Over the years, they have helped thousands of foster children and parents, and they take special pride in finding homes for children who are hard to place, including older children and those with special needs.[17]

***1886** Recently, however, the City has barred Catholic Social Services (CSS) from continuing this work. Because the Catholic Church continues to believe that marriage is a bond between one man and one woman, CSS will not vet same-sex couples. As far as the record reflects, no same-sex couple has ever approached CSS, but if that were to occur, CSS would simply refer the couple to another agency that is happy to provide that service—and there are at least 27 such agencies in Philadelphia. App. 171; App. to Pet. for Cert. 137a; see also *id.,* at 286a. Thus, not only is there no evidence that CSS's policy has ever interfered in the slightest with the efforts of a same-sex couple to care for a foster child, there is no reason to fear that it would ever have that effect.

None of that mattered to Philadelphia. When a newspaper publicized CSS's policy, the City barred CSS from continuing its foster care work. Remarkably, the City took this step even though it threatens the welfare of children awaiting placement in foster homes. There is an acute shortage of foster parents, both in Philadelphia and in the country at large.[18] By ousting CSS, the City eliminated one of its major sources of foster homes. And that's not all. The City went so far as to prohibit the placement of any children in homes that CSS had previously vetted and approved. Exemplary foster parents like petitioners Sharonell Fulton and Toni Lynn Simms-Busch are blocked from providing loving homes for children they were eager to ***1887** help.[19] The City apparently prefers to risk leaving children without foster parents than to allow CSS to follow its religiously dictated policy, which threatens no tangible harm.

CSS broadly implies that the fundamental objective of City officials is to force the Philadelphia Archdiocese to change its position on marriage. Among other things, they point to statements by a City official deriding the Archdiocese's position as out of step with Pope Francis's teaching and 21st century moral views.[20] But whether or not this is the City's real objective, there can be no doubt that Philadelphia's ultimatum restricts CSS's ability to do what it believes the Catholic faith requires.

Philadelphia argues that its stance is allowed by *Smith* because, it claims, a City policy categorically prohibits foster care agencies from discriminating against same-sex couples. Bound by *Smith*, the lower courts accepted this argument, 320 F.Supp.3d 661, 682–684 (E.D. Pa. 2018), 922 F.3d 140, 156–159 (C.A.3 2019), and we then granted certiorari, 589 U. S. ——, 140 S.Ct. 1104, 206 L.Ed.2d 177 (2020). One of the questions that we accepted for review is "[w]hether *Employment Division v. Smith* should be revisited." We should confront that question.

Regrettably, the Court declines to do so. Instead, it reverses based on what appears to be a superfluous (and likely to be short-lived) feature of the City's standard annual contract with foster care agencies. *Smith*'s holding about categorical rules does not apply if a rule permits

individualized exemptions, 494 U.S. at 884, 110 S.Ct. 1595, and the majority seizes on the presence in the City's standard contract of language giving a City official the power to grant exemptions. *Ante*, at 1877. The City tells us that it has never granted such an exemption and has no intention of handing one to CSS, Brief for City Respondents 36; App. to Pet. for Cert. 168a, but the majority reverses the decision below because the contract supposedly confers that never-used power. *Ante*, at 1879 – 1880, 1882.

This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power.[21] If it does that, then, voilà, today's decision will vanish—and the parties will be back where they started. The City will claim that it is protected by *Smith*; CSS will argue that *Smith* should be overruled; the lower courts, bound by *Smith*, will ***1888** reject that argument; and CSS will file a new petition in this Court challenging *Smith*. What is the point of going around in this circle?

Not only is the Court's decision unlikely to resolve the present dispute, it provides no guidance regarding similar controversies in other jurisdictions. From 2006 to 2011, Catholic Charities in Boston, San Francisco, Washington, D. C., and Illinois ceased providing adoption or foster care services after the city or state government insisted that they serve same-sex couples. Although the precise legal grounds for these actions are not always clear, it appears that they were based on laws or regulations generally prohibiting discrimination on the basis of sexual orientation.[22] And some jurisdictions have adopted anti-discrimination rules that expressly target adoption services.[23] Today's decision will be of no help in other cases involving the exclusion of faith-based foster care and adoption agencies unless by some chance the relevant laws contain the same glitch as the Philadelphia contractual provision on which the majority's decision hangs. The decision will be even less significant in all the other important religious liberty cases that are bubbling up.

We should reconsider *Smith* without further delay. The correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith*'s interpretation is hard to defend. It can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption. It swept aside decades of established precedent, and it has not aged well. Its interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause. Contrary to what many initially expected, *Smith* has not provided a clear-cut rule that is easy to apply, and experience has disproved the *Smith* majority's fear that retention of the Court's prior free-exercise jurisprudence would lead to "anarchy." 494 U.S. at 888, 110 S.Ct. 1595.

***1889** When *Smith* reinterpreted the Free Exercise Clause, four Justices—Brennan, Marshall, Blackmun, and O'Connor—registered strong disagreement. *Id.,* at 891, 892, 110 S.Ct. 1595 (O'CONNOR, J., joined in part by BRENNAN, MARSHALL, and BLACKMUN, JJ., concurring in judgment); *id.,* at 907–908, 110 S.Ct. 1595 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting). After joining the Court, Justice Souter called for *Smith* to be reexamined. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 559, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (opinion concurring in part and concurring in judgment). So have five sitting Justices. *Kennedy v. Bremerton School Dist.*, 586 U. S. ——, —— – ——, 139 S.Ct. 634, 636–637, 203 L.Ed.2d 137 (2019) (ALITO, J., joined by THOMAS, GORSUCH, and KAVANAUGH, JJ., concurring in denial of certiorari); *City of Boerne v. Flores*, 521 U.S. 507, 566, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (BREYER, J., dissenting). So have some of the country's most distinguished scholars of the Religion Clauses. See, *e.g.,* McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109 (1990) (McConnell, Free Exercise Revisionism); Laycock, The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed, 8 J. L. & Religion 99 (1990). On two separate occasions, Congress, with virtual unanimity, expressed the view that *Smith*'s interpretation is contrary to our society's deep-rooted commitment to religious liberty. In enacting the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*), and the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq.*), Congress tried to restore the constitutional rule in place before *Smith* was handed down. Those laws, however, do not apply to most state action, and they leave huge gaps.

It is high time for us to take a fresh look at what the Free Exercise Clause demands.

II

A

To fully appreciate what the Court did in *Smith*, it is necessary to recall the substantial body of precedent that it displaced. Our seminal decision on the question of religious exemptions from generally applicable laws was *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), which had been in place for nearly three decades when *Smith* was decided. In that earlier case, Adell Sherbert, a Seventh-day Adventist, was fired because she refused to work on Saturday, her Sabbath Day. 374 U.S. at 399, 83 S.Ct. 1790. Unable to find other employment that did not require Saturday work, she applied for unemployment compensation but was rejected because

state law disqualified claimants who "failed, without good cause ... to accept available suitable work when offered." *Id.*, at 399–401, 83 S.Ct. 1790, and n. 3 (internal quotation marks omitted). The State Supreme Court held that this denial of benefits did not violate Sherbert's free-exercise right, but this Court reversed.

In an opinion authored by Justice Brennan, the Court began by surveying the Court's few prior cases involving claims for religious exemptions from generally applicable laws. *Id.,* at 402–403, 83 S.Ct. 1790. In those decisions, the Court had not articulated a clear standard for resolving such conflicts, but as the *Sherbert* opinion accurately recounted, where claims for religious exemptions had been rejected, "[t]he conduct or actions [in question] invariably posed some substantial threat to public ***1890** safety, peace or order." *Id.*, at 403, 83 S.Ct. 1790. (As will be shown below, this description of the earlier decisions corresponds closely with the understanding of the scope of the free-exercise right at the time of the First Amendment's adoption. See *infra*, at 1899 – 1903.)

After noting these earlier decisions, the Court turned to the case at hand and concluded that the denial of benefits imposed a substantial burden on Sherbert's free exercise of religion. 374 U.S. at 404, 83 S.Ct. 1790. It "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Ibid.* As a result, the Court reasoned, the decision below could be sustained only if it was "justified by a 'compelling state interest.' " *Id.*, at 403, 406, 83 S.Ct. 1790. The State argued that its law was needed to prevent "the filing of fraudulent claims by unscrupulous claimants feigning religious objections," but Justice Brennan's opinion found this justification insufficient because the State failed to show that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.*, at 407, 83 S.Ct. 1790.

The test distilled from *Sherbert*—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule for the next 27 years. Applying that test, the Court sometimes vindicated free-exercise claims. In *Wisconsin v. Yoder*, 406 U.S. 205, 234, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), for example, the Court held that a state law requiring all students to remain in school until the age of 16 violated the free-exercise rights of Amish parents whose religion required that children leave school after the eighth grade. The Court acknowledged the State's "admittedly strong interest in compulsory education" but concluded that the State had failed to "show with ... particularity how [that interest] would be adversely affected by granting an exemption to the Amish." *Id.*, at 236, 92 S.Ct. 1526. And in holding that the Amish were entitled to a special exemption, the Court expressly rejected the interpretation of the Free Exercise Clause that was later embraced in *Smith*. Indeed, the *Yoder*

Court stated this point again and again: "[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*"; "*[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality* if it unduly burdens the free exercise of religion"; insisting that Amish children abide by the compulsory attendance requirement was unconstitutional *even though it* "*applie[d] uniformly to all citizens of the State* and d[id] not, on its face, discriminate against religions or a particular religion, [and was] motivated by legitimate secular concerns." *Id.*, at 220, 92 S.Ct. 1526 (emphasis added).

Other decisions also accepted free-exercise claims under the *Sherbert* test. In *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 710, 720, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the Court concluded that a State could not withhold unemployment benefits from a Jehovah's Witness who quit his job because he refused to do work that he viewed as contributing to the production of military weapons. In so holding, the Court reiterated that " '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.' " *Id.*, at 717, 101 S.Ct. 1425 (quoting *Yoder*, 406 U.S. at 220, 92 S.Ct. 1526).

***1891** Subsequently, in *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), the Court found that a state rule that was " 'neutral and uniform in its application' " nevertheless violated the Free Exercise Clause under the *Sherbert* test. A similar violation was found in *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989).

Other cases applied *Sherbert* but found no violation. In *United States v. Lee*, 455 U.S. 252, 258, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), the Court held that mandatory contributions to Social Security were constitutional because they were "indispensable to the fiscal vitality of the social security system." In *Gillette v. United States*, 401 U.S. 437, 462, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), denying conscientious-objector status to men whose opposition to war was limited to one particular conflict was held to be "strictly justified by substantial governmental interests." In still other cases, the Court found *Sherbert* inapplicable either because the challenged law did not implicate the conduct of the individual seeking an exemption, see *Bowen v. Roy*, 476 U.S. 693, 700, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450–451, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), or because the case arose in a context where the government exercised broader authority over assertions of individual rights, see *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 353, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (prison); *Goldman v. Weinberger*, 475 U.S. 503, 506, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986)

(military). None of these decisions questioned the validity of *Sherbert*'s interpretation of the free-exercise right.

B

This is where our case law stood when *Smith* reached the Court. The underlying situation in *Smith* was very similar to that in *Sherbert*. Just as Adell Sherbert had been denied unemployment benefits due to conduct mandated by her religion (refraining from work on Saturday), Alfred Smith and Galen Black were denied unemployment benefits because of a religious practice (ingesting peyote as part of a worship service of the Native American Church). 494 U.S. at 874, 110 S.Ct. 1595. Applying the *Sherbert* test, the Oregon Supreme Court held that this denial of benefits violated Smith's and Black's free-exercise rights, and this Court granted review. [24]

The State defended the denial of benefits under the *Sherbert* framework. It argued that it had a compelling interest in combating the use of dangerous drugs and that accommodating their use for religious purposes would upset its enforcement scheme. Brief for Petitioners in *Employment Div., Dept. of Human Resources* v. *Smith*, No. 88–1213, O. T. 1988, pp. 5–7, 12, 16. The State never suggested that *Sherbert* should be overruled. See Brief for Petitioners in No. 88–1213, at 11. Instead, the crux of its disagreement with Smith ***1892** and Black and the State Supreme Court was whether its interest in preventing drug use could be served by a more narrowly tailored rule that made an exception for religious use by members of the Native American Church.

The question divided the four Justices who objected to the *Smith* majority's rationale. Compare 494 U.S. at 905–907, 110 S.Ct. 1595 (O'CONNOR J., concurring in judgment), with *id.*, at 909–919, 110 S.Ct. 1595 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting). And the *Smith* majority wanted no part of that question. Instead, without briefing or argument on whether *Sherbert* should be cast aside, the Court adopted what it seems to have thought was a clear-cut test that would be easy to apply: A "generally applicable and otherwise valid" rule does not violate the Free Exercise Clause "if prohibiting the exercise of religion ... is not [its] object ... but merely the incidental effect of " its operation. 494 U.S. at 878, 110 S.Ct. 1595. Other than cases involving rules that target religious conduct, the *Sherbert* test was held to apply to only two narrow categories of cases: (1) those involving the award of unemployment benefits or other schemes allowing individualized exemptions and (2) so-called "hybrid rights" cases. See 494 U.S. at 881–884, 110 S.Ct. 1595. [25]

To clear the way for this new regime, the majority was willing to take liberties. Paying little attention to the terms of the Free Exercise Clause, it was satisfied that its interpretation represented a "permissible" reading of the text, *Smith*, 494 U.S. at 878, 110 S.Ct. 1595, and it did not even stop to explain why that was so. The majority made no effort to ascertain the original understanding of the free-exercise right, and it limited past precedents on grounds never previously suggested. *Sherbert*, *Thomas*, and *Hobbie* were placed in a ***1893** special category because they concerned the award of unemployment compensation, *Smith*, 494 U.S. at 883, 110 S.Ct. 1595, and *Yoder* was distinguished on the ground that it involved both a free-exercise claim and a parental-rights claim, *Smith,* 494 U.S. at 881, 110 S.Ct. 1595. Not only did these distinctions lack support in prior case law, the issue in *Smith* itself could easily be viewed as falling into both of these special categories. After all, it involved claims for unemployment benefits, and members of the Native American Church who ingest peyote as part of a religious ceremony are surely engaging in expressive conduct that falls within the scope of the Free Speech Clause. See, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

None of these obstacles stopped the *Smith* majority from adopting its new rule and displacing decades of precedent. The majority feared that continued adherence to that case law would "cour[t] anarchy" because it "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." 494 U.S. at 888, 110 S.Ct. 1595. The majority recognized that its new interpretation would place small religious groups at a "relative disadvantage," but the majority found that preferable to the problems it envisioned if the *Sherbert* test had been retained. 494 U.S. at 890, 110 S.Ct. 1595.

Four Justices emphatically disagreed with *Smith*'s reinterpretation of the Free Exercise Clause. Justice O'Connor wrote that this new reading "dramatically depart[ed] from well-settled First Amendment jurisprudence" and was "incompatible with our Nation's fundamental commitment to individual religious liberty." 494 U.S. at 891, 110 S.Ct. 1595 (opinion concurring in judgment). Justices Brennan, Marshall, and Blackmun protested that the majority had "mischaracteriz[ed]" and "discard[ed]" the Court's free-exercise jurisprudence on its way to "perfunctorily dismiss[ing]" the "settled and inviolate principle" that state laws burdening religious freedom may stand only if "justified by a compelling interest that cannot be served by less restrictive means." *Id.,* at 907–908, 110 S.Ct. 1595 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting).

Smith's impact was quickly felt, and Congress was inundated with reports of the decision's consequences.[26] In response, it attempted to restore the *Sherbert* test. In the House, then-Representative Charles Schumer introduced a bill that made a version of that test applicable to all actions taken by the Federal Government or the States. H. R. 1308, 103d Cong., 1st Sess. (1993).

This bill, which eventually became the Religious Freedom Restoration Act (RFRA), passed in the House without dissent, ***1894** was approved in the Senate by a vote of 97 to 3, and was enthusiastically signed into law by President Clinton. 139 Cong. Rec. 27239–27341 (1993) (House voice vote); *id*., at 26416 (Senate vote); Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 Weekly Comp. of Pres. Doc. 2377 (1993). And when this Court later held in *City of Boerne*, 521 U.S. 507, 117 S.Ct. 2157, that Congress lacked the power under the 14th Amendment to impose these rules on the States, Congress responded by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA) under its spending power and its power to regulate interstate commerce. See 114 Stat. 803. Introduced in the Senate by Sen. Orrin Hatch and cosponsored by Sen. Edward Kennedy, RLUIPA imposed the same rules as RFRA on land use and prison regulations. S. 2869, 106th Cong., 2d Sess. (2000); 42 U.S.C. § 2000cc *et seq*; 146 Cong. Rec. 16698 (2000). RLUIPA passed both Houses of Congress without a single negative vote and, like RFRA, was signed by President Clinton. *Id*., at 16703, 16623; Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 36 Weekly Comp. of Pres. Doc. 2168 (2000).

RFRA and RLUIPA have restored part of the protection that *Smith* withdrew, but they are both limited in scope and can be weakened or repealed by Congress at any time. They are no substitute for a proper interpretation of the Free Exercise Clause.

III

A

That project must begin with the constitutional text. In *Martin v. Hunter's Lessee*, 1 Wheat. 304, 338–339, 4 L.Ed. 97 (1816), Justice Story laid down the guiding principle: "If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible." And even though we now have a thick body of precedent regarding the meaning of most provisions of the Constitution, our opinions continue to respect the primacy of the Constitution's text. See, *e.g.*, *Chiafalo v. Washington*, 591 U. S. ——, —— – ——, 140 S.Ct. 2316, 2323–2326, 207 L.Ed.2d 761 (2020) (starting with the text of Art. II, § 1, before considering historical practice); *Knick v. Township of Scott*, 588 U. S. ——, ——, 139 S.Ct. 2162, 2169–2170, 204 L.Ed.2d 558 (2019) (beginning analysis with the text of the Takings Clause); *Gamble v. United States*, 587 U. S. ——, —— – ——, 139 S.Ct. 1960, 1964–1965, 204 L.Ed.2d 322 (2019) (starting with the text of the Fifth Amendment before turning to history and precedent); *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157 ("In assessing the breadth of § 5's enforcement power, we begin with its text").

Smith, however, paid shockingly little attention to the text of the Free Exercise Clause. Instead of examining what readers would have understood its words to mean when adopted, the opinion merely asked whether it was "permissible" to read the text to have the meaning that the majority favored. 494 U.S. at 878, 110 S.Ct. 1595. This strange treatment of the constitutional text cannot be justified—and is especially surprising since it clashes so sharply with the way in which *Smith*'s author, Justice Scalia, generally treated the text of the Constitution (and, indeed, with his entire theory of legal interpretation). As he put it, "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text." A. Scalia, A Matter of Interpretation 38 (1997). See also *NLRB v. Noel Canning*, 573 U.S. 513, 575–583, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (SCALIA, J., concurring in judgment); ***1895** *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 722, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) (plurality opinion of SCALIA, J.); *Maryland v. Craig*, 497 U.S. 836, 860–861, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (SCALIA, J., dissenting).

Justice Scalia's opinion for the Court in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), is a prime example of his usual approach, and it is a model of what a reexamination of the Free Exercise Clause should entail. In *Heller*, after observing that the "Constitution was written to be understood by the voters," Justice Scalia's opinion begins by presuming that the "words and phrases" of the Second Amendment carry "their normal and ordinary ... meaning." *Id.*, at 576, 128 S.Ct. 2783 (internal quotation marks omitted). The opinion then undertakes a careful examination of all the Amendment's key terms. It does not simply ask whether its interpretation of the text is "permissible." *Smith*, 494 U.S. at 878, 110 S.Ct. 1595.

B

Following the sound approach that the Court took in *Heller*, we should begin by considering the "normal and ordinary" meaning of the text of the Free Exercise Clause: "Congress shall make no law ... prohibiting the free exercise [of religion]." Most of these terms and phrases —"Congress,"[27] "shall make," "no law,"[28] and "religion" ***1896** [29]—do not require discussion for present purposes, and we can therefore focus on what remains: the term "prohibiting" and the phrase "the free exercise of religion."

Those words had essentially the same meaning in 1791 as they do today. "To prohibit" meant either "[t]o forbid" or "to hinder." 2 S. Johnson, A Dictionary of the English Language (1755) (Johnson (1755)).[30] The term "exercise" had both a broad primary definition ("[p]ractice" or

"outward performance") and a narrower secondary one (an "[a]ct of divine worship whether publick or private"). 1 *id.* [31] (The Court long ago declined to give the First Amendment's reference to "exercise" this narrow reading. See, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303–304, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).) And "free," in the sense relevant here, meant "unrestrained." 1 Johnson (1755). [32]

If we put these definitions together, the ordinary meaning of "prohibiting the free exercise of religion" was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*. It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted.

***1897** As interpreted in *Smith*, the Clause is essentially an anti-discrimination provision: It means that the Federal Government and the States cannot restrict conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct. *Smith* made no real attempt to square that equal-treatment interpretation with the ordinary meaning of the Free Exercise Clause's language, and it is hard to see how that could be done.

The key point for present purposes is that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the "exercise of religion") the right to do so without hindrance. The language of the Clause does not tie this right to the treatment of persons not in this group.

The oddity of *Smith*'s interpretation can be illustrated by considering what the same sort of interpretation would mean if applied to other provisions of the Bill of Rights. Take the Sixth Amendment, which gives a specified group of people (the "accused" in criminal cases) a particular right (the right to the "Assistance of Counsel for [their] defence"). Suppose that Congress or a state legislature adopted a law banning counsel in *all litigation*, civil and criminal. Would anyone doubt that this law would violate the Sixth Amendment rights of criminal defendants?

Or consider the Seventh Amendment, which gives a specified group of people (parties in most civil "Suits at common law") "the right of trial by jury." Would there be any question that a law abolishing juries in *all* civil cases would violate the rights of parties in cases that fall within the Seventh Amendment's scope?

Other examples involving language similar to that in the Free Exercise Clause are easy to imagine. Suppose that the amount of time generally allotted to complete a state bar exam is 12 hours but that applicants with disabilities secure a consent decree allowing them an extra hour. Suppose that the

State later adopts a rule requiring all applicants to complete the exam in 11 hours. Would anyone argue that this was consistent with the decree?

Suppose that classic car enthusiasts secure the passage of a state constitutional amendment exempting cars of a certain age from annual safety inspections, but the legislature later enacts a law requiring such inspections for all vehicles regardless of age. Can there be any doubt that this would violate the state constitution?

It is not necessary to belabor this point further. What all these examples show is that *Smith*'s interpretation conflicts with the ordinary meaning of the First Amendment's terms.

C

Is there any way to bring about a reconciliation? The short answer is "no." Survey all the briefs filed in support of respondents (they total more than 40) and three decades of law review articles, and what will you find? Philadelphia's brief refers in passing to one possible argument—and the source it cites is a law review article by one of *Smith*'s leading academic critics, Professor Michael W. McConnell. See Brief for City Respondents 49 (citing McConnell, Free Exercise Revisionism 1115). Trying to see if there was any way to make *Smith* fit with the constitutional text, Professor McConnell came up with this argument—but then rejected it. McConnell, Free Exercise Revisionism 1115–1116.

The argument goes as follows: Even if a law prohibits conduct that constitutes an essential religious practice, it cannot be said to "prohibit" the free exercise of religion ***1898** unless that was the lawmakers' specific object.

This is a hair-splitting interpretation. It certainly does not represent the "normal and ordinary" meaning of the Free Exercise Clause's terms. See *Heller*, 554 U.S. at 576, 128 S.Ct. 2783. Consider how it would play out if applied to some of the hypothetical laws discussed at the beginning of this opinion. A law categorically banning all wine would not "prohibit" the celebration of a Catholic Mass? A law categorically forbidding the slaughter of a conscious animal would not "prohibit" kosher and halal slaughterhouses? A rule categorically banning any head covering in a courtroom would not "prohibit" appearances by orthodox Jewish men, Sikh men, and Muslim women who wear hijabs? It is no wonder that *Smith*'s many defenders have almost uniformly forgone this argument.

D

Not only is it difficult to square *Smith*'s interpretation with the terms of the Free Exercise Clause, the absence of any language referring to equal treatment is striking. If equal treatment was the objective, why didn't Congress say that? And since it would have been simple to cast the Free Exercise Clause in equal-treatment terms, why would the state legislators who voted for ratification have read the Clause that way?

It is not as if there were no models that could have been used. Other constitutional provisions contain non-discrimination language. For example, Art. I, § 9, cl. 6, provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." Under Art. IV, § 2, cl. 1, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article V provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Language mandating equal treatment of one sort or another also appeared in the religious liberty provisions of colonial charters and state constitutions.[33] But Congress eschewed those models. The contrast between these readily available anti-discrimination models and the language that appears in the First Amendment speaks volumes.

IV

A

While we presume that the words of the Constitution carry their ordinary and normal meaning, we cannot disregard the possibility that some of the terms in the Free Exercise Clause had a special meaning that was well understood at the time. *Heller*, again, provides a helpful example. *Heller* did not hold that the right to keep and bear arms means that everyone has the right to keep and bear every type of weaponry in all places and at all times. Instead, it held that the Second Amendment protects a known right that was understood to ***1899** have defined dimensions. 554 U.S. at 626–628, 128 S.Ct. 2783.

Following *Heller*'s lead, we must ask whether the Free Exercise Clause protects a right that was known at the time of adoption to have defined dimensions. But in doing so, we must keep in mind that there is a presumption that the words of the Constitution are to be interpreted in accordance with their "normal and ordinary" sense. *Id.*, at 576, 128 S.Ct. 2783 (internal quotation marks omitted). Anyone advocating a different reading must overcome that presumption.

B

1

What was the free-exercise right understood to mean when the Bill of Rights was ratified? And in particular, was it clearly understood that the right simply required equal treatment for religious and secular conduct? When *Smith* was decided, scholars had not devoted much attention to the original meaning of the Free Exercise Clause, and the parties' briefs ignored this issue, as did the opinion of the Court. Since then, however, the historical record has been plumbed in detail,[34] and we are now in a good position to examine how the free-exercise right was understood when the First Amendment was adopted.

By that date, the right to religious liberty already had a long, rich, and complex history in this country. What appears to be the first "free exercise" provision was adopted in 1649. Prompted by Lord Baltimore,[35] the Maryland Assembly enacted a provision protecting the right of all Christians to engage in "the free exercise" of religion.[36] Rhode Island's 1663 Charter extended the right to all. See Charter of Rhode Island and Providence Plantations (1663), in Cogan 34. Early colonial charters and agreements in Carolina, Delaware, ***1900** New Jersey, New York, and Pennsylvania also recognized the right to free exercise,[37] and by 1789, every State except Connecticut had a constitutional provision protecting religious liberty. McConnell, Origins 1455. In fact, the Free Exercise Clause had more analogs in State Constitutions than any other individual right. See Calabresi, Agudo, & Dore, State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition? 85 S. Cal. L. Rev. 1451, 1463–1464, 1472–1473 (2012). In all of those State Constitutions, freedom of religion enjoyed broad protection, and the right "was universally said to be an unalienable right." McConnell, Origins 1456.[38]

***1901** 2

What was this right understood to protect? In seeking to discern that meaning, it is easy to get lost in the voluminous discussion of religious liberty that occurred during the long period from the first British settlements to the adoption of the Bill of Rights. Many different political figures, religious leaders, and others spoke and wrote about religious liberty and the relationship between the authority of civil governments and religious bodies. The works of a variety of thinkers were influential, and views on religious liberty were informed by religion, philosophy, historical

experience, particular controversies and issues, and in no small measure by the practical task of uniting the Nation. The picture is complex.

For present purposes, we can narrow our focus and concentrate on the circumstances that relate most directly to the adoption of the Free Exercise Clause. As has often been recounted, critical state ratifying conventions approved the Constitution on the understanding that it would be amended to provide express protection for certain fundamental rights,[39] and the right to religious liberty was unquestionably one of those rights. As noted, it was expressly protected in 12 of the 13 State Constitutions, and these state constitutional provisions provide the best evidence of the scope of the right embodied in the First Amendment.

When we look at these provisions, we see one predominant model. This model extends broad protection for religious liberty but expressly provides that the right does not protect conduct that would endanger "the public peace" or "safety."

This model had deep roots in early colonial charters. It appeared in the Rhode Island Charter of 1663,[40] the Second Charter ***1902** of Carolina in 1665,[41] and the New York Act Declaring Rights & Priviledges in 1691.[42]

By the founding, more than half of the State Constitutions contained free-exercise provisions subject to a "peace and safety" carveout or something similar. The Georgia Constitution is a good example. It provided that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the *peace and safety* of the State." Ga. Const., Art. LVI (1777), in Cogan 16 (emphasis added). The founding era Constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina all contained broad protections for religious exercise, subject to limited peace-and-safety carveouts.[43]

***1903** The predominance of this model is highlighted by its use in the laws governing the Northwest Territory. In the Northwest Ordinance of 1787, the Continental Congress provided that "[n]o person, demeaning himself in *a peaceable and orderly manner*, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory." Art. I (emphasis added). After the ratification of the Constitution, the First Congress used similar language in the Northwest Ordinance of 1789. See Act of Aug. 7, 1789, 1 Stat. 52 (reaffirming Art. I of Northwest Ordinance of 1787). Since the First Congress also framed and approved the Bill of Rights, we have often said that its apparent understanding of the scope of those rights is entitled to great respect. See, *e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 575–578, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014); *Harmelin v. Michigan*, 501 U.S. 957, 980, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.); *Marsh v. Chambers*, 463 U.S. 783, 786–792, 103 S.Ct.

3330, 77 L.Ed.2d 1019 (1983); *Carroll v. United States*, 267 U.S. 132, 150–151, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

3

The model favored by Congress and the state legislatures—providing broad protection for the free exercise of religion except where public "peace" or "safety" would be endangered—is antithetical to *Smith*. If, as *Smith* held, the free-exercise right does not require any religious exemptions from generally applicable laws, it is not easy to imagine situations in which a public-peace-or-safety carveout would be necessary. Legislatures enact generally applicable laws to protect public peace and safety. If those laws are thought to be sufficient to address a particular type of conduct when engaged in for a secular purpose, why wouldn't they also be sufficient to address the same type of conduct when carried out for a religious reason?

Smith's defenders have no good answer. Their chief response is that the free-exercise provisions that included these carveouts were tantamount to the *Smith* rule because any conduct that is generally prohibited or generally required can be regarded as necessary to protect public peace or safety. See *City of Boerne*, 521 U.S. at 539, 117 S.Ct. 2157 (SCALIA, J., concurring in part) ("At the time these provisos were enacted, keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws").

This argument gives "public peace and safety" an unnaturally broad interpretation. Samuel Johnson's 1755 dictionary defined "peace" as: "1. Respite from war.... 2. Quiet from suits or disturbances.... 3. Rest from any commotion. 4. Stil[l]ness from riots or tumults.... 5. Reconciliation of differences.... 6. A state not hostile.... 7. Rest; quiet; content; freedom from terrour; heavenly rest...." 2 Johnson.[44]

***1904** In ordinary usage, the term "safety" was understood to mean: "1. Freedom from danger.... 2. Exemption from hurt. 3. Preservation from hurt...." *Ibid.*[45]

When "peace" and "safety" are understood in this way, it cannot be said that every violation of every law imperils public "peace" or "safety." In 1791 (and today), violations of many laws do not threaten "war," "disturbances," "commotion," "riots," "terrour," "danger," or "hurt." Blackstone catalogs numerous violations that do not threaten any such harms, including "cursing";[46] refusing to pay assessments for "the repairs of sea banks and sea walls" and the "cleansing of rivers, public streams, ditches and other conduits";[47] "retaining a man's hired servant before his time is expired";[48] an attorney's failure to show up for a trial;[49] the unauthorized "solemniz[ing of a]

marriage in any other place besides a church, or public chapel wherein banns have been usually published"; [50] "transporting and seducing our artists to settle abroad"; [51] engaging in the conduct of "a common scold"; [52] and "exercis[ing] a trade in any town, without having previously served as an apprentice for seven years." [53]

In contrast to these violations, Blackstone lists "offences against the public peace." 4 Commentaries on the Laws of England 142–153 (1769). Those include: riotous assembling of 12 persons or more; unlawful hunting; anonymous threats and demands; destruction of public floodgates, locks, or sluices on a navigable river; public fighting; riots or unlawful assemblies; "tumultuous" petitioning; forcible entry or detainer; riding or "going armed" with dangerous or unusual weapons; spreading false news to "make discord between the king and nobility, or concerning any great man of the realm"; spreading "false and pretended" prophecies to disturb the peace; provoking breaches of the peace; and libel "to provoke ... wrath, or expose [an individual] to public hatred, contempt, and ridicule." *Ibid.* (emphasis deleted); see also McConnell, Freedom from Persecution 835–836. These offenses might inform what constitutes actual or threatened breaches of public peace or safety in the ordinary sense of those terms. [54] But the ***1905** ordinary meaning of offenses that threaten public peace or safety must be stretched beyond the breaking point to encompass *all* violations of *any* law. [55]

C

That the free-exercise right included the right to certain religious exemptions is strongly supported by the practice of the Colonies and States. When there were important clashes between generally applicable laws and the religious practices of particular groups, colonial and state legislatures were willing to grant exemptions—even when the generally applicable laws served critical state interests.

Oath exemptions are illustrative. Oath requirements were considered "indispensable" to civil society because they were thought to ensure that individuals gave truthful testimony and fulfilled commitments. McConnell, Origins 1467. Quakers and members of some other religious groups refused to take oaths, *ibid.*, and therefore a categorical oath requirement would have resulted in the complete exclusion of these Americans from important civic activities, such as testifying in court and voting, see *ibid.*

Tellingly, that is not what happened. In the 1600s, Carolina allowed Quakers to enter a pledge rather than swearing an oath. *Ibid.* In 1691, New York permitted Quakers to give testimony after giving an affirmation. *Ibid.* Massachusetts did the same in 1743. *Id.,* at 1467–1468. In 1734, New York also allowed Quakers to qualify to vote by making an affirmation, and in 1740, Georgia

granted an exemption to Jews, allowing them to omit the phrase " 'on the faith of a Christian' " from the State's naturalization oath. *Id.,* at 1467. By 1789, almost all States had passed oath exemptions. *Id.*, at 1468.

Some early State Constitutions and declarations of rights formally provided oath exemptions for religious objectors. For instance, the Maryland Declaration of Rights of 1776 declared that Quakers, Mennonites, and members of some other religious groups "ought to be allowed to make their solemn affirmation" instead of an oath. § 36, in Cogan 18. Similarly, the Massachusetts Constitution of 1780 permitted Quakers holding certain government positions to decline to take the prescribed oath of office, allowing affirmations instead. Pt. II, ch. VI, Art. I, in *id.,* at 22. The Federal Constitution likewise permits federal and state officials to make either an "Oath *or* Affirmation, to support this Constitution." Art. VI, cl. 3 (emphasis added); see also Art. I, § 3, cl. 6; Art. II, § 1, cl. 8.

Military conscription provides an even more revealing example. In the Colonies ***1906** and later in the States, able-bodied men of a certain age were required to serve in the militia, see *Heller*, 554 U.S. at 595–596, 128 S.Ct. 2783, but Quakers, Mennonites, and members of some other religious groups objected to militia service on religious grounds, see McConnell, Origins 1468. The militia was regarded as essential to the security of the State and the preservation of freedom, see *Heller*, 554 U.S. at 597–598, 128 S.Ct. 2783, but colonial governments nevertheless granted religious exemptions, see McConnell, Origins 1468. Rhode Island, Maryland, North Carolina, and New Hampshire did so in the founding era. *Ibid.* In 1755, New York permitted a conscientious objector to obtain an exemption if he paid a fee or sent a substitute. *Ibid.* Massachusetts adopted a similar law two years later, and Virginia followed suit in 1776. *Ibid.*, and n. 297.

The Continental Congress also granted exemptions to religious objectors because conscription would do "violence to their consciences." Resolution of July 18, 1775, in 2 Journals of the Continental Congress, 1774–1789, p. 189 (W. Ford ed. 1905) (quoted in McConnell, Origins 1469, and n. 299). This decision is especially revealing because during that time the Continental Army was periodically in desperate need of soldiers, [56] the very survival of the new Nation often seemed in danger, [57] and the Members of Congress faced bleak personal prospects if the war was lost. [58] Yet despite these stakes, exemptions were granted.

Colonies with established churches also permitted non-members to decline to pay special taxes dedicated to the support of ministers of the established church. McConnell, Origins 1469. Massachusetts and Connecticut exempted Baptists and Quakers in 1727. *Ibid.* Virginia provided exemptions to Huguenots in 1700, German Lutherans in 1730, and dissenters from the Church of England in 1776. *Ibid.*; see also S. Cobb, The Rise of Religious Liberty in America 98, 492 (1902). Beginning in 1692, New Hampshire exempted those who could prove they were "

'conscientiously' " of a " 'different persuasion,' " regularly attended their own religious services, and contributed financially to their faith. McConnell, Origins 1469.

Various other religious exemptions were also provided. North Carolina and Maryland granted exemptions from the requirement that individuals remove their hats in court, a gesture that Quakers viewed as an impermissible showing of respect to a secular authority. *Id.*, at 1471–1472. And Rhode Island exempted Jews from some marriage laws. *Id.*, at 1471.

In an effort to dismiss the significance of these legislative exemptions, it has been argued that they show only what the Constitution permits, not what it requires. *City of Boerne*, 521 U.S. at 541, 117 S.Ct. 2157 ***1907** (opinion of SCALIA, J.). But legislatures provided those accommodations before the concept of judicial review took hold, and their actions are therefore strong evidence of the founding era's understanding of the free-exercise right. See McConnell, Free Exercise Revisionism 1119. Cf. *Heller*, 554 U.S. at 600–603, 128 S.Ct. 2783 (looking to state constitutions that preceded the adoption of the Second Amendment).

D

Defenders of *Smith* have advanced historical arguments of their own, but they are unconvincing, and in any event, plainly insufficient to overcome the ordinary meaning of the constitutional text.

1

One prominent argument points to language in some founding-era charters and constitutions prohibiting laws or government actions that were taken "for" or "on account" of religion. See *City of Boerne*, 521 U.S. at 538–539, 117 S.Ct. 2157 (opinion of SCALIA, J.). That phrasing, it is argued, reaches only measures that target religion, not neutral and generally applicable laws. This argument has many flaws.

No such language appears in the Free Exercise Clause, and in any event, the argument rests on a crabbed reading of the words "for" or "on account of " religion. As Professor McConnell has explained, "[i]f a member of the Native American Church is arrested for ingesting peyote during a religious ceremony, then he surely is molested 'for' or 'on account of ' his religious practice —even though the law under which he is arrested is neutral and generally applicable." Freedom From Persecution 834.

This argument also ignores the full text of many of the provisions on which it relies. *Id.,* at 833–834. While some protect against government actions taken "for" or "on account of" religion, they do not stop there. Instead, they go on to provide broader protection for religious liberty. See, *e.g.,* Maryland Act Concerning Religion (1649), in Cogan 17 (guaranteeing residents not be "troubled ... in the free exercise [of religion]"); New York Constitution (1777), in *id.*, at 26 (guaranteeing "the free Exercise and Enjoyment of religious Profession and Worship").

2

Another argument advanced by *Smith*'s defenders relies on the paucity of early cases "refusing to enforce a generally applicable statute because of its failure to make accommodation," *City of Boerne*, 521 U.S. at 542, 117 S.Ct. 2157 (opinion of SCALIA, J.). If exemptions were thought to be constitutionally required, they contend, we would see many such cases.

There might be something to this argument if there were a great many cases denying exemptions and few granting them, but the fact is that diligent research has found only a handful of cases going either way. Commentators have discussed the dearth of cases, and as they note, there are many possible explanations.[59] Early 19th century legislation imposed only limited restrictions on private conduct, and this minimized the chances of conflict between generally applicable laws and religious practices. The principal conflicts that arose—involving oaths, conscription, and taxes to support an established church—were largely resolved by state constitutional ***1908** provisions and laws granting exemptions. And the religious demographics of the time decreased the likelihood of conflicts. The population was overwhelmingly Christian and Protestant, the major Protestant denominations made up the great bulk of the religious adherents,[60] and other than with respect to the issue of taxes to support an established church, it is hard to think of conflicts between the practices of the members of these denominations and generally applicable laws that a state legislature might have enacted.

Members of minority religions are most likely to encounter such conflicts, and the largest minority group, the Quakers, who totaled about 10% of religious adherents,[61] had received exemptions for the practices that conflicted with generally applicable laws. As will later be shown, see *infra*, at 1908 – 1911, the small number of religious-exemption cases that occurred during the early 19th century involved members of what were then tiny religious groups—such as Catholics, Jews, and Covenanters.[62] Given the size of these groups, one would not expect a large number of cases. And where cases arose, the courts' decisions may not have always been reported. Barclay, The Historical Origins of Judicial Religious Exemptions, 96 Notre Dame L. Rev. 55, 70 (2020).

3

When the body of potentially relevant cases is examined, they provide little support for *Smith*'s interpretation of the free-exercise right. Not only are these decisions few in number, but they reached mixed results. In addition, some are unreasoned; some provide ambiguous explanations; and many of the cases denying exemptions were based on grounds that do not support *Smith.*

The most influential early case granting an exemption was *People* v. *Philips*, 1 W. L. J. 109, 112–113 (Gen. Sess., N. Y. 1813), where the court held that a Catholic priest could not be compelled to testify about a confession. The priest's refusal, the court reasoned, was protected by the state constitutional right to the free exercise of religion and did not fall within the exception for "acts of licentiousness" and "practices inconsistent with the peace or safety of th[e] State."[63] This, of course, is exactly the understanding of the free-exercise right that is seen in the founding era State Constitutions.

Although *Philips* was not officially reported, knowledge of the decision appears to have spread widely. Four years later, another New York court implicitly reaffirmed the principle *Philips* recognized but found the decision inapplicable because the Protestant minister who was called to testify did not feel a religious obligation to refuse. See *Smith's Case*, 2 N. Y. City-Hall Recorder 77, 80, and n. (1817); McConnell, Origins 1505–1506; Walsh 40–41.

***1909** In 1827, a South Carolina court relied on *Philips* as support for its decision to grant an exemption from a state law relied on to bar the testimony of a witness who denied a belief in punishment after death for testifying falsely, and the State's newly constituted high court approved that opinion. *Farnandis* v. *Henderson*, 1 Carolina L. J. 202, 213, 214 (1827).[64]

In *Commonwealth v. Cronin*, 2 Va.Cir. 488, 498, 500, 505 (1855), a Virginia court followed *Philips* and held that a priest's free-exercise right required an exemption from the general common law rule compelling a witness to "disclose all he may know" when giving testimony.

On the other side of the ledger, the most prominent opponent of exemptions was John Bannister Gibson of the Pennsylvania Supreme Court. Today, Gibson is best known for his dissent in *Eakin v. Raub*, 12 Serg. & Rawle 330, 355–356 (1825), which challenged John Marshall's argument for judicial review in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). See McConnell, Origins 1507. Three years after *Eakin*, Gibson's dissent in *Commonwealth v. Lesher*, 17 Serg. & Rawle 155 (Pa. 1828), advanced a related argument against decisions granting religious exemptions. Gibson agreed that the state constitutional provision protecting religious liberty conferred the right to do or forbear from doing any act "not prejudicial to the public weal," but he

argued that judges had no authority to override legislative judgments about what the public weal required. *Id.,* at 160–161 (emphasis deleted).

Three years later, he made a similar argument in dicta in *Philips's Executors v. Gratz*, 2 Pen. & W. 412, 412–413 (Pa. 1831), where a Jewish plaintiff had taken a non-suit (agreed to a dismissal) in a civil case scheduled for trial on a Saturday. Gibson's opinion for the Court set aside the non-suit on other grounds but rejected the plaintiff 's religious objection to trial on Saturday. *Id.,* at 416–417. He proclaimed that a citizen's obligation to the State must always take precedence over any religious obligation, and he expressly registered disagreement with the New York court's decision in *Philips*. *Id.,* at 417.

In South Carolina, an exemption claim was denied in *State v. Willson*, 13 S. C. L. 393, 394–397 (1823), where the court refused to exempt a member of the Covenanters religious movement from jury service. Because Covenanters opposed the Constitution on religious grounds, they refused to engage in activities, such as jury service and voting, that required an oath to support the Constitution or otherwise enlisted their participation in the Nation's scheme of government. [65] It is possible to read the opinion in *Willson* as embodying something like the *Smith* rule—or as concluding that granting the exemption would have opened the floodgates and undermined public peace and safety. See 13 S. C. L. at 395 ("who could distinguish ... between the pious asseveration of a holy ***1910** man and that of an accomplished villain"). But if *Willson* is read as rejecting religious exemptions, South Carolina's reconstituted high court reversed that position in *Farnandis*. [66]

Other cases denying exemptions are even less helpful to *Smith*'s defenders. Three decisions rejected challenges to Sunday closing laws by merchants who celebrated Saturday as the Sabbath, but at least two of these were based on the court's conclusion that the asserted religious belief was unfounded. See *City Council of Charleston v. Benjamin*, 33 S. C. L. 508, 529 (1848) ("There is ... no violation of the Hebrew's religion, in requiring him to cease from labor on another day than his Sabbath, if he be left free to observe the latter according to his religion" (emphasis deleted)); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 50, 51 (Pa. 1817) ("[T]he Jewish Talmud ... asserts no such doctrine" and the objection was made "out of mere caprice"). That reasoning is contrary to a principle that *Smith* reaffirmed: "Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim." 494 U.S. at 887, 110 S.Ct. 1595.

A third Sunday closing law decision appears to rest at least in part on a similar ground. See *Specht v. Commonwealth*, 8 Pa. 312 (1848). The court observed that the merchant's conscience rights might have been violated if his religion actually required him to work on Sunday, but the court concluded that the commandment to keep holy the Sabbath had never been understood to impose

"an imperative obligation to fill up each day of the other six with some worldly employment." *Id.*, at 326.

Other cases cited as denying exemptions were decided on nebulous grounds. In *Stansbury v. Marks*, 2 Dall. 213, 1 L.Ed. 353 (Pa. 1793), a decision of the Pennsylvania Supreme Court, the case report in its entirety states: "In this cause (which was tried on Saturday, the 5th of April) the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The Court, therefore, fined him £10; but the defendant, afterwards, waving the benefit of his testimony, he was discharged from the fine." (Emphasis deleted.) What can be deduced from this cryptic summary? Was the issue mooted when the defendant waived the benefit of Phillips's testimony? Who can tell?

In *Commonwealth v. Drake*, 15 Mass. 161 (1818), the Supreme Judicial Court of Massachusetts summarily affirmed the conviction of a criminal defendant who was convicted after the trial court admitted the testimony of his fellow church members before whom he had confessed. The State argued that the defendant had voluntarily confessed, that his confession was not required by any "ecclesiastical rule," and that he had confessed "not to the church" but "to his friends and neighbours." *Id.*, at 162. Because the court provided no explanation of its decision, this case sheds no light on the understanding of the free-exercise right.

All told, this mixed bag of antebellum decisions does little to support *Smith*, and extending the search past the Civil War does not advance *Smith*'s cause. One of the objectives of the Fourteenth Amendment, ***1911** it has been argued, was to protect the religious liberty of African-Americans in the South, where a combination of laws that did not facially target religious practice had been used to suppress religious exercise by slaves. See generally Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106 (1994).

4

Some have claimed that the drafting history of the Bill of Rights supports *Smith*. See Brief for First Amendment Scholars as *Amici Curiae* 10–11; Muñoz, Original Meaning 1085. But as Professor Philip Hamburger, one of *Smith*'s most prominent academic defenders, has concluded, "[w]hat any of this [history] implies about the meaning of the Free Exercise Clause is speculative." Religious Exemption 928.

Here is the relevant history. The House debated a provision, originally proposed by Madison, that protected the right to bear arms but included language stating that "no person, religiously

scrupulous, shall be compelled to bear arms." 1 Annals of Cong. 749, 766 (1789); see also Muñoz, Original Meaning 1112. Some Members spoke in favor of the proposal,[67] others opposed it,[68] and in the end, after adding the words "in person" at the end of the clause, the House adopted it.[69] The Senate, however, rejected the proposal (for reasons not provided on the public record), *id*., at 1116, and the House acceded to the deletion.

Those who claim that this episode supports *Smith* argue that the House would not have found it necessary to include this proviso in the Second Amendment if it had thought that the Free Exercise Clause already protected conscientious objectors from conscription, Muñoz, Original Meaning 1120, but that conclusion is unfounded. Those who favored Madison's language might have thought it necessary, not because the free-exercise right *never* required religious exemptions but because they feared that exemption from military service would be held to fall into the free-exercise right's carveout for conduct that threatens public safety.[70] And of course, it could be argued that the willingness of the House to constitutionalize this exemption despite its potential effect on national security shows the depth of the Members' commitment to the concept of religious exemptions.

As for the Senate's rejection of the proviso, we have often warned against drawing inferences from Congress's failure to adopt a legislative proposal. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act"); *Brecht v. Abrahamson*, 507 U.S. 619, 632–633, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (collecting cases). And in this instance, there are many possible explanations for what happened in the Senate. The rejection of the proviso *could* have been due to a general objection to religious exemptions, but it could also have been based on ***1912** any of the following grounds: opposition to this particular exemption, the belief that conscientious objectors were already protected by the Free Exercise Clause, a belief that military service fell within the public safety carveout, or the view that Congress should be able to decide whether to grant or withhold such exemptions based on its assessment of what national security required at particular times.

* * *

In sum, based on the text of the Free Exercise Clause and evidence about the original understanding of the free-exercise right, the case for *Smith* fails to overcome the more natural reading of the text. Indeed, the case against *Smith* is very convincing.

V

That conclusion cannot end our analysis. "We will not overturn a past decision unless there are strong grounds for doing so," *Janus v. State, County, and Municipal Employees,* 585 U. S. ——, ——, 138 S.Ct. 2448, 2478, 201 L.Ed.2d 924 (2018), but at the same time, *stare decisis* is "not an inexorable command." *Ibid.* (internal quotation marks omitted). It "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). And it applies with "perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus*, 585 U. S., at ——, 138 S.Ct., at 2478; see also *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (SCALIA, J., concurring in part and concurring in judgment) ("This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)" (internal quotation marks omitted)); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 365, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)).

In assessing whether to overrule a past decision that appears to be incorrect, we have considered a variety of factors, and four of those weigh strongly against *Smith*: its reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down. See *Janus*, 585 U. S., at —— – ——, 138 S.Ct., at 2478–2479. No relevant factor, including reliance, weighs in *Smith*'s favor.

A

Smith's reasoning. As explained in detail above, *Smith* is a methodological outlier. It ignored the "normal and ordinary" meaning of the constitutional text, see *Heller*, 554 U.S. at 576, 128 S.Ct. 2783, and it made no real effort to explore the understanding of the free-exercise right at the time of the First Amendment's adoption. And the Court adopted its reading of the Free Exercise Clause with no briefing on the issue from the parties or *amici*. Laycock, 8 J. L. & Religion, at 101.

Then there is *Smith*'s treatment of precedent. It looked for precedential support in strange places, and the many precedents that stood in its way received remarkably rough treatment.

Looking for a case that had endorsed its no-exemptions view, *Smith* turned to *Gobitis*, 310 U.S. at 586, 60 S.Ct. 1010, a decision ***1913** that Justice Scalia himself later acknowledged was "erroneous," *Wisconsin Right to Life, Inc.*, 551 U.S. at 500–501, 127 S.Ct. 2652 (opinion concurring in part). William Gobitas,[71] a 10-year-old fifth grader, and his 12-year-old sister Lillian refused to salute the flag during the Pledge of Allegiance because, along with other Jehovah's Witnesses, they thought the salute constituted idolatry. 310 U.S. at 591–592, 60 S.Ct. 1010.[72] William's "teacher tried to force his arm up, but William held on to his pocket and successfully resisted."[73] The Gobitas children were expelled from school, and the family grocery was boycotted.[74]

This Court upheld the children's expulsion because, in ringing rhetoric quoted by *Smith*, "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." 310 U.S. at 594, 60 S.Ct. 1010; see also *Smith*, 494 U.S. at 879, 110 S.Ct. 1595 (quoting this passage). This declaration was overblown when issued in 1940. (As noted, many religious exemptions had been granted by legislative bodies, and the 1940 statute instituting the peacetime draft continued that tradition by exempting conscientious objectors. Selective Training and Service Act, 54 Stat. 885, 889.) By 1990, when *Smith* was handed down, the pronouncement flew in the face of nearly 30 years of Supreme Court precedent.

But even if all that is put aside, *Smith*'s recourse to *Gobitis* was surprising because the decision was overruled just three years later when three of the Justices in the majority had second thoughts. See *Barnette*, 319 U. S. at 642, 63 S.Ct. 1178; *id.*, at 643–644, 63 S.Ct. 1178 (Black and Douglas, JJ., concurring); *id.*, at 644–646, 63 S.Ct. 1178 (MURPHY, J., concurring). Turning *Gobitis*'s words on their head, *Barnette* held that students with religious objections to saluting the flag were indeed "relieved ... from obedience to a general [rule] not aimed at the promotion or restriction of religious beliefs." *Gobitis*, 310 U.S. at 594, 60 S.Ct. 1010.

After reviving *Gobitis*'s anti-exemption rhetoric, *Smith* turned to *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244, an 1879 decision upholding the polygamy conviction of a member of the Church of Jesus Christ of Latter-day Saints. Unlike *Gobitis*, *Reynolds* at least had not been overruled,[75] but the decision was not based on anything like *Smith*'s interpretation of the Free Exercise Clause. It rested primarily on the proposition that the Free Exercise Clause protects

beliefs, not conduct. 98 U.S. at 166–167. The Court had repudiated that distinction a half century before *Smith* was decided. See *Cantwell*, 310 U.S. at 303–304, 60 S.Ct. 900; *Murdock v. Pennsylvania*, 319 U.S. 105, 110–111, 117, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). And *Smith* itself agreed! See 494 U.S. at 877, 110 S.Ct. 1595.

The remaining pre-*Sherbert* cases cited by *Smith* actually cut against its interpretation. None was based on the rule that *Smith* adopted. Although these decisions ended up denying exemptions, they did so on other grounds. In ***1914** *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), where a Jehovah's Witness who enlisted a child to distribute religious literature was convicted for violating a state child labor law, the decision was based on the Court's assessment of the strength of the State's interest. *Id.*, at 159–160, 162, 169–170, 64 S.Ct. 438; see also *Yoder*, 406 U.S. at 230–231, 92 S.Ct. 1526 (describing the *Prince* Court's rationale).

In *Braunfeld v. Brown*, 366 U.S. 599, 601, 609, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion), which rejected a Jewish merchant's challenge to Pennsylvania's Sunday closing laws, the Court balanced the competing interests. The Court attached diminished weight to the burden imposed by the law (because it did not require work on Saturday), *id.*, at 606, 81 S.Ct. 1144, [76] and on the other side of the balance, the Court accepted the Commonwealth's view that the public welfare was served by providing a uniform day of rest, *id.*, at 608–609, 81 S.Ct. 1144; see *Sherbert*, 374 U.S. at 408–409, 83 S.Ct. 1790 (discussing *Braunfeld*).

When *Smith* came to post-*Sherbert* cases, the picture did not improve. First, in order to place *Sherbert*, *Hobbie*, and *Thomas* in a special category reserved for cases involving unemployment compensation, an inventive transformation was required. None of those opinions contained a hint that they were limited in that way. And since *Smith* itself involved the award of unemployment compensation benefits under a scheme that allowed individualized exemptions, it is hard to see why that case did not fall into the same category.

The Court tried to escape this problem by framing Alfred Smith's and Galen Black's free-exercise claims as requests for exemptions from the Oregon law criminalizing the possession of peyote, see 494 U.S. at 876, 110 S.Ct. 1595, but neither Smith nor Black was prosecuted for that offense even though the State was well aware of what they had done. The State had the discretion to decline prosecution based on the facts of particular cases, and that is presumably what it did regarding Smith and Black. Why this was not sufficient to bring the case within *Smith*'s rule about individualized exemptions is unclear. See McConnell, Free Exercise Revisionism 1124.

Having pigeon-holed *Sherbert*, *Hobbie*, and *Thomas* as unemployment compensation decisions, *Smith* still faced problems. For one thing, the Court had previously applied the *Sherbert* test in many cases not involving unemployment compensation, including *Hernandez v. Commissioner*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (disallowance of tax deduction); *Lee*, 455 U.S. 252, 102 S.Ct. 1051 (payment of taxes); and *Gillette*, 401 U.S. 437, 91 S.Ct. 828 (denial of conscientious objector status to person with religious objection to a particular war). To get these cases out of the way, *Smith* claimed that, because they ultimately found no free-exercise violations, they merely "*purported* to apply the *Sherbert* test." 494 U.S. at 883, 110 S.Ct. 1595 (emphasis added).

This was a curious observation. In all those cases, the Court invoked the *Sherbert* test but found that it did not require relief. See *Hernandez*, 490 U.S. at 699, 109 S.Ct. 2136; *Lee*, 455 U.S. at 257–260, 102 S.Ct. 1051; *Gillette*, 401 U.S. at 462, 91 S.Ct. 828. Was the *Smith* Court questioning the sincerity of these earlier opinions? If not, then in what sense did those decisions merely "purport" to apply *Sherbert*?

Finally, having swept all these cases from the board, *Smith* still faced at least one big troublesome precedent: *Yoder*. ***1915** *Yoder* not only applied the *Sherbert* test but held that the Free Exercise Clause required an exemption totally unrelated to unemployment benefits. 406 U.S. at 220–221, 236, 92 S.Ct. 1526. To dispose of *Yoder*, *Smith* was forced to invent yet another special category of cases, those involving "hybrid-rights" claims. *Yoder* fell into this category because it implicated both the Amish parents' free-exercise claim and a parental-rights claim stemming from *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). See *Smith*, 494 U.S. at 881, 110 S.Ct. 1595. And in such hybrid cases, *Smith* held, the *Sherbert* test survived. See 494 U.S. at 881–882, 110 S.Ct. 1595.

It is hard to see the justification for this curious doctrine. The idea seems to be that if two independently insufficient constitutional claims join forces they may merge into a single valid hybrid claim, but surely the rule cannot be that asserting two invalid claims, no matter how weak, is always enough. So perhaps the doctrine requires the assignment of a numerical score to each claim. If a passing grade is 70 and a party advances a free-speech claim that earns a grade of 40 and a free-exercise claim that merits a grade of 31, the result would be a (barely) sufficient hybrid claim. Such a scheme is obviously unworkable and has never been recognized outside of *Smith*.

And then there is the problem that the hybrid-rights exception would largely swallow up *Smith*'s general rule. A great many claims for religious exemptions can easily be understood as hybrid free-exercise/free-speech claims. Take the claim in *Smith* itself. To members of the Native American Church, the ingestion of peyote during a religious ceremony is a sacrament. When Smith and Black participated in this sacrament, weren't they engaging in a form of expressive conduct? Their ingestion of peyote "communicate[d], in a rather dramatic way, [their] faith in the tenets of the Native American Church," and the State's prohibition of that practice "interfered with their ability to communicate this message" in violation of the Free Speech Clause. McConnell, Free Exercise Revisionism 1122. And, "if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under *another* constitutional provision, then there would have been no reason for the Court in [the so-called] hybrid cases to have mentioned the Free Exercise Clause at all." *Lukumi*, 508 U.S. at 566–567, 113 S.Ct. 2217 (opinion of SOUTER, J.); see also Laycock, 8 J. L. & Religion, at 106 (noting that *Smith* "reduces the free exercise clause to a cautious redundancy, relevant only to 'hybrid' cases"). It is telling that this Court has never once accepted a "hybrid rights" claim in the more than three decades since *Smith*.

In addition to all these maneuvers—creating special categories for unemployment compensation cases, cases involving individualized exemptions, and hybrid-rights cases—*Smith* ignored the multiple occasions when the Court had directly repudiated the very rule that *Smith* adopted. See *supra,* at 1881 – 1882.

Smith's rough treatment of prior decisions diminishes its own status as a precedent.

B

Consistency with other precedents. *Smith* is also discordant with other precedents. *Smith* did not overrule *Sherbert* or any of the other cases that built on *Sherbert* from 1963 to 1990, and for the reasons just discussed, *Smith* is tough to harmonize with those precedents.

The same is true about more recent decisions. In ***1916** *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012), the Court essentially held that the First Amendment entitled a religious school to a special exemption from the requirements of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq*. When the school discharged a teacher, she claimed that she had been terminated because of disability. 565 U.S. at 178–179, 132 S.Ct. 694. Since the school considered her

a "minister" and she provided religious instruction for her students, the school argued that her discharge fell within the so-called "ministerial exception" to generally applicable employment laws. *Id.*, at 180, 132 S.Ct. 694. The Equal Employment Opportunity Commission maintained that *Smith* precluded recognition of this exception because "the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability." *Id.*, at 190, 132 S.Ct. 694; see *id.*, at 189–190, 132 S.Ct. 694. We nevertheless held that the exception applied. *Id.*, at 190, 132 S.Ct. 694.[77] Similarly, in *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U. S. ——, —— – ——, 140 S.Ct. 2049, 2066–2067, 207 L.Ed.2d 870 (2020), we found that other religious schools were entitled to similar exemptions from both the ADA and the Age Discrimination in Employment Act of 1967.

There is also tension between *Smith* and our opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 584 U. S. ——, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018). In that case, we observed that "[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion." *Id.*, at ——, 138 S.Ct., at 1727. The clear import of this observation is that such a member of the clergy would be entitled to a religious exemption from a state law restricting the authority to perform a state-recognized marriage to individuals who are willing to officiate both opposite-sex and same-sex weddings.

Other inconsistencies exist. *Smith* declared that "a private right to ignore generally applicable laws" would be a "constitutional anomaly," 494 U.S. at 886, 110 S.Ct. 1595, but this Court has often permitted exemptions from generally applicable laws in First Amendment cases. For instance, in *Boy Scouts of America v. Dale*, 530 U.S. 640, 656, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000), we granted the Boy Scouts an exemption from an otherwise generally applicable state public accommodations law. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Inc., 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), parade sponsors' speech was exempted from the requirements of a similar law.

The granting of an exemption from a generally applicable law is tantamount to a holding that a law is unconstitutional as applied to a particular set of facts, see ***1917** Barclay & Rienzi, Constitutional Anomalies or As-Applied *Challenges*? *A Defense of Religious* Exemptions, 59 Boston College L. Rev. 1595, 1611 (2018), and cases holding generally applicable laws unconstitutional as applied are unremarkable. "[T]he normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (internal quotation marks omitted;

emphasis added). Thus, in *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 103 S.Ct. 416, 74 L.Ed.2d 250 (1982), we held that a law requiring disclosure of campaign contributions and expenditures could not be "constitutionally applied" to a minor party whose members and contributors would face "threats, harassment or reprisals." *Id.*, at 101–102, 103 S.Ct. 416. Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (exempting the NAACP from a disclosure order entered to purportedly investigate compliance with a generally applicable statute). In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), and *Snyder v. Phelps*, 562 U.S. 443, 459, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011), the Court held that an established and generally applicable tort claim (the intentional infliction of emotional distress) could not constitutionally be applied to the particular expression at issue. Similarly, breach-of-the-peace laws, although generally valid, have been held to violate the Free Speech Clause under certain circumstances. See *Cohen v. California*, 403 U.S. 15, 16, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Cantwell*, 310 U.S. at 300, 311, 60 S.Ct. 900; see also *Bartnicki v. Vopper*, 532 U.S. 514, 517, 535, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) (respondents not liable under law prohibiting disclosure of illegally intercepted communications because their speech was protected by the First Amendment); *United States v. Treasury Employees*, 513 U.S. 454, 477, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (respondents not subject to the honoraria ban because it would violate their First Amendment rights); *United States v. Grace*, 461 U.S. 171, 175, 179, 183, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (respondents engaging in expressive conduct on public sidewalks not subject to law generally regulating conduct on Supreme Court grounds).

Finally, *Smith*'s treatment of the free-exercise right is fundamentally at odds with how we usually think about liberties guaranteed by the Bill of Rights. As Justice Jackson famously put it, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *Barnette*, 319 U.S. at 638, 63 S.Ct. 1178. *Smith*, by contrast, held that protection of religious liberty was better left to the political process than to courts. 494 U.S. at 890, 110 S.Ct. 1595. In *Smith*'s view, the Nation simply could not "afford the luxury" of protecting the free exercise of religion from generally applicable laws. *Id.*, at 888, 110 S.Ct. 1595. Under this interpretation, the free exercise of religion does not receive the judicial protection afforded to other, favored rights.

C

Workability. One of *Smith*'s supposed virtues was ease of application, but things have not turned out that way. Instead, at least four serious problems have arisen and continue to plague courts when called upon to apply *Smith*.

***1918** 1

"Hybrid-rights" cases. The "hybrid rights" exception, which was essential to distinguish *Yoder*, has baffled the lower courts. They are divided into at least three camps. See *Combs v. Homer-Center School Dist.*, 540 F.3d 231, 244–247 (C.A.3 2008) (describing Circuit split). Some courts have taken the extraordinary step of openly refusing to follow this part of *Smith*'s interpretation. The Sixth Circuit was remarkably blunt: "[H]old[ing] that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights ... is completely illogical." *Kissinger v. Board of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (1993). The Second and Third Circuits have taken a similar approach. See *Leebaert v. Harrington*, 332 F.3d 134, 144 (C.A.2 2003) ("We ... can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated"); *Knight v. Connecticut Dept. of Pub. Health*, 275 F.3d 156, 167 (C.A.2 2001); *Combs*, 540 F.3d at 247 ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta").

A second camp holds that the hybrid-rights exception applies only when a free-exercise claim is joined with some other independently viable claim. See *Archdiocese of Washington* v. *WMATA*, 897 F.3d 314, 331 (C.A.D.C. 2018) (A "hybrid rights claim ... requires independently viable free speech and free exercise claims"); *Gary S. v. Manchester School Dist.*, 374 F.3d 15, 19 (C.A.1 2004) (adopting District Court's reasoning that "the [hybrid-rights] exception can be invoked only if the plaintiff has joined a free exercise challenge with another independently viable constitutional claim," 241 F.Supp.2d 111, 121 (D.N.H. 2003)); *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525, 539 (C.A.1 1995). But this approach essentially makes the free-exercise claim irrelevant. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1296–1297 (C.A.10 2004) ("[I]t makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary"); see also *Lukumi*, 508 U.S. at 567, 113 S.Ct. 2217 (opinion of SOUTER, J.) (making the same point).

The third group requires that the non-free-exercise claim be "colorable." See *Cornerstone Christian Schools v. University Interscholastic League*, 563 F.3d 127, 136, n. 8 (C.A.5 2009); *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1032–1033 (C.A.9 2004);

Axson-Flynn, 356 F.3d at 1295–1297. But what that means is obscure. See, *e.g.,* *id.*, at 1295 (referring to "helpful" analogies such as the " 'likelihood of success on the merits' standard for preliminary injunctions" or the pre-Antiterrorism and Effective Death Penalty Act standard for obtaining an evidentiary hearing, *i.e.*, a " 'colorable showing of factual innocence' "). [78]

It is rare to encounter a holding of this Court that has so thoroughly stymied or elicited such open derision from the Courts of Appeals.

2

Rules that "target" religion. Post-*Smith* cases have also struggled with the task of ***1919** determining whether a purportedly neutral rule "targets" religious exercise or has the restriction of religious exercise as its "object." *Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217; *Smith*, 494 U.S. at 878, 110 S.Ct. 1595. A threshold question is whether "targeting" calls for an objective or subjective inquiry. Must "targeting" be assessed based solely on the terms of the relevant rule or rules? Or can evidence of the rulemakers' motivation be taken into account? If subjective motivations may be considered, does it matter whether the challenged state action is an adjudication, the promulgation of a rule, or the enactment of legislation? Should courts consider the motivations of only the officials who took the challenged action, or may they also take into account comments by superiors and others in a position of influence? And what degree of hostility to religion or a religious group is required to prove "targeting"?

The genesis of this problem was *Smith*'s holding that a rule is not neutral "if prohibiting the exercise of religion" is its "object." 494 U.S. at 878, 110 S.Ct. 1595. *Smith* did not elaborate on what that meant, and later in *Lukumi*, which concerned city ordinances that burdened the practice of Santeria, 508 U.S. at 525–528, 113 S.Ct. 2217, Justices in the *Smith* majority adopted different interpretations. Justice Scalia and Chief Justice Rehnquist took the position that the "object" of a rule must be determined by its terms and that evidence of the rulemakers' motivation should not be considered. 508 U.S. at 557–559, 113 S.Ct. 2217. This interpretation had the disadvantage of allowing skillful rulemakers to target religious exercise by devising a facially neutral rule that applies to both the targeted religious conduct and a slice of secular conduct that can be burdened without eliciting unacceptable opposition from those whose interests are affected.

The alternative to this approach takes courts into the difficult business of ascertaining the subjective motivations of rulemakers. In *Lukumi*, Justices Kennedy and Stevens took that path and relied on numerous statements by council members showing that their object was to ban the practice

of Santeria within the city's borders. *Id.*, at 540–542, 113 S.Ct. 2217. Thus, *Lukumi* left the meaning of a rule's "object" up in the air.

When the issue returned in *Masterpiece Cakeshop*, the question was only partially resolved. Holding that the Colorado Civil Rights Commission violated the free-exercise rights of a baker who refused for religious reasons to create a cake for a same-sex wedding, the Court pointed to disparaging statements made by commission members, and the Court noted that these comments, "by an adjudicatory body deciding a particular case," "were made in a very different context" from the remarks by the council members in *Lukumi*. *Masterpiece Cakeshop,* 584 U. S., at ——, 138 S.Ct., at 1729–1730. That is as far as this Court's decisions have gone on the question of targeting, and thus many important questions remain open.

The present case highlights two—specifically, which officials' motivations are relevant and what degree of disparagement must be shown to establish unconstitutional targeting. In *Masterpiece Cakeshop*, the commissioners' statements—comparing the baker's actions to the Holocaust and slavery and suggesting that his beliefs were just an excuse for bigotry—went too far. *Id.*, at ——– ——, 138 S.Ct., at 1728–1730. But what about the comments of Philadelphia officials in this case? The city council labeled CSS's policy "discrimination that occurs under the guise of religious freedom." App. to Pet. for Cert. 147a. The mayor had said that the Archbishop's actions were not "Christian," and ***1920** he once called on the Pope "to kick some ass here." *Id.*, at 173a, 177a–178a. In addition, the commissioner of the Department of Human Services (DHS), who serves at the mayor's pleasure, [79] disparaged CSS's policy as out of date and out of touch with Pope Francis's teachings. [80]

The Third Circuit found this evidence insufficient. Although the mayor conferred with the DHS commissioner both before and after her meeting with CSS representatives, the mayor's remarks were disregarded because there was no evidence "that he played a *direct* role, or even a *significant* role, in the process." 922 F.3d at 157 (emphasis added). The city council's suggestion that CSS's religious liberty claim was a "guise" for discrimination was found to "fal[l] into [a] grey zone," and the commissioner's debate with a CSS representative about up-to-date Catholic teaching, which "some might think ... improper" "if taken out of context" was "best viewed as an effort to reach common ground with [CSS] by appealing to an authority within their shared religious tradition." *Ibid*. One may agree or disagree with the Third Circuit's characterization and evaluation of the statements of the City officials, but the court's analysis highlights the extremely impressionistic inquiry that *Smith*'s targeting requirement may entail.

Confusion and disagreement about "targeting" have surfaced in other cases. Recently in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ——, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020)

(*per curiam*), there were conflicting views about comments made by the Governor of New York. On the day before he severely restricted religious services in Brooklyn, the Governor "said that if the 'ultra-Orthodox [Jewish] community' would not agree to enforce the rules, 'then we'll close the institutions down.' " *Agudath Israel of America v. Cuomo*, 980 F.3d 222, 229 (C.A.2 2020) (PARK, J., dissenting). A dissenting judge on the Second Circuit thought the Governor had crossed the line, *ibid.*, and we ultimately enjoined enforcement of the rules, *Roman Catholic Diocese*, 592 U. S., at ——, 141 S.Ct., at ——. But two Justices who dissented found the Governor's comments inconsequential. *Id.*, at —— – ——, 141 S.Ct., at 79–81 (opinion of SOTOMAYOR, J., joined by KAGAN, J.).

In *Stormans, Inc. v. Wiesman*, 579 U. S. ——, 136 S.Ct. 2433, 195 L.Ed.2d 870 (2016) (denying certiorari), there was similar disagreement. That case featured strong evidence that pro-life Christian pharmacists who refused to dispense emergency contraceptives were the object of a new rule requiring every pharmacy to dispense every Food and Drug Administration-approved drug. A primary drafter of the rule all but admitted that the rule was aimed at these pharmacists, and the Governor took unusual steps to secure adoption of the rule. ***1921** *Stormans, Inc. v. Selecky*, 854 F.Supp.2d 925, 937–943 (W.D. Wash. 2012). After a 12-day trial, the District Court found that Christian pharmacists had been targeted, *id.*, at 966, 987, but the Ninth Circuit refused to accept that finding, *Stormans, Inc.*, 794 F.3d 1064, 1079 (2015). Compare *Stormans, Inc.*, 579 U. S., at —— – ——, and n. 3, 136 S.Ct., at 2436–2437, and n. 3 (ALITO, J., joined by ROBERTS, C. J., and THOMAS, J., dissenting from denial of certiorari) (questioning Ninth Circuit's finding).

Decisions of the lower courts on the issue of targeting remain in disarray. Compare *F. F. v. State*, 66 Misc.3d 467, 479–482, 114 N.Y.S.3d 852, 865–867 (2019) (declining to consider individual legislators' comments); *Tenafly Eruv Assn., Inc. v. Tenafly*, 309 F.3d 144, 168, n. 30 (C.A.3 2002) (declining to reach issue), with *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 211 (C.A.2 2012) (considering legislative history); *St. John's United Church of Christ v. Chicago*, 502 F.3d 616, 633 (C.A.7 2007) ("[W]e must look at ... the 'historical background of the decision under challenge' " (quoting *Lukumi*, 508 U.S. at 540, 113 S.Ct. 2217)); *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (C.A.8 2000) (targeting can be evidenced by legislative history).

3

The nature and scope of exemptions. There is confusion about the meaning of *Smith*'s holding on exemptions from generally applicable laws. Some decisions apply this special rule if multiple secular exemptions are granted. See, *e.g.*, *Horen v. Commonwealth*, 23 Va.App. 735, 743–744,

479 S.E.2d 553, 557 (1997); *Rader v. Johnston*, 924 F.Supp. 1540, 1551–1553 (D.Neb. 1996). Others conclude that even one secular exemption is enough. See, *e.g.*, *Midrash Sephardi, Inc. v. Surfside*, 366 F.3d 1214, 1234–1235 (C.A.11 2004); *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359, 365 (C.A.3 1999). And still others have applied the rule where the law, although allowing no exemptions on its face, was widely unenforced in cases involving secular conduct. See, *e.g.*, *Tenafly Eruv Assn.*, 309 F.3d at 167–168.

4

Identifying appropriate comparators. To determine whether a law provides equal treatment for secular and religious conduct, two steps are required. First, a court must identify the secular conduct with which the religious conduct is to be compared. Second, the court must determine whether the State's reasons for regulating the religious conduct apply with equal force to the secular conduct with which it is compared. See *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. In *Smith*, this inquiry undoubtedly seemed straightforward: The secular conduct and the religious conduct prohibited by the Oregon criminal statute were identical. But things are not always that simple.

Cases involving rules designed to slow the spread of COVID–19 have driven that point home. State and local rules adopted for this purpose have typically imposed different restrictions for different categories of activities. Sometimes religious services have been placed in a category with certain secular activities, and sometimes religious services have been given a separate category of their own. To determine whether COVID–19 rules provided neutral treatment for religious and secular conduct, it has been necessary to compare the restrictions on religious services with the restrictions on secular activities that present a comparable risk of spreading the virus, and identifying the secular activities ***1922** that should be used for comparison has been hotly contested.

In *South Bay United Pentecostal Church v. Newsom*, 590 U. S. ——, 140 S.Ct. 1613, 207 L.Ed.2d 154 (2020), where the Court refused to enjoin restrictions on religious services, THE CHIEF JUSTICE's concurrence likened religious services to lectures, concerts, movies, sports events, and theatrical performances. *Id.*, at ——, 140 S.Ct., at 1614–1615. The dissenters, on the other hand, focused on "supermarkets, restaurants, factories, and offices." *Id.*, at ——, 140 S.Ct., at 1615 (opinion of KAVANAUGH, J., joined by THOMAS and GORSUCH, JJ.).

In *Calvary Chapel Dayton Valley v. Sisolak*, 591 U. S. ——, 140 S.Ct. 2603, 207 L.Ed.2d 1129 (2020), Nevada defended a rule imposing severe limits on attendance at religious services and argued that houses of worship should be compared with "movie theaters, museums, art galleries, zoos, aquariums, trade schools, and technical schools." Response to Emergency Application for

Injunction, O. T. 2019, No. 19A1070, pp. 7, 14–15. Members of this Court who would have enjoined the Nevada rule looked to the State's more generous rules for casinos, bowling alleys, and fitness facilities. 591 U. S., at ——— – ———, 140 S.Ct., at 2614–2615 (ALITO, J., joined by THOMAS and KAVANAUGH, JJ., dissenting).

In *Roman Catholic Diocese of Brooklyn*, 592 U. S. ——, 141 S.Ct. 63, Justices in the majority compared houses of worship with large retail establishments, factories, schools, liquor stores, bicycle repair shops, and pet shops, *id.*, at ——, 141 S.Ct., at 69; *id.*, at ——, 141 S.Ct., at 69–70 (GORSUCH, J., concurring), *id.*, at ——, 141 S.Ct., at 73–74 (KAVANAUGH, J., concurring), while dissenters cited theaters and concert halls, *id.*, at ——, 141 S.Ct., 77–78 (opinion of SOTOMAYOR, J., joined by KAGAN, J.).

In *Danville Christian Academy, Inc. v. Beshear*, 592 U. S. ——, 141 S.Ct. 527, 208 L.Ed.2d 504 (2020), the District Court enjoined enforcement of an executive order that compelled the closing of a religiously affiliated school, reasoning that the State permitted pre-schools, colleges, and universities to stay open and also allowed attendance at concerts and lectures. *Danville Christian Academy, Inc. v. Beshear*, 503 F.Supp.3d 516, 523–24 (E.D. Ky., 2020). The Sixth Circuit reversed, concluding that the rule was neutral and generally applicable because it applied to all elementary and secondary schools, whether secular or religious. *Kentucky ex rel. Danville Christian Academy, Inc. v. Beshear*, 981 F.3d 505, 509 (2020).

Much of *Smith*'s initial appeal was likely its apparent simplicity. *Smith* seemed to offer a relatively simple and clear-cut rule that would be easy to apply. Experience has shown otherwise.

D

Subsequent developments. Developments since *Smith* provide additional reasons for changing course. The *Smith* majority thought that adherence to *Sherbert* would invite "anarchy," 494 U.S. at 888, 110 S.Ct. 1595, but experience has shown that this fear was not well founded. Both RFRA and RLUIPA impose essentially the same requirements as *Sherbert*, and we have observed that the courts are well "up to the task" of applying that test. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). See also *Cutter v. Wilkinson*, 544 U.S. 709, 722, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (noting "no cause to believe" the test could not be "applied in an appropriately balanced way").

***1923** Another significant development is the subsequent profusion of studies on the original meaning of the Free Exercise Clause. When *Smith* was decided, the available scholarship was thin, and the Court received no briefing on the subject. Since then, scholars have explored the subject in great depth. [81]

* * *

Multiple factors strongly favor overruling *Smith*. Are there countervailing factors?

E

None is apparent. Reliance is often the strongest factor favoring the retention of a challenged precedent, but no strong reliance interests are cited in any of the numerous briefs urging us to preserve *Smith*. Indeed, the term is rarely even mentioned.

All that the City has to say on the subject is that overruling *Smith* would cause "substantial regulatory ... disruption" by displacing RFRA, RLUIPA, and related state laws, Brief for City Respondents 51 (internal quotation marks omitted), but this is a baffling argument. How would overruling *Smith* disrupt the operation of laws that were enacted to abrogate *Smith*?

One of the City's *amici*, the New York State Bar Association, offers a different reliance argument. It claims that some individuals, relying on *Smith*, have moved to jurisdictions with anti-discrimination laws that do not permit religious exemptions. Brief for New York State Bar Association as *Amicus Curiae* 11. The bar association does not cite any actual examples of individuals who fall into this category, and there is reason to doubt that many actually exist.

For the hypothesized course of conduct to make sense, all of the following conditions would have to be met. First, it would be necessary for the individuals in question to believe that a religiously motivated party in the jurisdiction they left or avoided might engage in conduct that harmed them. Second, this conduct would have to be conduct not already protected by *Smith* in that it (a) did not violate a generally applicable state law, (b) that law did not allow individual exemptions, and (c) there was insufficient proof of religious targeting. Third, the feared conduct would have to fall outside the scope of RLUIPA. Fourth, the conduct, although not protected by *Smith*, would have to be otherwise permitted by local law, for example, through a state version of RFRA. Fifth, this fear of harm at the hands of a religiously motivated actor would have to be a but-for cause of the decision to move. Perhaps there are individuals who fall into the category that the bar association

hypothesizes, but we should not allow violations of the Free Exercise Clause in perpetuity based on such speculation.

Indeed, even if more substantial reliance could be shown, *Smith*'s dubious standing would weigh against giving this factor too much weight. *Smith* has been embattled since the day it was decided, and calls for its reexamination have intensified in recent years. See *Masterpiece Cakeshop,* 584 U. S., at ——, 138 S.Ct., at 1734 (GORSUCH, J., joined by ALITO, J., concurring); ***1924** *Kennedy*, 586 U. S., at —— – ——, 139 S.Ct., at 636–637 (ALITO, J., joined by THOMAS, GORSUCH, and KAVANAUGH, JJ., concurring in denial of certiorari); *City of Boerne* 521 U.S. at 566, 117 S.Ct. 2157 (BREYER, J., dissenting) ("[T]he Court should direct the parties to brief the question whether [*Smith*] was correctly decided"); *id.*, at 565, 117 S.Ct. 2157 (O'CONNOR, J., joined by BREYER, J., dissenting) ("[I]t is essential for the Court to reconsider its holding in *Smith*"); *Lukumi*, 508 U.S. at 559, 113 S.Ct. 2217 (SOUTER, J., concurring in part and concurring in judgment) ("[I]n a case presenting the issue, the Court should reexamine the rule *Smith* declared"). Thus, parties have long been on notice that the decision might soon be reconsidered. See *Janus,* 585 U. S., at ——, 138 S.Ct., at 2484–2485.

* * *

Smith was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom. And while precedent should not lightly be cast aside, the Court's error in *Smith* should now be corrected.

VI

A

If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.

Whether this test should be rephrased or supplemented with specific rules is a question that need not be resolved here because Philadelphia's ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case. As noted, CSS's policy has not

hindered any same-sex couples from becoming foster parents, and there is no threat that it will do so in the future.

CSS's policy has only one effect: It expresses the idea that same-sex couples should not be foster parents because only a man and a woman should marry. Many people today find this idea not only objectionable but hurtful. Nevertheless, protecting against this form of harm is not an interest that can justify the abridgment of First Amendment rights.

We have covered this ground repeatedly in free speech cases. In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding. See *Matal v. Tam*, 582 U. S. ——, —— – ——, 137 S.Ct. 1744, 1751, 198 L.Ed.2d 366 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend"); *Hurley*, 515 U.S. at 579, 115 S.Ct. 2338 ("[T]he law ... is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government"); *Johnson*, 491 U.S. at 414, 109 S.Ct. 2533 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (opinion of STEVENS, J.) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection"); *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves ***1925** offensive to some of their hearers"); Cf. *Coates v. Cincinnati*, 402 U.S. 611, 615, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of ... constitutional freedoms").

The same fundamental principle applies to religious practices that give offense. The preservation of religious freedom depends on that principle. Many core religious beliefs are perceived as hateful by members of other religions or nonbelievers. Proclaiming that there is only one God is offensive to polytheists, and saying that there are many gods is anathema to Jews, Christians, and Muslims. Declaring that Jesus was the Son of God is offensive to Judaism and Islam, and stating that Jesus was not the Son of God is insulting to Christian belief. Expressing a belief in God is nonsense to atheists, but denying the existence of God or proclaiming that religion has been a plague is infuriating to those for whom religion is all-important.

Suppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game. While CSS's ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with

racial bigots is insulting to those who retain such beliefs. In *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), the majority made a commitment. It refused to equate traditional beliefs about marriage, which it termed "decent and honorable," *id.*, at 672, 135 S.Ct. 2584, with racism, which is neither. And it promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.*, at 679, 135 S.Ct. 2584. An open society can keep that promise while still respecting the "dignity," "worth," and fundamental equality of all members of the community. *Masterpiece Cakeshop*, 584 U. S., at ——, 138 S.Ct., at 1727.

B

One final argument must be addressed. Philadelphia and many of its *amici* contend that preservation of the City's policy is not dependent on *Smith*. They argue that the City is simply asserting the right to control its own internal operations, and they analogize CSS to either a City employee or a contractor hired to perform an exclusively governmental function.

This argument mischaracterizes the relationship between CSS and the City. The members of CSS's staff are not City employees; the power asserted by the City goes far beyond a refusal to enter into a contract; and the function that CSS and other private foster care agencies have been performing for decades has not historically been an exclusively governmental function. See, *e.g.*, *Leshko v. Servis*, 423 F.3d 337, 343–344 (C.A.3 2005) ("No aspect of providing care to foster children in Pennsylvania has ever been the exclusive province of the government"); *Rayburn v. Hogue*, 241 F.3d 1341, 1347 (C.A.11 2001) (acknowledging that foster care is not traditionally an exclusive state prerogative); *Milburn v. Anne Arundel Cty. Dept. of Social Servs.*, 871 F.2d 474, 479 (C.A.4 1989) (same); *Malachowski v. Keene*, 787 F.2d 704, 711 (C.A.1 1986) (same); see also *Ismail v. County of Orange*, 693 Fed.Appx. 507, 512 (C.A.9 2017) (concluding that foster parents were not state actors). On the contrary, States and cities were latecomers to this field, and even today, they typically leave most of the work to private agencies.

The power that the City asserts is essentially the power to deny CSS a license ***1926** to continue to perform work that it has carried out for decades and that religious groups have performed since time immemorial. Therefore, the cases that provide the basis for the City's argument—such as *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), and *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996)—are far afield. A government cannot "reduce a group's First Amendment rights by simply imposing a

licensing requirement." *National Institute of Family and Life Advocates v. Becerra*, 585 U. S. ——, ——, 138 S.Ct. 2361, 2375, 201 L.Ed.2d 835 (2018).

* * *

For all these reasons, I would overrule *Smith* and reverse the decision below. Philadelphia's exclusion of CSS from foster care work violates the Free Exercise Clause, and CSS is therefore entitled to an injunction barring Philadelphia from taking such action.

After receiving more than 2,500 pages of briefing and after more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state. Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, concurring in the judgment.

The Court granted certiorari to decide whether to overrule *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). As Justice ALITO's opinion demonstrates, *Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice. A majority of our colleagues, however, seek to sidestep the question. They agree that the City of Philadelphia's treatment of Catholic Social Services (CSS) violates the Free Exercise Clause. But, they say, there's no "need" or "reason" to address the error of *Smith* today. *Ante,* at 1876 – 1877 (majority opinion); *ante*, at 1883 (BARRETT, J., concurring).

On the surface it may seem a nice move, but dig an inch deep and problems emerge. *Smith* exempts "neutral" and "generally applicable" laws from First Amendment scrutiny. 494 U.S. at 878–881, 110 S.Ct. 1595. The City argues that its challenged rules qualify for that exemption because they require all foster-care agencies—religious and non-religious alike—to recruit and certify same-sex couples interested in serving as foster parents. For its part, the majority assumes (without deciding) that Philadelphia's rule is indeed "neutral" toward religion. *Ante,* at 1876 – 1877. So to avoid *Smith*'s exemption and subject the City's policy to First Amendment scrutiny, the majority must carry the burden of showing that the policy isn't "generally applicable."

*

That path turns out to be a long and lonely one. The district court held that the City's public accommodations law (its Fair Practices Ordinance or FPO) *is* both generally applicable and

applicable to CSS. At least initially, the majority chooses to bypass the district court's major premise—that the FPO qualifies as "generally applicable" under *Smith*. It's a curious choice given that the FPO applies only to certain defined entities that qualify as public accommodations while the "generally applicable law" in *Smith* was "an across-the-board criminal prohibition" enforceable against anyone. 494 U.S. at 884, 110 S.Ct. 1595. But if the goal is to turn a big ***1927** dispute of constitutional law into a small one, the majority's choice to focus its attack on the district court's minor premise—that the FPO applies to CSS as a matter of municipal law—begins to make some sense. Still, it isn't exactly an obvious path. The Third Circuit did not address the district court's interpretation of the FPO. And not one of the over 80 briefs before us contests it. To get to where it wishes to go, then, the majority must go it alone. So much for the adversarial process and being "a court of review, not of first view." *Brownback v. King*, 592 U. S. ——, ——, n. 4, 141 S.Ct. 740, 747, n. 4, 209 L.Ed.2d 33 (2021) (internal quotation marks omitted).

Trailblazing through the Philadelphia city code turns out to be no walk in the park either. As the district court observed, the City's FPO defines "public accommodations" expansively to include "[a]ny provider" that "solicits or accepts patronage" of "the public or whose ... services [or] facilities" are "made available to the public." App. to Pet. for Cert. 77a (alteration omitted; emphasis deleted). And, the district court held, this definition covers CSS because (among other things) it "publicly solicits prospective foster parents" and "provides professional 'services' to the public." *Id.,* at 78a. All of which would seem to block the majority's way. So how does it get around that problem?

It changes the conversation. The majority ignores the FPO's expansive definition of "public accommodations." It ignores the reason the district court offered for why CSS falls within that definition. Instead, it asks us to look to a *different* public accommodations law—a Commonwealth of Pennsylvania public accommodations statute. See *ante,* at 1879 – 1880 (discussing Pa. Stat. Ann., Tit. 43, § 954(*l*) (Purdon Cum. Supp. 2009)). And, the majority promises, CSS fails to qualify as a public accommodation under the terms of *that* law. But why should we ignore the City's law and look to the Commonwealth's? No one knows because the majority doesn't say.

Even playing along with this statutory shell game doesn't solve the problem. The majority highlights the fact that the state law lists various examples of public accommodations—including hotels, restaurants, and swimming pools. *Ante,* at 1880. The majority then argues that foster agencies fail to qualify as public accommodations because, unlike these listed entities, foster agencies "involv[e] a customized and selective assessment." *Ibid.* But where does *that* distinction come from? Not the text of the state statute, not state case law, and certainly not from the briefs. The majority just declares it—a new rule of Pennsylvania common law handed down by the United States Supreme Court.

The majority's gloss on state law isn't just novel, it's probably wrong. While the statute lists hotels, restaurants, and swimming pools as examples of public accommodations, it also lists over 40 other kinds of institutions—and the statute emphasizes that these examples are illustrative, not exhaustive. See § 954(*l*). Among its illustrations, too, the statute offers public "colleges and universities" as examples of public accommodations. *Ibid.* Often these institutions *do* engage in a "customized and selective assessment" of their clients (students) and employees (faculty). And if *they* can qualify as public accommodations under the state statute, it isn't exactly clear why foster agencies cannot. What does the majority have to say about this problem? Again, silence.

If anything, the majority's next move only adds to the confusion. It denies cooking up any of these arguments on its own. It says it merely means to "agree with CSS's position ... that its 'foster services do not constitute a "public accommodation" ***1928** under the City's Fair Practices Ordinance.' " *Ante,* at 1881 (quoting App. to Pet. for Cert. 159a). But CSS's cited "position"—which comes from a letter it sent to the City before litigation even began—includes nothing like the majority's convoluted chain of reasoning involving a separate state statute. *Id.*, at 159a–160a. Instead, CSS's letter contends that the organization's services do not qualify as "public accommodations" because they are "only available to at-risk children who have been removed by the state and are in need of a loving home." *Ibid.* The majority tells us with assurance that it "agree[s] with" this position, adding that it would be "incongru[ous]" to "dee[m] a private religious foster agency a public accommodation." *Ante,* at 1881.

What to make of all this? Maybe this part of the majority opinion should be read only as reaching for something—anything—to support its curious separate-statute move. But maybe the majority means to reject the district court's major premise after all—suggesting it would be incongruous for public accommodations laws to qualify as generally applicable under *Smith* because they do not apply to everyone. Or maybe the majority means to invoke a canon of constitutional avoidance: Before concluding that a public accommodations law is generally applicable under *Smith*, courts must ask themselves whether it would be "incongru[ous]" to apply that law to religious groups. Maybe all this ambiguity is deliberate, maybe not. The only thing certain here is that the majority's attempt to cloak itself in CSS's argument introduces more questions than answers.

*

Still that's not the end of it. Even now, the majority's circumnavigation of *Smith* remains only half complete. The City argues that, in addition to the FPO, *another* generally applicable nondiscrimination rule can be found in § 15.1 of its contract with CSS. That provision independently instructs that foster service providers "shall not discriminate or permit discrimination against any individual on the basis of ... sexual orientation." Supp. App. to Brief for City Respondents 31. This provision, the City contends, amounts to a second and separate rule

of general applicability exempt from First Amendment scrutiny under *Smith*. Once more, the majority must find some way around the problem. Its attempt to do so proceeds in three steps.

First, the majority directs our attention to another provision of the contract—§ 3.21. See *ante,* at 1877 – 1879. Entitled "Rejection of Referral," this provision prohibits discrimination based on sexual orientation, race, religion, or other grounds "unless an exception is granted" in the government's "sole discretion." Supp. App. to Brief for City Respondents 16–17. Clearly, the majority says, *that* provision doesn't state a generally applicable rule against discrimination because it expressly contemplates "exceptions." *Ante,* at 1878.

But how does that help? As § 3.21's title indicates, the provision contemplates exceptions only when it comes to the referral stage of the foster process—where the government seeks to place a particular child with an available foster family. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 221 (2012) ("The title and headings are permissible indicators of meaning" (boldface deleted)). So, for example, the City has taken race into account when placing a child who "used racial slurs" to avoid placing him with parents "of that race." Tr. of Oral Arg. 61. Meanwhile, our case has nothing to do with the referral—or placement—stage of the foster process. This case concerns the recruitment and certification stages—where foster agencies like CSS ***1929** screen and enroll adults who wish to serve as foster parents. And in *those* stages of the foster process, § 15.1 seems to prohibit discrimination absolutely.

That difficulty leads the majority to its second step. It asks us to ignore § 3.21's title and its limited application to the referral stage. See *ante,* at 1879. Instead, the majority suggests, we should reconceive § 3.21 as authorizing exceptions to the City's nondiscrimination rule at *every* stage of the foster process. Once we do that, the majority stresses, § 3.21's reservation of discretion is irreconcilable with § 15.1's blanket prohibition against discrimination. See *ante,* at 1879.

This sets up the majority's final move—where the real magic happens. Having conjured a conflict within the contract, the majority devises its own solution. It points to some state court decisions that, it says, set forth the "rule" that Pennsylvania courts shouldn't interpret one provision in a contract "to annul" another part. *Ibid.* To avoid nullifying § 3.21's reservation of discretion, the majority insists, it has no choice but to rewrite § 15.1. All so that—*voila*—§ 15.1 now contains *its own* parallel reservation of discretion. See *ante,* at 1879. As rewritten, the contract contains no generally applicable rule against discrimination anywhere in the foster process.

From start to finish, it is a dizzying series of maneuvers. The majority changes the terms of the parties' contract, adopting an uncharitably broad reading (really revision) of § 3.21. It asks us to ignore the usual rule that a more specific contractual provision can comfortably coexist with a more general one. And it proceeds to resolve a conflict it created by rewriting § 15.1. Once more, too, no party, *amicus*, or lower court argued for any of this.

To be sure, the majority again claims otherwise—representing that it merely adopts the arguments of CSS and the United States. See *ante,* at 1879. But here, too, the majority's representation raises rather than resolves questions. Instead of pursuing anything like the majority's contract arguments, CSS and the United States suggest that § 3.21 "*alone* triggers strict scrutiny," Reply Brief 5 (emphasis added), because that provision authorizes the City "to grant formal exemptions *from its policy*" of nondiscrimination, Brief for United States as *Amicus Curiae* 26 (emphasis added). On this theory, it's irrelevant whether § 3.21 or § 15.1 reserve discretion to grant exemptions at all stages of the process or at only one stage. Instead, the City's power to grant exemptions from its nondiscrimination policy *anywhere* "undercuts its asserted interests" and thus "trigger[s] strict scrutiny" for applying the policy *everywhere*. *Id.,* at 21. Exceptions for one means strict scrutiny for all. See, *e.g., Tandon* v. *Newsom*, *ante*, at 1874 – 1875 (*per curiam*). All of which leaves us to wonder: Is the majority just stretching to claim some cover for its novel arguments? Or does it actually mean to adopt the theory it professes to adopt?

*

Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about *Smith*'s fate that it is willing to say pretty much anything about municipal law and the parties' briefs. One way or another, the majority seems determined to declare there is no "need" or "reason" to revisit *Smith* today. *Ante,* at 1876 – 1877 (majority opinion); *ante,* at 1883 (BARRETT, J., concurring).

But tell that to CSS. Its litigation has already lasted years—and today's (ir)resolution promises more of the same. Had we followed the path Justice ALITO outlines—holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable—this case ***1930** would end today. Instead, the majority's course guarantees that this litigation is only getting started. As the final arbiter of state law, the Pennsylvania Supreme Court can effectively overrule the majority's reading of the Commonwealth's public accommodations law. The City can revise its FPO to make even plainer still that its law does encompass foster services. Or with a flick of a pen, municipal lawyers may rewrite the City's contract to close the § 3.21 loophole.

Once any of that happens, CSS will find itself back where it started. The City has made clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincerely held religious beliefs. To the City, it makes no difference that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies. The City has expressed its determination to put CSS to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families. If CSS is unwilling to provide foster-care services to same-sex couples, the City prefers that CSS provide no foster-care services at all. This

litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children. And throughout it all, the opacity of the majority's professed endorsement of CSS's arguments ensures the parties will be forced to devote resources to the unenviable task of debating what it *even means*.

Nor will CSS bear the costs of the Court's indecision alone. Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties. Consider Jack Phillips, the baker whose religious beliefs prevented him from creating custom cakes to celebrate same-sex weddings. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. ——, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018). After being forced to litigate all the way to the Supreme Court, we ruled for him on narrow grounds similar to those the majority invokes today. Because certain government officials responsible for deciding Mr. Phillips's compliance with a local public accommodations law uttered statements exhibiting hostility to his religion, the Court held, those officials failed to act "neutrally" under *Smith*. See 584 U. S., at ——– – ——, 138 S.Ct., at 1730–1732. But with *Smith* still on the books, all that victory assured Mr. Phillips was a new round of litigation—with officials now presumably more careful about admitting their motives. See Associated Press, Lakewood Baker Jack Phillips Sued for Refusing Gender Transition Cake (Mar. 22, 2021), https://denver.cbslocal.com/2021/03/22/jack-phillips-masterpiece-cakeshop-lakewood-transgender/. A nine-year odyssey thus barrels on. No doubt, too, those who cannot afford such endless litigation under *Smith*'s regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects.

The costs of today's indecision fall on lower courts too. As recent cases involving COVID–19 regulations highlight, judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced. In the last nine months alone, this Court has had to intervene at least half a dozen times to clarify how *Smith* works. See, *e.g., Tandon*, *ante,* at p. 1874; *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ——, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (*per curiam*); *High Plains Harvest Church v. Polis*, 592 U. S ——, 141 S.Ct. 527, 208 L.Ed.2d 503 (2020). To be sure, this Court began to resolve at least some of the confusion surrounding *Smith*'s application ***1931** in *Tandon*. But *Tandon* treated the symptoms, not the underlying ailment. We owe it to the parties, to religious believers, and to our colleagues on the lower courts to cure the problem this Court created.

It's not as if we don't know the right answer. *Smith* has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution. See *ante,* at 1887 – 1889 (ALITO, J., concurring in judgment); *ante*, at 1882 – 1883 (BARRETT, J., concurring). The Court granted certiorari in this case to resolve its fate. The parties and *amici* responded with over 80 thoughtful briefs addressing every angle of the problem.

Justice ALITO has offered a comprehensive opinion explaining why *Smith* should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?

We hardly need to "wrestle" today with every conceivable question that might follow from recognizing *Smith* was wrong. See *ante,* at 1883 (BARRETT, J., concurring). To be sure, any time this Court turns from misguided precedent back toward the Constitution's original public meaning, challenging questions may arise across a large field of cases and controversies. But that's no excuse for refusing to apply the original public meaning in the dispute actually before us. Rather than adhere to *Smith* until we settle on some "grand unified theory" of the Free Exercise Clause for all future cases until the end of time, see *American Legion v. American Humanist Assn.*, 588 U. S. ——, ——, 139 S.Ct. 2067, 2086–2087, 204 L.Ed.2d 452 (2019) (plurality opinion), the Court should overrule it now, set us back on the correct course, and address each case as it comes.

What possible benefit does the majority see in its studious indecision about *Smith* when the costs are so many? The particular appeal before us arises at the intersection of public accommodations laws and the First Amendment; it involves same-sex couples and the Catholic Church. Perhaps our colleagues believe today's circuitous path will at least steer the Court around the controversial subject matter and avoid "picking a side." But refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution *is* picking a side. *Smith* committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer. Respectfully, it should have done so today.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Code of Canon Law, Canon § 924 (Eng. transl. 1998).

2 See Law Library of Congress, Global Legal Research Center, Legal Restrictions on Religious Slaughter in Europe (Mar. 2018), www.loc.gov/law/help/religious-slaughter/religious-slaughter-europe.pdf.

3 *Id.*, at 1–2.

4 See Frisch et al., Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision, 131 Pediatrics 796, 799 (2013) (representatives of pediatric medical associations in 16 European countries and Canada recommending against circumcision because the practice "has no compelling health benefits, causes postoperative pain, can have serious long-term consequences, constitutes a violation of the United Nations' Declaration of the Rights of the Child, and conflicts with the Hippocratic oath").

5 See Initiative Measure To Be Submitted Directly to the Voters: Genital Cutting of Male Minors (Oct. 13, 2010) (online source archived at www.supremecourt.gov); see also *Jewish Community Relations Council of San Francisco v. Arntz*, 2012 WL 11891474, *1 (Super. Ct. San Francisco Cty., Cal., Apr. 6, 2012) (ordering that the proposed initiative be removed from the ballot because it was preempted by California law).

6 See 4 Encyclopaedia Judaica 730 (2d ed. 2007) ("Jewish circumcision originated, according to the biblical account, with Abraham"); The Shengold Jewish Encyclopedia 62 (3d ed. 2003) ("[Circumcision] has become a basic law among Jews. In times of persecution, Jews risked their lives to fulfill the commandment"); B. Abramowitz, The Law of Israel: A Compilation of the Hayye Adam 206 (1897) ("It is a positive commandment that a father shall circumcise his son or that he shall appoint another Israelite to act as his agent therein"); 3 Encyclopedia of Religion 1798 (2d ed. 2005) ("Muslims agree that [circumcision] must occur before marriage and is required of male converts"); H. Gibb & J. Kramers, Shorter Encyclopaedia of Islam 254 (1953).

7 See Holy Bible, Deuteronomy 10:18, 16:11, 26:12–13; James 1:27.

8 See A. Crislip, From Monastery to Hospital: Christian Monasticism & the Transformation of Health Care in Late Antiquity 104, 111 (2005) (describing Basil of Caesarea's use of his 4th century monastery as a "place for the nourishment of orphans," who "lived in their own wing of the monastery," "were provided with all the necessities of life[,] and were raised by the monastics acting as surrogate parents" (internal quotation marks omitted)).

9 Ransel, Orphans and Foundlings, in 3 Encyclopedia of European Social History 497, 498 (2001).

10 T. Hacsi, Second Home: Orphan Asylums and Poor Families in America 17 (1997).

11 *Id.*, at 17–18; F. Chapell, The Great Awakening of 1740, pp. 90–91 (1903).

12 2 Encyclopedia of the New American Nation 477 (2006); Hacsi, Second Home, at 18.

13 15 Encyclopaedia Judaica 485.

14 2 Encyclopedia of Children and Childhood 639–640 (2004); Brief for Historians of Child Welfare as *Amici Curiae* 16–17.

15 Brief for Annie E. Casey Foundation et al. as *Amici Curiae* 4–5.

16 See Social Security Act, § 521, 49 Stat. 627, 633; Social Security Act Amendments of 1961, 75 Stat. 131.

17 See United States Conference of Catholic Bishops, Discrimination Against Catholic Adoption Services (2018), https://www.usccb.org/issues-and-action/religious-liberty/upload/Discrimination-against-Catholic-adoption-services.pdf.

18 See Brief for Petitioners 11–12 (citing Wax-Thibodeaux, "We Are Just Destroying These Kids": The Foster Children Growing Up Inside Detention Centers, Washington Post (Dec. 30, 2019), https://www.washingtonpost.com/national/we-are-just-destroying-these-kids-thefoster-children-growing-up-inside-detention-centers/2019/12/30/97f65f3a-eaa2-11e9-9c6d-436a0df4f31d_story.html (describing the placement of foster children in emergency shelters and juvenile detention centers)); Brief in Opposition for City Respondents 4 (acknowledging 5,000 children in need of care in Philadelphia); Terruso, Philly Puts Out "Urgent" Call—300 Families Needed for Fostering, Philadelphia Inquirer (Mar. 8, 2018), https://www.inquirer.com/philly/news/foster-parents-dhs-philly-child-welfare-adoptions-20180308.html; see also Haskins, Kohomban, & Rodriguez, Keeping Up With the Caseload: How To Recruit and Retain Foster Parents, The Brookings Institution (Apr. 24, 2019), https://www.brookings.edu/blog/upfront/2019/04/24/keeping-up-with-the-caseload-how-to-recruit-and-retain-foster-parents/ (explaining that "[t]he number of children in foster care ha[d] risen for the fifth consecutive year" to nearly 443,000 in 2017 and noting that "between 30 to 50 percent of foster families step down each year"); Adams, Foster Care Crisis: More Kids Are Entering, but Fewer Families Are Willing To Take Them In, NBC News (Dec. 30, 2020), https://www.nbcnews.com/news/nbcblk/ foster-care-crisis-more-kids-are-entering-fewer-families-are-n1252450 (explaining how the COVID–19 pandemic has overwhelmed the United States' foster care system); Satija, For Troubled Foster Kids in Houston, Sleeping in Offices Is "Rock Bottom," Texas Tribune (Apr. 20, 2017), https://www.texastribune.org/2017/04/20/texas-foster-care-placement-crisis/ (describing Texas's shortage of placement options, which resulted in children sleeping in office buildings where "no one is likely to stop them" if they decide to run away); Associated Press, Indiana Agencies Desperate To Find Foster Parents With Children Entering System at All-Time High, Fox 59 (Mar. 7, 2017), https://fox59.com/news/indianaagencies-desperate-to-find-foster-parents-with-children-entering-system-at-all-time-high/ (noting that nearly 1,000 children in Indiana are in need of care and that, in the span of one month, the State's largest not-for-profit child services agency was able to place 3 children out of 150 to 200 in one region); Lawrence, Georgia Foster Care System in Crisis Due to Shortage of Foster Homes, ABC News Channel 9 (Feb. 15, 2017), https://newschannel9.com/news/local/georgia-foster-care-system-in-crisis-due-to-shortage-of-foster-homes (reporting on a county in Georgia with 116 children in need of care but only 14 foster families).

19 See App. to Pet. for Cert. 19a, 64a, 140a; see also App. 59 (plaintiff Cecilia Paul testifying that, at the time of the evidentiary hearing below, she had no children in her care due to the City's policy).

20 *Id.,* at 182, 365–366 (describing Department of Human Services commissioner's comments to CSS that "it would be great if we followed the teachings of Pope Francis" and that "things have changed since 100 years ago").

21 The Court's decision also depends on its own contested interpretation of local and state law. See *post*, at 1926 – 1930 (GORSUCH, J., concurring in judgment). Instead of addressing whether the City's Fair Practices Ordinance is generally applicable, the Court concludes that the ordinance does not apply to CSS because CSS's foster care certification services do not constitute "public accommodations" under the FPO. *Ante*, at 1880. Of course, this Court's interpretation of state and local law is not binding on state courts. See, *e.g.,* *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236, 61 S.Ct. 179, 85 L.Ed. 139 (1940); see also *Danforth v. Minnesota*, 552 U.S. 264, 291, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (ROBERTS, C. J., dissenting) ("State courts are the final arbiters of their own state law"). Should the Pennsylvania courts interpret the FPO differently, they would effectively abrogate the Court's decision in this case.

22 See 102 Code Mass. Regs. 1.03(1) (1997) (prohibiting discrimination on the basis of sexual orientation as a condition of receiving the state license required to provide adoption services); San Francisco Admin. Code § 12B.1(a) (2021) (requiring that all contracts with the city include a provision "obligating the contractor not to discriminate on the basis of " sexual orientation and noting that the code section was last amended in 2000); D. C. Code §§ 2–1401.02(24), 2–1402.31 (2008) (prohibiting, on the basis of sexual orientation, the direct or indirect denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations," defined to include "establishments dealing with goods or services of any kind"); Ill. Comp. Stat., ch. 775, §§ 5/1–103(O–1), (Q), 5/5–101(A), 5/5–102 (2011) (prohibiting discrimination on the basis of sexual orientation in a "place of public accommodation," defined by a list of non-exclusive examples).

23 See, *e.g.,* Cal. Welf. & Inst. Code Ann. § 16013(a) (West 2018) (declaring that "all persons engaged in providing care and services to foster children, including ... foster parents [and] adoptive parents ... shall have fair and equal access to all available programs, services, benefits, and licensing processes, and shall not be subjected to discrimination ... on the basis of ... sexual orientation"); D. C. Munic. Regs., tit. 29, § 6003.1(d) (2018) (providing that foster parents are "[t]o not be subject to discrimination as provided in the D. C. Human Rights Act," which prohibits discrimination on the basis of sexual orientation); see also 110 Code Mass. Regs. 1.09(1) (2008) ("No applicant for or recipient of Department [of Children and Families] services shall, on the ground of ... sexual orientation ... be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in connection with any service, program, or activity administered or provided by the Department").

24 This Court actually granted review twice: once, after the state court first held that the denial of benefits was unconstitutional, see *Smith v. Employment Div., Dept. of Human Resources*, 301 Ore. 209, 220, 721 P.2d 445, 451 (1986), cert. granted 480 U.S. 916, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987), and then again after the case was remanded for the state court to determine whether peyote consumption for religious use was unlawful under Oregon law, see *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 485 U.S. 660, 662, 673–674, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988). When the state court held that it was and reaffirmed its prior decision, 307 Ore. 68, 72–73, 763 P.2d 146, 147–148 (1988), the Court granted certiorari, 489 U.S. 1077, 109 S.Ct. 1526, 103 L.Ed.2d 832 (1989).

25 Justice BARRETT makes the surprising claim that "[a] longstanding tenet of our free exercise jurisprudence" that "pre-dates" *Smith* is "that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions." *Ante*, at 1883 (concurring opinion). If there really were such a "longstanding [pre-*Smith*] tenet," one would expect to find cases stating that rule, but Justice BARRETT does not cite even one such case. Instead, she claims to find support by reading between the lines of what the Court said in a footnote in *Sherbert*, 374 U.S. at 401, n. 4, 83 S.Ct. 1790, and a portion of the opinion in *Cantwell v. Connecticut*, 310 U.S. 296, 303–307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)). *Ante*, at 1883. But even a close interlinear reading of those cases yields no evidence of this supposed tenet.

In the *Sherbert* footnote, the Court responded to the dissent's argument that South Carolina law did not recognize any exemptions from the general eligibility requirement for unemployment benefits. 374 U.S. at 419–420, 83 S.Ct. 1790 (HARLAN, J., dissenting). The footnote expressed skepticism about this interpretation of South Carolina law, but it did not suggest that its analysis would have been any different if the dissent's interpretation were correct.

In *Cantwell*, the Court addressed the constitutionality of a state statute that generally prohibited the solicitation of funds for religious purposes unless a public official found in advance that the cause was authentically religious. See 310 U.S. at 300–302, 60 S.Ct. 900. The Court held that the Free Exercise Clause prohibited the State from conditioning permission to solicit funds on an administrative finding about a religious group's authenticity, but the Court did not suggest that a blanket ban on solicitation would have necessarily been sustained. On the contrary, it said that the State was "free to regulate *the time and manner* of solicitation generally, in the interest of public safety, peace, comfort or convenience." *Id.*, at 307–308, 60 S.Ct. 900 (emphasis added). And the Court said not one word about "strict scrutiny," a concept that was foreign to Supreme Court case law at that time. See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1284 (2007) ("Before 1960, what we would now call strict judicial scrutiny ... did not exist").

26 A particularly heartbreaking example was a case in which a judge felt compelled by *Smith* to reverse his previous decision holding the state medical examiner liable for performing the autopsy of a young Hmong man who had been killed in a car accident. The young man's parents were tortured by the thought that the autopsy would prevent their son from entering the afterlife. See *Yang v. Sturner*, 750 F.Supp. 558, 560 (D.R.I. 1990); see also 139 Cong. Rec. 9681 (1993) (remarks of Rep. Edwards). Members of Congress were also informed that veterans' cemeteries had refused to allow burial on weekends even when that was required by the deceased's religion, *id.*, at 9687 (remarks of Rep. Cardin), and that churches were prohibited from conducting services in areas zoned for commercial and industrial uses, *id.*, at 9684 (remarks of Rep. Schumer). In just the first three years after *Smith*, more than 50 cases were decided against religious claimants. 139 Cong. Rec., at 9685 (remarks of Rep. Hoyer); see also *id.,* at 9684 (remarks of Rep. Schumer) ("Smith was a devastating blow to religious freedom").

27 Although the First Amendment refers to "Congress," we have held that the Fourteenth Amendment—which references the entire "State," not just a legislature—makes the rights protected by the Amendment applicable to the States. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934); *Cantwell*, 310 U.S. 296, 60 S.Ct. 900; *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). And we have long applied that Amendment to actions taken by those responsible for enforcing the law. See, *e.g.*, *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (considering First Amendment claim based on federal agency's decision); *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (applying First Amendment against a state agency); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (applying First Amendment against local board of education); see also U. S. Const., Amdt. 14, § 1 ("No State shall make *or enforce* any law which shall abridge the privileges or immunities of citizens of the United States" (emphasis added)).

28 The phrase "no law" applies to the freedom of speech and the freedom of the press, as well as the right to the free exercise of religion, and there is no reason to believe that its meaning with respect to all these rights is not the same. With respect to the freedom of speech, we have long held that "no law" does not mean that every restriction on what a person may say or write is unconstitutional. See, *e.g.*, *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); see also *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of ROBERTS, C. J.); *Times Film Corp. v. Chicago*, 365 U.S. 43, 47–49, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961). Many restrictions on what a person could lawfully say or write were well established at the time of the adoption of the First Amendment and have continued to this

day. Fraudulent speech, speech integral to criminal conduct, speech soliciting bribes, perjury, speech threatening physical injury, and obscenity are examples. See, *e.g.*, *Donaldson v. Read Magazine*, Inc., 333 U.S. 178, 190–191, 68 S.Ct. 591, 92 L.Ed. 628 (1948) (fraud); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949) (speech integral to criminal conduct); *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 191–192, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014) (plurality opinion) (*quid pro quo* bribes); *United States v. Dunnigan*, 507 U.S. 87, 96–97, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) (perjury); *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (threats); *Miller*, 413 U.S. at 23, 93 S.Ct. 2607 (obscenity). The First Amendment has never been thought to have done away with all these rules. Alexander Meiklejohn reconciled this conclusion with the constitutional text: The First Amendment "does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech." Free Speech and Its Relation to Self-Government 19 (1948) (emphasis deleted). In other words, the Free Speech Clause protects a right that was understood at the time of adoption to have certain defined limits. See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49, and n. 10, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961). As explained below, the same is true of the Free Exercise Clause. See *infra*, at 1898 – 1903. No one has ever seriously argued that the Free Exercise Clause protects every conceivable religious practice or even every conceivable form of worship, including such things as human sacrifice.

29 Whatever the outer boundaries of the term "religion" as used in the First Amendment, there can be no doubt that CSS's contested policy represents an exercise of "religion."

30 See also N. Bailey, Universal Etymological English Dictionary (22d ed. 1770) (Bailey) ("to forbid, to bar, to keep from"); T. Dyche & W. Pardon, A New General English Dictionary (14th ed. 1771) (Dyche & Pardon) ("to forbid, bar, hinder, or keep from any thing"); 2 Johnson (6th ed. 1785) ("1. To forbid, to interdict by authority.... 2. To debar; to hinder"); 2 J. Ash, The New & Complete Dictionary of the English Language (2d ed. 1795) (Ash) ("To forbid, to interdict by authority; to debar, to hinder"); 2 N. Webster, An American Dictionary of the English Language (1828) (Webster) ("1. To forbid; to interdict by authority; ... 2. To hinder; to debar; to prevent; to preclude"); 2 J. Boag, The Imperial Lexicon of the English Language 275 (1850) (Boag) ("To forbid; to interdict by authority. To hinder; to debar; to prevent; to preclude").

31 See also Bailey ("to practice"); Dyche & Pardon ("to practice or do a thing often; to employ one's self frequently in the same thing"); 1 Ash ("Practise, use, employment, a task, an act of divine worship"); 2 Johnson (9th ed. 1805) ("Practice; outward performance"; "Act of divine worship, whether publick or private"); 1 Webster ("1. Use, practice; ... 2. Practice; performance; as the *exercise* of religion ... 10. Act of divine worship"); 1 Boag 503 ("Use; practice; ... Practice; performance ... Act of divine worship").

32 See also Dyche & Pardon ("at liberty, that can do or refuse at his pleasure, that is under no restraint"); 1 Ash ("Having liberty," "unrestrained," "exempt"); 1 Webster ("1. Being

at liberty; not being under necessity or restraint, physical or moral ... 5. Unconstrained; unrestrained; not under compulsion or control"); 1 Boag 567–568 ("Being at liberty; not being under necessity or restraint, physical or moral ... Unconstrained; unrestrained, not under compulsion or control. Permitted; allowed; open; not appropriated. Not obstructed").

33 See, *e.g.*, Del. Declaration of Rights § 3 (1776), in The Complete Bill of Rights 15 (N. Cogan ed. 1997) (Cogan) ("That all persons professing the Christian religion ought forever to enjoy *equal rights and privileges* in this state" (emphasis added)); Md. Declaration of Rights, Art. 33 (1776), in *id.,* at 17 ("[A]ll persons professing the christian religion are *equally entitled* to protection in their religious liberty" (emphasis added)); N. Y. Const., Art. XXXVIII (1777), in *id*., at 26 ("[T]he free Exercise and Enjoyment of religious Profession and Worship, *without Discrimination or Preference*, shall forever hereafter be allowed within this State to all Mankind" (emphasis added)); S. C. Const., Art. VIII, § 1 (1790), in *id*., at 41 ("The free exercise and enjoyment of religious profession and worship, *without discrimination or preference*, shall, forever hereafter, be allowed within this state to all mankind" (emphasis added)).

34 See, *e.g.,* McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990) (McConnell, Origins); McConnell, Free Exercise Revisionism 1109; McConnell, Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in *City of Boerne* v. *Flores*, 39 Wm. & Mary L. Rev. 819 (1998) (McConnell, Freedom From Persecution); Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992) (Hamburger, Religious Exemption); Hamburger, More Is Less, 90 Va. L. Rev. 835 (2004) (Hamburger, More Is Less); Laycock, Religious Liberty as Liberty, 7 J. Contemp. Legal Issues 313 (1996); Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L. Rev. 245 (1991); Campbell, Note, A New Approach to Nineteenth Century Religious Exemption Cases, 63 Stan. L. Rev. 973 (2011) (Campbell, A New Approach); Kmiec, The Original Understanding of the Free Exercise Clause and Religious Diversity, 59 UMKC L. Rev. 591 (1991); Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106 (1994); Lombardi, Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions, 85 Ore. L. Rev. 369 (2006) (Lombardi, Free Exercise); Muñoz, The Original Meaning of the Free Exercise Clause: The Evidence From the First Congress, 31 Harv. J. L. & Pub. Pol'y 1083 (2008) (Muñoz, Original Meaning); Nestor, Note, The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion, 42 Harv. J. L. & Pub. Pol'y 971 (2019) (Nestor); M. Nussbaum, Liberty of Conscience 120–130 (2008); Walsh, The First Free Exercise Case, 73 Geo. Wash. L. Rev. 1 (2004) (Walsh).

35 McConnell, Origins 1425 (describing Lord Baltimore's directive to the new Protestant governor and councilors of Maryland to refrain from interfering with the "free exercise" of Christians, particularly Roman Catholics).

36 Act Concerning Religion (1649), in Cogan 17; see also McConnell, Origins 1425.

37 See Second Charter of Carolina (1665), in Cogan 27–28 (recognizing the right of persons to "freely and quietly have and enjoy ... their Judgments and Consciences, in Matters of Religion" and declaring that "no Person ... shall be in any way molested, punished, disquieted, or called in Question, for any Differences in Opinion, or Practice in Matters of religious Concernments, who do not actually disturb the Civil Peace"); Charter of Delaware, Art. I (1701), in *id.,* at 15 (ensuring "[t]hat no person ... who shall confess and acknowledge One Almighty God ... shall be in any case molested or prejudiced, in his ... person or estate, because of his ... consciencious persuasion or practice, nor ... to do or suffer any other act or thing, contrary to their religious persuasion"); Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New-Jersey (1664), in *id*., at 23 (declaring the right of all persons to "freely and fully have and enjoy ... their Judgments and Consciences in matters of Religion throughout the said Province" and ensuring "[t]hat no person ... at any Time shall be any ways molested, punished, disquieted or called in question for any Difference in Opinion or Practice in matter of Religious Concernments, who do not actually disturb the civil Peace of the said Province"); Concessions and Agreements of West New-Jersey, ch. XVI (1676), in *id*., at 24 (providing that "no Person ... shall be any ways upon any pretence whatsoever, called in Question, or in the least punished or hurt, either in Person, Estate, or Priviledge, for the sake of his Opinion, Judgment, Faith or Worship towards God in Matters of Religion"); Laws of West New-Jersey, Art. X (1681), *ibid.* ("That Liberty of Conscience in Matters of Faith and Worship towards God, shall be granted to all People within the Province aforesaid; who shall live peacably and quietly therein"); Fundamental Constitutions for East New-Jersey, Art. XVI (1683), *ibid.* ("All Persons living in the Province who confess and acknowledge the one Almighty and Eternal God, and holds themselves obliged in Conscience to live peacably and quietly in a civil Society, shall in no way be molested or prejudged for their Religious Perswasions and Exercise in matters of Faith and Worship"); New York Act Declaring ... Rights & Priviledges (1691), in *id*., at 25 ("That no Person ... shall at any time be any way molested, punished, disturbed, disquieted or called in question for any Difference in Opinion, or matter of Religious Concernment, who do not under that pretence disturb the Civil Peace of the Province"); Charter of Privileges Granted by William Penn (1701), in *id*., at 31–32 (declaring that "no Person ... who shall confess and acknowledge *One* almighty God ... and profess ... themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced ... because of ... their consciencious [*sic*] Persuasion or Practice, nor ... suffer any other Act or Thing, contrary to their religious Persuasion").

38 See *infra*, at 1901 – 1902, and n. 43; N. J. Const., Art. XVIII (1776), in Cogan 25 ("THAT no Person shall ever within this Colony be deprived of the inestimable Privilege of worshipping

Almighty GOD in a Manner agreeable to the Dictates of his own Conscience; nor under any Pretence whatsoever compelled to attend any Place of Worship contrary to his own Faith and Judgment"); N. C. Decl. of Rights § XIX (1776), in *id.,* at 30 ("That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Conscience"); Pa. Const., Declaration of Rights of the Inhabitants of the State of Pa., Art. II (1776), in *id.,* at 32 ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship"); Va. Declaration of Rights, Art. XVI (1776), in *id.,* at 44 ("THAT religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other"); see also Vt. Const., ch. 1, § 3 (1777), in *id.,* at 41 ("THAT all Men have a natural and unalienable Right to worship ALMIGHTY GOD according to the Dictates of their own Consciences and Understanding ... and that no Man ought or of Right can be compelled to attend any religious Worship, or erect, or support any Place of Worship, or maintain any Minister contrary to the Dictates of his Conscience; nor can any Man who professes the Protestant Religion, be justly deprived or abridged of any civil Right, as a Citizen, on Account of his religious Sentiment, or peculiar Mode of religious Worship, and that no Authority can, or ought to be vested in, or assumed by any Power whatsoever, that shall in any Case interfere with, or in any Manner control the Rights of Conscience, in the free Exercise of religious Worship").

39 See *McDonald v. Chicago*, 561 U.S. 742, 769, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010); see also Creating the Bill of Rights 281, 282 (H. Veit., K. Bowling, & C. Bickford eds. 1991); 1 A. Kelly, W. Harbison, & H. Belz, The American Constitution: Its Origins and Development 110, 118 (7th ed. 1991).

40 See Charter of Rhode Island and Providence Plantations (1663), in Cogan 34 (protecting the free exercise of religion so long as residents "do not Actually disturb the Civil Peace of Our said Colony" and "Behav[e] themselves Peaceably and Quietly, And not Using This Liberty to Licentiousness and Prophaneness; nor to the Civil Injury, or outward Disturbance of others" (emphasis deleted)).

41 See Second Charter of Carolina (1665), in *id.,* at 27–28 (guaranteeing free exercise to persons "who do not actually disturb the Civil Peace" and who "behav[e] themselves peaceably, and

[do] not us[e] this Liberty to Licentiousness, nor to the Civil Injury, or outward Disturbance of others").

42 New York Act Declaring ... Rights & Priviledges (1691), in *id.,* at 25 (protecting the right to free exercise for all persons "who do not under that pretence disturb the Civil Peace" and who "behav[e] themselves peaceably, quietly, modestly and Religiously, and [do] not us[e] this Liberty to Licentiousness, nor to the civil Injury or outward Disturbance of others").

43 Del. Declaration of Rights §§ 2–3 (1776), in *id.,* at 15 ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings .... That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man *disturb the peace, the happiness or safety of society*" (emphasis added)); Md. Declaration of Rights, Art. 33 (1776), in *id.,* at 17 ("That as it is the duty of every man to worship God in such manner as he thinks most acceptable to him, all persons professing the christian religion are equally entitled to protection in their religious liberty, wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless under colour of religion any man shall *disturb the good order, peace or safety of the state,* or shall *infringe the laws of morality, or injure others,* in their natural, civil or religious rights" (emphasis added)); Mass. Const., pt. I, Art. II (1780), in *id.,* at 20–21 ("It is the right as well as the duty of all men in society, publickly, and at stated seasons, to worship the **SUPREME BEING**, the Great Creator and Preserver of the Universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping **GOD** in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not *disturb the publick peace, or obstruct others in their religious worship*" (emphasis added)); N. H. Const., pt. I, Art. V (1783), in *id.,* at 22–23 ("Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience, ... provided he doth not *disturb the public peace, or disturb others in their religious worship*" (emphasis added)); N. Y. Const., Art. XXXVIII (1777), in *id.,* at 26 ("[T]he free Exercise and Enjoyment of religious Profession and Worship, without Discrimination or Preference, shall forever hereafter be allowed within this State to all Mankind. *Provided*, That the Liberty of Conscience hereby granted, shall not be so construed, as to *excuse Acts of Licentiousness*, or justify Practices inconsistent with *the Peace or Safety of this State*" (some emphasis added)); Charter of Rhode Island and Providence Plantations (1663), in *id.,* at 34 (guaranteeing free exercise for matters that "do not Actually *disturb the Civil Peace* of Our said *Colony*" so long as persons "[b]ehav[e] themselves *Peaceably and Quietly, And [do] not Us[e] This Liberty to Licentiousness and Prophaneness;* nor to the Civil Injury, or outward Disturbance of others" (some emphasis added)); S. C. Const., Art. VIII, § 1 (1790), in *id.,* at 41 ("The free exercise and enjoyment of religious profession and

worship, without discrimination or preference, shall, forever hereafter, be allowed within this state to all mankind; provided that the liberty of conscience thereby declared shall not be so construed as to *excuse acts of licentiousness*, or justify practices inconsistent with *the peace or safety of this state*" (emphasis added)).

44 See also 2 Webster ("1. In *a general sense*, a state of quiet or tranquility; freedom from disturbance or agitation.... 2. Freedom from war with a foreign nation; public quiet. 3. Freedom from internal commotion or civil war. 4. Freedom from private quarrels, suits or disturbance. 5. Freedom from agitation or disturbance by the passions, as from fear, terror, anger, anxiety or the like; quietness of mind; tranquillity; calmness; quiet of conscience.... 6. Heavenly rest; the happiness of heaven.... 7. Harmony; concord; a state of reconciliation between parties at variance. 8. Public tranquility; that quiet, order and security which is guarauteed by the laws; as, to keep the *peace*; to break the *peace*"); 2 Ash ("Rest, quiet, respite from war, respite from tumult; reconciliation, an accommodation of differences").

45 See also Bailey ("Freedom from Danger, Custody, Security"); 2 Ash ("Security from danger, freedom from hurt; custody, security from escape"); 2 Webster ("[1.] Freedom from danger or hazard .... 2. Exemption from hurt, injury or loss.... 3. Preservation from escape; close custody.... 4. Preservation from hurt").

46 4 W. Blackstone, Commentaries on the Laws of England 59 (1769).

47 3 *id.,* at 73–74 (1768).

48 *Id*., at 141–142.

49 *Id.*, at 164.

50 4 *id.,* at 163.

51 *Id.,* at 160 (emphasis deleted).

52 *Id.,* at 169 (emphasis deleted).

53 *Id.,* at 160 (emphasis deleted).

54 Some late 18th century and early 19th century dictionaries provided special definitions of the term "peace" as used in the law, and these definitions fit the offenses on Blackstone's list. See, *e.g.*, 1 Johnson (6th ed. 1785) ("That general security and quiet which the king warrants to his subjects, and of which he therefore avenges the violation; every forcible injury is a breach of the king's peace" (emphasis deleted)); 5 G. Jacob, Law-Dictionary (1811) ("[P]articularly in law, ['peace'] intends a quiet behaviour towards the King and his Subjects"); Bailey (defining "peace" in the "*Law Sense*" as "quiet and inoffensive Behaviour towards King and Subject").

55 Such an interpretation would also clash with the way in which the scope of state legislative power was understood. If any violation of the law had been regarded as a breach of public peace or safety, there would have been no need for the lawmaking authority of a state legislature to extend any further, but there is no evidence that state legislative authority was understood that way. New York's 1777 Constitution demonstrates the point. As noted above, it protected free exercise unless a person invoked that protection to "excuse Acts of Licentiousness, or justify Practices inconsistent with the Peace or Safety of this State." Art. XXXVIII, in Cogan 26. But the New York Constitution authorized the legislature to

enact laws to further broader aims, including "good government, welfare, and prosperity." Art. XIX, in 5 Federal and State Constitutions 2633 (F. Thorpe ed. 1909). That authority obviously goes well beyond the prohibition of "Practices inconsistent with" the "Peace" and "Safety" (or "Licentiousness"). See McConnell, Freedom from Persecution 835–836. In like manner, State Constitutions and other declarations of rights commonly proclaimed that government should pursue broader goals, such as the promotion of "prosperity" and "happiness." See Nestor, Table III: Comparing the Provisos to the Scope of Legislative Power (online source archived at www.supremecourt.gov).

56 Mayer, The Continental Army, in A Companion to the American Revolution 309 (J. Greene & J. Pole eds. 2000); R. Wright, The Continental Army 153–154, 163 (1983).

57 See The Oxford Companion to American Military History 606–608, 611 (J. Chambers ed. 1999).

58 See Declaration of Independence ¶ 31 ("[W]e mutually pledge to each other our Lives, our Fortunes and our sacred Honor"); see also P. Maier, American Scripture 152–153 (1997); Boyd, The Declaration of Independence: The Mystery of the Lost Original, 100 Pa. Mag. Hist. & Bio. 438, 445 (1976); L. Montross, The Reluctant Rebels 165 (1970); E. Burnett, The Continental Congress 196–197 (1941). Of the 56 signers of the Declaration of Independence, 9 were taken as prisoners of war; 2 had sons who died; 3 had sons who were taken captive; 9 had their homes destroyed; and 13 saw their homes occupied, confiscated, or damaged. M. Novak, On Two Wings: Humble Faith and Common Sense at the American Founding 157–158 (2002).

59 See Barclay, The Historical Origins of Judicial Religious Exemptions, 96 Notre Dame L. Rev. 55, 69–73 (2020); McConnell, Free Exercise Revisionism 1118; Campbell, A New Approach 978, 987; Lombardi, Free Exercise 385; Campbell, Religious Neutrality in the Early Republic, 24 Regent U. L. Rev. 311, 314–315, n. 20 (2012).

60 W. Newman & P. Halvorson, Atlas of American Religion 18 (2000).

61 *Ibid.*

62 The Covenanters originated in Scotland, where they opposed the Stuart kings' right to rule over the Presbyterian Church. See Emery, Church and State in the Early Republic: The Covenanters' Radical Critique, 25 J. L. & Religion 487, 488 (2009). They immigrated to the United States and, in the 1790s, organized a branch of the Reformed Presbyterian Church. *Id.,* at 489. Members subscribe to two foundational documents—the Scottish National Covenant of 1638 and the Solemn League and Covenant of 1643—and believe in the supremacy of God over man in both civil and ecclesiastical matters. *Id.,* at 488; see also J. McFeeters, The Covenanters in America: The Voice of Their Testimony on Present Moral Issues 57 (1892).

63 Privileged Communications to Clergymen, 1 Cath. Law. 199, 207–209 (1955).

64 See also Walsh 41; Campbell, A New Approach 992, n. 99; Lombardi, Free Exercise 408, and n. 152.

65 See McFeeters, The Covenanters in America 121–129; *id.,* at 122 (Covenanters "must refuse upon the grounds of honor, conscience, and consistency, to be identified by oath or ballot with

such a political system"); *id.,* at 129 (Covenanters "decline to take any responsible part in the administration of civil power"); W. Gibson & A. McLeod, Reformation Principles Exhibited, by the Reformed Presbyterian Church in the United States of America 138 (1807) ("The juror voluntarily places himself upon oath, under the direction of a law which is immoral. The Reformed Presbytery declare this practice inconsistent with their Testimony, and warn Church-members against serving on juries under the direction of the constituted courts of law").

66 See O'Neall, Early History of the Judiciary of South Carolina, p. xi, in 1 Biographical Sketches of the Bench and Bar of South Carolina (1859); Walsh 41–42 (explaining that South Carolina "dismantled" the "five-member constitutional court" that decided *Willson* and replaced it with a new high court—the South Carolina Court of Appeals—which concurred in the opinion in *Farnandis*).

67 Hamburger, Religious Exemption 928, and n. 56 (quoting the statement of Rep. Boudinot).

68 *Id.,* at 928, and n. 57 (quoting the statement of Rep. Benson).

69 Muñoz, Original Meaning 1115.

70 Several State Constitutions contained both Free Exercise Clause analogs and provisions protecting conscientious objectors, and this has been cited as evidence that the free-exercise analogs did not confer any right to exemptions. See *id.*, at 1118–1119. This argument is unpersuasive for the reasons explained above.

71 The family name was apparently misspelled in the case caption. See Sutton, *Barnette,* Frankfurter, and Judicial Review, 96 Marq. L. Rev. 133, 134 (2012).

72 See also N. Feldman, Scorpions 179 (2010).

73 *Ibid.*

74 *Id.,* at 180.

75 This discussion does not suggest that *Reynolds* should be overruled.

76 "The clear implication was that a 'direct' interference would have been unconstitutional." McConnell, Free Exercise Revisionism 1125.

77 Our strained attempt to square the ministerial exception with *Smith* highlights the tension between the two decisions. *Smith* held that a generally applicable law satisfies the First Amendment if "prohibiting the exercise of religion ... is not the object of the [government action] but merely the incidental effect." 494 U.S. at 878, 110 S.Ct. 1595. But the ADA's effect on religion in *Hosanna-Tabor* was "incidental" in the sense in which the term was used in *Smith*. The opinion in *Hosanna-Tabor* tried to distinguish *Smith* as involving only "outward physical acts" instead of "the faith and mission of the church itself." 565 U.S. at 190, 132 S.Ct. 694. But a prohibition of peyote use surely affected "the faith and mission" of the Native American Church, which regards the ingestion of peyote as a sacrament.

78 Recently, some lower courts have proceeded under yet another approach, which analyzes whether the claims presented are sufficiently similar to those raised in the cases that this

Court purported to distinguish in *Smith*. See *Henderson v. McMurray*, 987 F.3d 997, 1006–1007 (C.A.11 2021); see also *Illinois Bible Colleges Assn. v. Anderson*, 870 F.3d 631, 641 (C.A.7 2017).

79 App. 367–369 (Commissioner Figueora testifying that she was appointed by the mayor, reports ultimately to him, and considers herself part of his administration); Phila. Home Rule Charter, Art. IX, ch. 2, § 9–200 (Removal of Appointive Officers).

80 App. 182, 365–366. Apart from the statements made by City officials, other evidence suggested that the City was targeting CSS. For instance, the City changed its justification for the closure of intake to CSS numerous times. Brief for Petitioners 12–15 (describing six different justifications). And although the City's stated harm was that CSS's process for certifying *new* families was discriminatory, it responded by prohibiting placement with all CSS families, including those already certified. The City's response therefore appears to "proscribe more religious conduct than is necessary to achieve [its] stated ends." *Lukumi*, 508 U.S. at 538, 113 S.Ct. 2217.

81 See, *e.g.,* McConnell, Origins 1409; McConnell, Free Exercise Revisionism 1109; McConnell, Freedom From Persecution 819; Hamburger, Religious Exemption 915; Hamburger, More Is Less 835; Laycock, 7 J. Contemp. Legal Issues 313; Bradley, 20 Hofstra L. Rev. 245; Campbell, A New Approach 973; Kmiec, 59 UMKC L. Rev. 591; Lash, 88 Nw. U. L. Rev. 1106; Lombardi, Free Exercise 369; Muñoz, Original Meaning 1083; Nestor 971; Nussbaum, Liberty of Conscience, at 120–130; Walsh 1.

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140 S.Ct. 2103
Supreme Court of the United States.

JUNE MEDICAL SERVICES L. L. C. et al., Petitioners
v.
Stephen RUSSO, Interim Secretary, Louisiana Department of Health and Hospitals;
Stephen Russo, Interim Secretary, Louisiana
Department of Health and Hospitals, Petitioner
v.
June Medical Services LLC., et al.

No. 18-1323, No. 18-1460
|
Argued March 4, 2020
|
Decided June 29, 2020

Synopsis

Background: Abortion clinics and abortion doctors brought action against Secretary of Louisiana Department of Health and Hospitals (DHH) and President of Louisiana State Board of Medical Examiners, seeking to bar enforcement of Louisiana's Unsafe Abortion Protection Act requiring every doctor who performed abortions to have active hospital admitting privileges at a hospital within 30 miles of where abortions were performed or induced. The United States District Court for the Middle District of Louisiana, John W. deGravelles, J., 158 F.Supp.3d 473, granted preliminary injunction to plaintiffs, and denied a temporary stay pending appeal, 2016 WL 617444. Defendants appealed. The United States Court of Appeals for the Fifth Circuit, 814 F.3d 319, granted emergency stay pending appeal. The Supreme Court, 136 S.Ct. 1354, 194 L.Ed.2d 254, granted plaintiffs' application to vacate the stay. The Court of Appeals, 2016 WL 11494731, remanded for further fact-finding. Following a bench trial, the District Court, John W. deGravelles, J., 250 F.Supp.3d 27, found that admitting privileges requirement imposed an undue burden on women's due process right to choose an abortion and therefore was facially unconstitutional, and permanently enjoined the Act. Defendants appealed. The Court of Appeals, Smith, Circuit Judge, 905 F.3d 787, reversed and rendered a judgment of dismissal. Following the denial of rehearing en banc, 913 F.3d 573, the Supreme Court, 139 S.Ct. 663, 203 L.Ed.2d 143, stayed the Fifth Circuit's mandate. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

State of Louisiana waived its argument that plaintiff abortion providers and clinics could not bring suit and that their patients were the proper parties;

the providers and clinics could bring suit claiming the law infringed their patients' rights to access an abortion;

deferential clear-error standard applied to district court's findings of fact;

the admitting privileges requirement imposed undue burden on a woman's constitutional right to choose to have an abortion.

Reversed.

Chief Justice Roberts filed an opinion concurring in the judgment.

Justice Thomas filed a dissenting opinion.

Justice Alito filed a dissenting opinion, in which Justice Gorsuch joined, and in which Justice Thomas and Justice Kavanaugh joined in part.

Justice Gorsuch filed a dissenting opinion.

Justice Kavanaugh filed a dissenting opinion.

Procedural Posture(s): Petition for Writ of Certiorari; Petition for Rehearing En Banc; On Appeal; Judgment; Motion to Stay Proceedings.

West Codenotes

Held Unconstitutional

La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a)

Recognized as Unconstitutional

Tex. Health & Safety Code Ann. § 171.0031(a)

***2108** *Syllabus* [*]

Louisiana's Act 620, which is almost word-for-word identical to the Texas "admitting privileges" law at issue in *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, 136 S.Ct. 2292, 195 L.Ed.2d 665, requires any doctor who performs abortions to hold "active admitting privileges at a hospital ... located not further than thirty miles from the location at which the abortion is performed or induced," and defines "active admitting privileges" as being "a member in good standing" of the hospital's "medical staff ... with the ability to admit a patient and to provide diagnostic and surgical services to such patient."

In these consolidated cases, five abortion clinics and four abortion providers challenged Act 620 before it was to take effect, alleging that it was unconstitutional because (among other things) it imposed an undue burden on the right of their patients to obtain an abortion. (The plaintiff providers and two additional doctors are referred to as Does 1 through 6.) The plaintiffs asked for a temporary restraining order (TRO), followed by a preliminary injunction to prevent the law from taking effect. The defendant (State) opposed the TRO request but also urged the court not to delay ruling on the preliminary injunction motion, asserting that there was no doubt about the physicians' standing. Rather than staying the Act's effective date, the District Court provisionally forbade the State to enforce the Act's penalties, while directing the plaintiff doctors to continue to seek privileges and to keep the court apprised of their progress. Several months later, after a 6-day bench trial, the District Court declared Act 620 unconstitutional on its face and preliminarily enjoined its enforcement. On remand in light of *Whole Woman's Health,* the District Court ruled favorably on the plaintiffs' request for a permanent injunction on the basis of the record previously developed, finding, among other things, that the law offers no significant health benefit; that conditions on admitting privileges common to hospitals throughout the State have made and will continue to make it impossible for abortion providers to obtain conforming privileges for reasons that have nothing to do with the State's asserted interests in promoting women's health and safety; and that this inability places a substantial obstacle in the path of women seeking an abortion. The court concluded that the law imposes an undue burden and is thus unconstitutional. The Fifth Circuit reversed, agreeing with the District Court's interpretation of the standards that apply to abortion regulations, but disagreeing with nearly every one of the District Court's factual findings.

Held: The judgment is reversed.

905 F.3d 787, reversed.

Justice BREYER, joined by Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN, concluded:

1. The State's unmistakable concession of standing as part of its effort to obtain a quick decision from the District Court on the merits of the plaintiffs' undue-burden claims and a long line of well-established precedents foreclose its belated challenge to the plaintiffs' standing in this Court. Pp. 2117 – 2120.

2. Given the District Court's factual findings and precedents, particularly *Whole Woman's Health*, Act 620 violates the Constitution. Pp. 2120 – 2133.

(a) Under the applicable constitutional standards set forth in the Court's earlier abortion-related cases, particularly *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, and *Whole Woman's Health*, " '[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right' " and are therefore "constitutionally invalid," *Whole Woman's Health,* 579 U. S., at ——, 136 S.Ct., at 2300. This standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's "asserted benefits against the burdens" it imposes on abortion access. *Id.*, at ——, 136 S.Ct., at 2310. The District Court here, like the trial court in *Whole Woman's Health*, faithfully applied these standards. The Fifth Circuit disagreed with the District Court, not so much in respect to the legal standards, but in respect to the factual findings on which the District Court relied in assessing both the burdens that Act 620 imposes and the health-related benefits it might bring.

Under well-established legal standards, a district court's findings of fact "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." Fed. Rule. Civ. Proc. 52(a)(6). When the district court is "sitting without a jury," the appellate court "is not to decide factual issues *de novo,*" *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518. Provided "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.*, at 573–574, 105 S.Ct. 1504. Viewed in light of this standard, the testimony and other evidence contained in the extensive record developed over the 6-day trial support the District Court's conclusion on Act 620's constitutionality. Pp. 2120 – 2122.

(b) Taken together, the District Court's findings and the evidence underlying them are sufficient to support its conclusion that enforcing the admitting-privileges requirement would drastically reduce the number and geographic distribution of abortion providers, making it impossible for many women to obtain a safe, legal abortion in the State and imposing substantial obstacles on those who could. Pp. 2121 – 2130.

(1) The evidence supporting the court's findings in respect to Act 620's impact on abortion providers is stronger and more detailed than that in *Whole Woman's Health*. The District Court supervised Does 1, 2, 5, and 6 for more than 18 months as they tried, and largely failed, to obtain conforming privileges from 13 relevant hospitals; it relied on a combination of direct evidence that some of the doctors' applications were denied for reasons having nothing to do with their ability to perform abortions safely, and circumstantial evidence—including hospital bylaws with requirements like those considered in *Whole Woman's Health* and evidence that showed the role that opposition to abortion plays in some hospitals' decisions—that explained why other applications were denied despite the doctors' good-faith efforts. Just as in *Whole Woman's Health*, that evidence supported the District Court's factual finding that Louisiana's admitting-privileges requirement serves no "relevant credentialing function." 579 U. S., at ——, 136 S.Ct., at 2313. The Fifth Circuit's conclusion that Does 2, 5, and 6 acted in bad faith cannot be squared with the clear-error standard of review that applies to the District Court's contrary findings. Pp. 2121 – 2128.

(2) The District Court also drew from the record evidence several conclusions in respect to the burden that Act 620 is likely to impose upon women's ability to access an abortion in Louisiana. It found that enforcing that requirement would prevent Does 1, 2, and 6 from providing abortions altogether. Doe 3 gave uncontradicted, in-court testimony that he would stop performing abortions if he was the last provider in northern Louisiana, so the departure of Does 1 and 2 would also eliminate Doe 3. And Doe 5's inability to obtain privileges in the Baton Rouge area would leave Louisiana with just one clinic with one provider to serve the 10,000 women annually who seek abortions in the State. Those women not altogether prevented from obtaining an abortion would face "longer waiting times, and increased crowding." *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct., at 2313. Delays in obtaining an abortion might increase the risk that a woman will experience complications from the procedure and may make it impossible for her to choose a non-invasive medication abortion. Both expert and lay witnesses testified that the burdens of increased travel to distant clinics would fall disproportionately on poor women, who are least able to absorb them. Pp. 2128 – 2130.

(c) An examination of the record also shows that the District Court's findings regarding the law's asserted benefits are not "clearly erroneous." The court found that the admitting-privileges requirement serves no "relevant credentialing function." 250 F.Supp.3d 27, 87. Hospitals can, and do, deny admitting privileges for reasons unrelated to a doctor's ability safely to perform abortions, focusing primarily upon a doctor's ability to perform the inpatient, hospital-based procedures for which the doctor seeks privileges—not outpatient abortions. And nothing in the record indicates that the vetting of applicants for privileges adds significantly to the vetting already provided by the State Board of Medical Examiners. The court's finding that the admitting-

privileges requirement "does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana," *ibid.*, is supported by expert and lay trial testimony. And, as in *Whole Woman's Health*, the State introduced no evidence "showing that patients have better outcomes when their physicians have admitting privileges" or "of any instance in which an admitting privileges requirement would have helped even one woman obtain better treatment," 250 F.Supp.3d. at 64. Pp. 2130 – 2132.

(d) In light of the record, the District Court's significant factual findings—both as to burdens and as to benefits—have ample evidentiary support and are not "clearly erroneous." Thus, the court's related factual and legal determinations and its ultimate conclusion that Act 620 is unconstitutional are proper. P. 2131–2132.

THE CHIEF JUSTICE agreed that abortion providers in this case have standing to assert the constitutional rights of their patients and concluded that because Louisiana's Act 620 imposes a burden on access to abortion just as severe as that imposed by the nearly identical Texas law invalidated four years ago in *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, 136 S.Ct. 2292, 195 L.Ed.2d 665, it cannot stand under principles of *stare decisis*. Pp. 2112 – 2120.

BREYER, J., announced the judgment of the Court and delivered an opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed an opinion concurring in the judgment. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which GORSUCH, J., joined, in which THOMAS, J., joined except as to Parts III–C and IV–F, and in which KAVANAUGH, J., joined as to Parts I, II, and III. GORSUCH, J., and KAVANAUGH, J., filed dissenting opinions.

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Opinion

Justice BREYER announced the judgment of the Court and delivered an opinion, in which Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join.

***2112** In *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016), we held that " '[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right' " and are therefore "constitutionally invalid." *Id.,* at ——, 136 S.Ct., at 2300 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion); alteration in original). We explained that this standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's "asserted benefits against the burdens" it imposes on abortion access. 579 U. S., at ——, 136 S.Ct., at 2310 (citing *Gonzales v. Carhart*, 550 U.S. 124, 165, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007)).

The Texas statute at issue in *Whole Woman's Health* required abortion providers to hold " 'active admitting privileges at a hospital' " within 30 miles of the place where they perform abortions. 579 U. S., at ——, 136 S.Ct., at 2300 (quoting Tex. Health & Safety Ann. Code § 171.0031(a) (West Cum. Supp. 2015)). Reviewing the record for ourselves, we found ample evidence to support the District Court's finding that the statute did not further the State's asserted interest in protecting women's health. The evidence showed, moreover, that conditions on admitting privileges that served no "relevant credentialing function," 579 U. S., at ——, 136 S.Ct., at 2313, "help[ed] to explain" the closure of half of Texas' abortion clinics, *id.,* at ——, 136 S.Ct., at 2312. Those closures placed a substantial obstacle in the path of Texas women seeking an abortion. *Ibid.* And that obstacle, "when viewed in light of the virtual absence of any health benefit," imposed an "undue burden" on abortion access in violation of the Federal Constitution. *Id.,* at ——, 136 S.Ct., at 2313; see *Casey*, 505 U.S. at 878, 112 S.Ct. 2791 (plurality opinion).

In this case, we consider the constitutionality of a Louisiana statute, Act 620, that is almost word-for-word identical to Texas' admitting-privileges law. See La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a) (West 2020). As in *Whole Woman's Health,* the District Court found that the statute offers no significant health benefit. It found that conditions on admitting privileges common to hospitals throughout the State have made and will continue to make it impossible for abortion providers to obtain conforming privileges for reasons that have nothing to do with the State's asserted interests in promoting women's health and safety. And it found that this inability places a substantial obstacle in the path of women seeking an abortion. As in *Whole Woman's Health*, the substantial obstacle

the Act imposes, and the absence of any health-related benefit, led the District Court to conclude that the law imposes an ***2113** undue burden and is therefore unconstitutional. See U. S. Const., Amdt. 14, § 1.

The Court of Appeals agreed with the District Court's interpretation of the standards we have said apply to regulations on abortion. It thought, however, that the District Court was mistaken on the facts. We disagree. We have examined the extensive record carefully and conclude that it supports the District Court's findings of fact. Those findings mirror those made in *Whole Woman's Health* in every relevant respect and require the same result. We consequently hold that the Louisiana statute is unconstitutional.

I

A

In March 2014, five months after Texas' admitting-privileges requirement forced the closure of half of that State's abortion clinics, Louisiana's Legislature began to hold hearings to consider a substantially identical proposal. Compare *Whole Woman's Health*, 579 U. S., at —— – ——, 136 S.Ct., at 2299–2300, with *June Medical Services LLC v. Kliebert*, 250 F.Supp.3d 27, 53 (MD La. 2017); Record 11220. The proposal became law in mid-June 2014. 2014 La. Acts p. 2330.

As was true in Texas, Louisiana law already required abortion providers *either* to possess local hospital admitting privileges *or* to have a patient "transfer" arrangement with a physician who had such privileges. Compare *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct., at 2300 (citing Tex. Admin. Code, tit. 25, § 139.56 (2009)), with former La. Admin. Code, tit. 48, pt. I, § 4407(A)(3) (2003), 29 La. Reg. 706–707 (2003). The new law eliminated that flexibility. Act 620 requires any doctor who performs abortions to hold "active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a).

The statute defines "active admitting privileges" to mean that the doctor must be "a member in good standing" of the hospital's "medical staff ... with the ability to admit a patient and to provide diagnostic and surgical services to such patient." *Ibid.*; La. Admin. Code, tit. 48, pt. I, § 4401. Failure to comply may lead to fines of up to $4,000 per violation, license revocation, and civil liability. See *ibid.*; La. Rev. Stat. Ann. § 40:1061.29.

B

A few weeks before Act 620 was to take effect in September 2014, three abortion clinics and two abortion providers filed a lawsuit in Federal District Court. They alleged that Act 620 was unconstitutional because (among other things) it imposed an undue burden on the right of their patients to obtain an abortion. App. 24. The court later consolidated their lawsuit with a similar, separate action brought by two other clinics and two other abortion providers. (Like the courts below, we shall refer to the two doctors in the first case as Doe 1 and Doe 2; we shall refer to the two doctors in the second case as Doe 5 and Doe 6; and we shall refer to two other doctors then practicing in Louisiana as Doe 3 and Doe 4.)

The plaintiffs immediately asked the District Court to issue a temporary restraining order (TRO), followed by a preliminary injunction that would prevent the law from taking effect. *June Medical Services LLC* v. *Caldwell*, No. 14–cv–00525, 2014 WL 12923494 (MD La., Aug. 22, 2014), Doc. No. 5.

The State of Louisiana, appearing for the defendant Secretary of the Department ***2114** of Health and Hospitals, filed a response that opposed the plaintiffs' TRO request. App. 32–39. But the State went on to say that, if the court granted the TRO or if the parties reached an agreement that would allow the plaintiffs time to obtain privileges without a TRO, the court should hold a hearing on the preliminary injunction request as soon as possible. *Id.*, at 43. The State argued that there was no reason to delay a ruling on the merits of the plaintiffs' undue-burden claims. *Id.*, at 43–44. It asserted that there was "no question that the physicians had standing to contest the law." *Id.*, at 44. And, in light of the State's "overriding interest in vindicating the constitutionality of its admitting-privileges law," the plaintiffs' suit was "the proper vehicle" to "remov[e] any cloud upon" Act 620's "validity." *Id.*, at 45.

The District Court declined to stay the Act's effective date. Instead, it provisionally forbade the State to enforce the Act's penalties, while directing the plaintiff doctors to continue to seek conforming privileges and to keep the court apprised of their progress. See TRO in No. 14–cv–00525, Doc. No. 31, pp. 2–3; see, *e.g.,* App. 48–55, 64–82. These updates continued through the date of the District Court's decision. 250 F.Supp.3d at 77.

C

In June 2015, the District Court held a 6-day bench trial on the plaintiffs' request for a preliminary injunction. It heard live testimony from a dozen witnesses, including three Louisiana abortion

providers, June Medical's administrator, the Secretary (along with a senior official) of the State's Department of Health and Hygiene, and three experts each for the plaintiffs and the State. *Id.,* at 33–34. It also heard from several other witnesses via deposition. *Ibid.* Based on this evidentiary record, the court issued a decision in January 2016 declaring Act 620 unconstitutional on its face and preliminarily enjoining its enforcement. *June Medical Services LLC v. Kliebert*, 158 F.Supp.3d 473 (MD La.).

The State immediately asked the Court of Appeals for the Fifth Circuit to stay the District Court's injunction. The Court of Appeals granted that stay. But we then issued our own stay at the plaintiffs' request, thereby leaving the District Court's preliminary injunction (at least temporarily) in effect. See *June Medical Services, L. L. C. v. Gee*, 814 F.3d 319 (CA5), vacated, 577 U. S. ——, 136 S.Ct. 1354, 194 L.Ed.2d 254 (2016).

Approximately two months later, in June 2016, we issued our decision in *Whole Woman's Health,* reversing the Fifth Circuit's judgment in that case. We remanded this case for reconsideration, and the Fifth Circuit in turn remanded the case to the District Court permitting it to engage in further factfinding. See *June Medical Services, L.L.C. v. Gee*, 2016 WL 11494731 (CA5, Aug. 24, 2016) (*per curiam*). All the parties agreed that the District Court could rule on the plaintiffs' request for a permanent injunction on the basis of the record it had already developed. Minute Entry in No. 14–cv–00525, Doc. No. 253. The court proceeded to do so.

D

Because the issues before us in this case primarily focus upon the factual findings (and fact-related determinations) of the District Court, we set forth only the essential findings here, giving greater detail in the analysis that follows.

With respect to the Act's asserted benefits, the District Court found that:

- "[A]bortion in Louisiana has been extremely safe, with particularly low rates of serious complications." 250 F.Supp.3d at 65. The "testimony of clinic staff and physicians demonstrated" ***2115** that it "rarely ... is necessary to transfer patients to a hospital: far less than once a year, or less than one per several thousand patients." *Id.,* at 63. And "[w]hether or not a patient's treating physician has admitting privileges is not relevant to the patient's care." *Id.,* at 64.

- There was accordingly " 'no significant health-related problem that the new law helped to cure.' The record does not contain any evidence that complications from abortion were being

treated improperly, nor any evidence that any negative outcomes could have been avoided if the abortion provider had admitting privileges at a local hospital." *Id.,* at 86. (quoting *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct., at 2311); see also 250 F.Supp.3d at 86–87 (summarizing conclusions).

- There was also "no credible evidence in the record that Act 620 would further the State's interest in women's health beyond that which is already insured under existing Louisiana law." *Id.,* at 65.

Turning to Act 620's impact on women's access to abortion, the District Court found that:

- Approximately 10,000 women obtain abortions in Louisiana each year. *Id.,* at 39. At the outset of this litigation, those women were served by six doctors at five abortion clinics. *Id.,* at 40, 41–44. By the time the court rendered its decision, two of those clinics had closed, and one of the doctors (Doe 4) had retired, leaving only Does 1, 2, 3, 5, and 6. *Ibid.*

- "[N]otwithstanding the good faith efforts of Does 1, 2, 4, 5 and 6 to comply with the Act by getting active admitting privileges at a hospital within 30 miles of where they perform abortions, they have had very limited success for reasons related to Act 620 and not related to their competence." *Id.,* at 78.

- These doctors' inability to secure privileges was "caused by Act 620 working in concert with existing laws and practices," including hospital bylaws and criteria that "preclude or, at least greatly discourage, the granting of privileges to abortion providers." *Id.,* at 50.

- These requirements establish that admitting privileges serve no " 'relevant credentialing function' " because physicians may be denied privileges "for reasons unrelated to competency." *Id.,* at 87 (quoting *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct., at 2313).

- They also make it "unlikely that the [a]ffected clinics will be able to comply with the Act by recruiting new physicians who have or can obtain admitting privileges." 250 F.Supp.3d at 82.

- Doe 3 testified credibly "that, as a result of his fears, and the demands of his private OB/GYN practice, if he is the last physician performing abortion in either the entire state or in the northern part of the state, he will not continue to perform abortions." *Id.,* at 79; see also *id.,* at 78–79 (summarizing that testimony).

- Enforcing the admitting-privileges requirement would therefore "result in a drastic reduction in the number and geographic distribution of abortion providers, reducing the number of clinics to one, or at most two, and leaving only one, or at most two, physicians providing abortions in the entire state," Does 3 and 5, who would only be allowed to practice in Shreveport and New Orleans. ***2116** *Id.,* at 87. Depending on whether Doe 3 stopped practicing, or whether his retirement was treated as legally relevant, the impact would be a 55%–70% reduction in capacity. *Id.,* at 81.

- "The result of these burdens on women and providers, taken together and in context, is that many women seeking a safe, legal abortion in Louisiana will be unable to obtain one. Those who can will face substantial obstacles in exercising their constitutional right to choose abortion due to the dramatic reduction in abortion services." *Id.,* at 88; see *id.,* at 79, 82, 87–88.

- In sum, "Act 620 does not advance Louisiana's legitimate interest in protecting the health of women seeking abortions. Instead, Act 620 would increase the risk of harm to women's health by dramatically reducing the availability of safe abortion in Louisiana." *Id.,* at 87; see also *id.,* at 65–66.

The District Court added that

> "there is no legally significant distinction between this case and [*Whole Woman's Health*]: Act 620 was modeled after the Texas admitting privileges requirement, and it functions in the same manner, imposing significant obstacles to abortion access with no countervailing benefits." *Id.,* at 88.

On the basis of these findings, the court held that Act 620 and its implementing regulations are unconstitutional. It entered an injunction permanently forbidding their enforcement.

E

The State appealed. A divided panel of the Court of Appeals reversed the District Court's judgment. The panel majority concluded that Act 620's impact was "dramatically less" than that of the Texas law invalidated in *Whole Woman's Health*. *June Medical Services L. L. C. v. Gee*, 905 F.3d 787, 791 (CA5 2018). "Despite its diligent effort to apply [*Whole Woman's Health*] faithfully," the majority thought that the District Court had "clearly erred in concluding otherwise." *Id.,* at 815.

With respect to the Act's asserted benefits, the majority thought that, "[u]nlike Texas, Louisiana presents some evidence of a minimal benefit." *Id.,* at 805. Rejecting the District Court's contrary finding, it concluded that the admitting-privileges requirement "performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion." *Id.,* at 806. The majority believed that the process of obtaining privileges would help to "verify an applicant's surgical ability, training, education, experience, practice record, and criminal history." *Id.,* at 805, and n. 53. And it accepted the State's argument that the law "brings the requirements regarding outpatient abortion clinics into conformity with the *preexisting* requirement that physicians at ambulatory surgical centers ('ASCs') must have privileges at a hospital within the community." *Id.,* at 805.

Moving on to Act 620's burdens, the appeals court wrote that "everything turns on whether the privileges requirement actually would prevent doctors from practicing in Louisiana." *Id.,* at 807. Although the State challenged the District Court's findings only with respect to Does 2 and 3, the Court of Appeals went further. It disagreed with nearly every one of the District Court's findings, concluding that "the district court erred in finding that only Doe 5 would be able to obtain privileges and that the application process creates particular hardships and obstacles for abortion providers in Louisiana." *Id.,* at 810. The court noted that "[a]t least three hospitals have proven willing to extend privileges." *Ibid.* It thought that "only Doe 1 has put forth a ***2117** good-faith effort to get admitting privileges," while "Doe 2, Doe 5, and Doe 6 could likely obtain privileges," *ibid.*, and "Doe 3's personal choice to stop practicing cannot be legally attributed to Act 620," *id.,* at 811.

Having rejected the District Court's findings with respect to all but one of the physicians, the Court of Appeals concluded that "there is no evidence that Louisiana facilities will close from Act 620." *Id.,* at 810. The appeals court allowed that the Baton Rouge clinic where Doe 5 had not obtained privileges would close. But it reasoned that "[b]ecause obtaining privileges is not overly burdensome, ... the fact that one clinic would have to close is not a substantial burden that can currently be attributed to Act 620 as distinguished from Doe 5's failure to put forth a good faith effort." *Ibid.* The Court of Appeals added that the additional work that Doe 2 and Doe 3 would have to do to compensate for Doe 1's inability to perform abortions "does not begin to approach the capacity problem in" *Whole Woman's Health*. 905 F.3d at 812. It estimated that Act 620 would "resul[t] in a potential increase" in waiting times "of 54 minutes at one of the state's clinics for at most 30% of women." *Id.,* at 815.

On the basis of these findings, the panel majority concluded that Louisiana's admitting-privileges requirement would impose no "substantial burden at all" on Louisiana women seeking an abortion, "much less a substantial burden on a large fraction of women as is required to sustain a facial challenge." *Ibid.* Judge Higginbotham dissented.

The Court of Appeals denied the plaintiffs' petition for en banc rehearing over dissents by Judges Dennis and Higginson, joined by four of their colleagues. See *June Medical Services, L. L. C. v. Gee*, 913 F.3d 573 (CA5 2019) (*per curiam*). The plaintiffs then asked this Court to stay the Fifth Circuit's judgment. We granted their application, thereby allowing the District Court's injunction to remain in effect. *June Medical Services, L. L. C.* v. *Gee*, 586 U. S. ——, 139 S.Ct. 663, 203 L.Ed.2d 143 (2019). The plaintiffs subsequently filed a petition for certiorari addressing the merits of the appeals court's decision. The State filed a cross-petition, challenging the plaintiffs' authority to maintain this action. We granted both petitions.

II

We initially consider a procedural argument that the State raised for the first time in its cross-petition for certiorari. As we have explained, the plaintiff abortion providers and clinics in this case have challenged Act 620 on the ground that it infringes their patients' rights to access an abortion. The State contends that the proper parties to assert these rights are the patients themselves. We think that the State has waived that argument.

The State's argument rests on the rule that a party cannot ordinarily " 'rest his claim to relief on the legal rights or interests of third parties.' " *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). This rule is "prudential." 543 U.S. at 128–129, 125 S.Ct. 564. It does not involve the Constitution's "case-or-controversy requirement." *Id.*, at 129, 125 S.Ct. 564; see *Craig v. Boren*, 429 U.S. 190, 193, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). And so, we have explained, it can be forfeited or waived. See *Craig*, 429 U.S. at 193–194, 97 S.Ct. 451.

As we pointed out, *supra,* at 2113 – 2114, the State's memorandum opposing the ***2118** plaintiffs' TRO request urged the District Court to proceed swiftly to the merits of the plaintiffs' undue-burden claim. It argued that there was "no question that the physicians had standing to contest" Act 620. App. 44. And it told the District Court that the Fifth Circuit had found that doctors challenging Texas' "identical" law "had third-party standing to assert their patients' rights." *Id.,* at 43–44. Noting that the Texas law had "already been upheld," the State asserted that it had "a keen interest

in removing any cloud upon the validity of its law." *Id.,* at 45. It insisted that this suit was "the proper vehicle to do so." *Ibid.* The State did not mention its current objection until it filed its cross-petition—more than five years after it argued that the plaintiffs' standing was beyond question.

The State's unmistakable concession of standing as part of its effort to obtain a quick decision from the District Court on the merits of the plaintiffs' undue-burden claims bars our consideration of it here. See *Wood v. Milyard*, 566 U.S. 463, 474, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012); cf. *post,* at 2165 – 2166 (ALITO, J., dissenting) (addressing the Court's approach to claims forfeited, rather than waived); *post*, at 2174 – 2175 (GORSUCH, J., dissenting) (addressing waiver of structural rather than prudential objections).

The State refers to the Fifth Circuit's finding of standing in *Whole Woman's Health* as an excuse for its concession. Brief for Respondent in No. 181323, p. 52 (Brief for Respondent). But the standing argument the State makes here rests on reasons that it tells us are specific to abortion providers *in Louisiana*. See *id.,* at 41–48. We are not persuaded that the State could have thought it was precluded from making those arguments by a decision with respect to *Texas* doctors.

And even if the State had merely forfeited its objection by failing to raise it at any point over the last five years, we would not now undo all that has come before on that basis. What we said some 45 years ago in *Craig* applies equally today: "[A] decision by us to forgo consideration of the constitutional merits"—after "the parties have sought or at least have never resisted an authoritative constitutional determination" in the courts below—"in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence." 429 U.S. at 193–194, 97 S.Ct. 451 (quotation altered).

In any event, the rule the State invokes is hardly absolute. We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations. See, *e.g.*, *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct., at 2314; *Gonzales*, 550 U.S. at 133, 127 S.Ct. 1610; *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 324, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 922, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000); *Mazurek v. Armstrong*, 520 U.S. 968, 969–970, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (*per curiam*); *Casey*, 505 U.S. at 845, 112 S.Ct. 2791 (majority opinion); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 440, n. 30, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 62, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); *Doe v. Bolton*, 410 U.S. 179, 188–189, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973).

And we have generally permitted plaintiffs to assert third-party rights in cases where the " 'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' ***2119** rights.' " *Kowalski*, 543 U.S. at 130, 125 S.Ct. 564 (quoting *Warth*, 422 U.S. at 510, 95 S.Ct. 2197); see, *e.g.*, *Department of Labor v. Triplett*, 494 U.S. 715, 720, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990) (Scalia, J., for the Court) (attorney raising rights of clients to challenge restrictions on fee arrangements); *Craig*, 429 U.S. at 192, 97 S.Ct. 451 (convenience store raising rights of young men to challenge sex-based restriction on beer sales); *Doe*, 410 U.S. at 188, 93 S.Ct. 739 (abortion provider raising the rights of pregnant women to access an abortion); *Carey v. Population Services Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (distributors of contraceptives raising rights of prospective purchasers to challenge restrictions on sales of contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (similar); *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (similar); *Sullivan v. Little Hunting Park, Inc.*, 396 U. S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) (white property owner raising rights of black contractual counterparty to challenge discriminatory restrictions on ability to contract); *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953) (similar). In such cases, we have explained, "the obvious claimant" and "the least awkward challenger" is the party upon whom the challenged statute imposes "legal duties and disabilities." *Craig*, 429 U.S. at 196–197, 97 S.Ct. 451; see *Akron*, 462 U.S. at 440, n. 30, 103 S.Ct. 2481; *Danforth*, 428 U.S. at 62, 96 S.Ct. 2831; *Doe*, 410 U.S. at 188, 93 S.Ct. 739.

The case before us lies at the intersection of these two lines of precedent. The plaintiffs are abortion providers challenging a law that regulates their conduct. The "threatened imposition of governmental sanctions" for noncompliance eliminates any risk that their claims are abstract or hypothetical. *Craig*, 429 U.S. at 195, 97 S.Ct. 451. That threat also assures us that the plaintiffs have every incentive to "resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Ibid.* And, as the parties who must actually go through the process of applying for and maintaining admitting privileges, they are far better positioned than their patients to address the burdens of compliance. See *Singleton*, 428 U.S. at 117, 96 S.Ct. 2868 (plurality opinion) (observing that "the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against," a woman's decision to have an abortion). They are, in other words, "the least awkward" and most "obvious" claimants here. *Craig*, 429 U.S. at 197, 97 S.Ct. 451.

Our dissenting colleagues suggest that this case is different because the plaintiffs have challenged a law ostensibly enacted to protect the women whose rights they are asserting. See *post,* at 2166

– 2167 (opinion of ALITO, J.); *post*, at 2174 (opinion of GORSUCH, J.). But that is a common feature of cases in which we have found third-party standing. The restriction on sales of 3.2% beer to young men challenged by a drive-through convenience store in *Craig* was defended on "public health and safety grounds," including the premise that young men were particularly susceptible to driving while intoxicated. 429 U.S. at 199–200, 97 S.Ct. 451; see Hager, Gender Discrimination and the Courts: New Ground to Cover, Washington Post, Sept. 26, 1976, p. 139. And the rule requiring approval from the Department of Labor for attorney fee arrangements challenged by a lawyer in *Triplett* was "designed to protect [their clients] from their improvident contracts, in the interest not only of themselves and their families but of the public." ***2120** 494 U.S. at 722, 110 S.Ct. 1428 (internal quotation marks omitted).

Nor is this the first abortion case to address provider standing to challenge regulations said to protect women. Both the hospitalization requirement in *Akron*, 462 U.S. at 435, 103 S.Ct. 2481, and the hospital-accreditation requirement in *Doe*, 410 U.S. at 195, 93 S.Ct. 739, were defended as health and safety regulations. And the ban on saline amniocentesis in *Danforth* was based on the legislative finding "that the technique is deleterious to maternal health." 428 U.S. at 76, 96 S.Ct. 2831 (internal quotation marks omitted).

In short, the State's strategic waiver and a long line of well-established precedents foreclose its belated challenge to the plaintiffs' standing. We consequently proceed to consider the merits of the plaintiffs' claims.

III

A

Turning to the merits, we apply the constitutional standards set forth in our earlier abortion-related cases, and in particular in *Casey* and *Whole Woman's Health*. At the risk of repetition, we remind the reader of the standards we described above. In *Whole Woman's Health*, we quoted *Casey* in explaining that " 'a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.' " 579 U. S., at ——, 136 S.Ct., at 2309 (quoting *Casey*, 505 U.S. at 877, 112 S.Ct. 2791 (plurality opinion)). We added that " '*[u]nnecessary* health regulations' " impose an unconstitutional " 'undue burden' " if they have " 'the purpose or effect

of presenting a substantial obstacle to a woman seeking an abortion.' " 579 U. S., at ——, 136 S.Ct., at 2309 (quoting *Casey*, 505 U.S. at 878, 112 S.Ct. 2791; emphasis added).

We went on to explain that, in applying these standards, courts must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 579 U. S., at —— – ——, 136 S.Ct., at 2324. We cautioned that courts "must review legislative 'factfinding under a deferential standard.' " *Id.,* at ——, 136 S.Ct., at 2310 (quoting *Gonzales*, 550 U.S. at 165, 127 S.Ct. 1610). But they "must not 'place dispositive weight' on those 'findings,' " for the courts " 'retai[n] an independent constitutional duty to review factual findings where constitutional rights are at stake.' " 579 U. S., at ——, 136 S.Ct., at 2310 (quoting *Gonzales*, 550 U.S. at 165, 127 S.Ct. 1610; emphasis deleted).

We held in *Whole Woman's Health* that the trial court faithfully applied these standards. It "considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony." 579 U. S., at ——, 136 S.Ct., at 2310. It "then weighed the asserted benefits" of the law "against the burdens" it imposed on abortion access. *Ibid.* And it concluded that the balance tipped against the statute's constitutionality. The District Court in this suit did the same.

B

The Court of Appeals disagreed with the District Court, not so much in respect to the legal standards that we have just set forth, but because it did not agree with the factual findings on which the District Court relied in assessing both the burdens that Act 620 imposes and the health-related benefits it might bring. Compare, *e.g., supra,* at 2114 – 2116, with *supra,* at 2116 – 2117. We have consequently reviewed the record in detail ourselves. In doing so, we ***2121** have applied well-established legal standards.

We start from the premise that a district court's 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." Fed. Rule Civ. Proc. 52(a)(6). In " 'applying [this] standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*' " *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969)). Where "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it

been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson,* 470 U.S. at 573–574, 105 S.Ct. 1504. "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper* v. *Harris*, 581 U. S. ——, ——, 137 S.Ct. 1455, 1465, 197 L.Ed.2d 837 (2017).

Our dissenting colleagues suggest that a different, less-deferential standard should apply here because the District Court enjoined the admitting-privileges requirement before it was enforced. See *post*, at 2158 – 2159 (opinion of ALITO, J.); *post*, at 2176 – 2178 (opinion of GORSUCH, J.). We are aware of no authority suggesting that appellate scrutiny of factual determinations varies with the timing of a plaintiff's lawsuit or a trial court's decision. And, in any event, the record belies the dissents' claims that the District Court's findings in this case were "conjectural" or premature. As we have explained, the District Court's order on the plaintiffs' motion for a temporary restraining order suspended only Act 620's penalties. The plaintiffs were required to continue in their efforts to obtain admitting privileges. See *supra,* at 2114. The District Court supervised those efforts through the trial and beyond. See 250 F.Supp.3d at 77. It based its findings on this real-world evidence, not speculative guesswork. Nor can we agree with the suggestion that the timing of the District Court's decision somehow prejudiced the State. From the start, the State urged that the District Court decide the merits of the plaintiffs' claims without awaiting a decision on their applications for admitting privileges. See App. 43–44. And, when this case returned to the District Court in August 2016, following our decision in *Whole Woman's Health*, the State stipulated that the case was ripe for decision on the record as it stood in June 2015. See *supra,* at 2114 – 2115. In short, we see no legal or practical basis to depart from the familiar standard that applies to all "[f]indings of fact." Fed. Rule Civ. Proc. 52(a).

Under that familiar standard, we find that the testimony and other evidence contained in the extensive record developed over the 6-day trial support the District Court's ultimate conclusion that, "[e]ven if Act 620 could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit, and thus the Act imposes an unconstitutional undue burden." 250 F.Supp.3d at 88.

IV

The District Court's Substantial-Obstacle Determination

The District Court found that enforcing the admitting-privileges requirement ***2122** would "result in a drastic reduction in the number and geographic distribution of abortion providers." *Id.,* at 87. In light of demographic, economic, and other evidence, the court concluded that this reduction

would make it impossible for "many women seeking a safe, legal abortion in Louisiana ... to obtain one" and that it would impose "substantial obstacles" on those who could. *Id.,* at 88. We consider each of these findings in turn.

A

Act 620's Effect on Abortion Providers

We begin with the District Court's findings in respect to Act 620's impact on abortion providers. As we have said, the court found that the Act would prevent Does 1, 2, and 6 from providing abortions. And it found that the Act would bar Doe 5 from working in his Baton Rouge-based clinic, relegating him to New Orleans. See *supra,* at 2115 – 2116.

1

In *Whole Woman's Health*, we said that, by presenting "direct testimony" from doctors who had been unable to secure privileges, and "plausible inferences to be drawn from the timing of the clinic closures" around the law's effective date, the plaintiffs had "satisfied their burden" to establish that the Texas admitting-privileges requirement caused the closure of those clinics. 579 U. S., at ——, 136 S.Ct., at 2313.

We wrote that these inferences were bolstered by the submissions of *amici* in the medical profession, which "describe[d] the undisputed general fact that hospitals often" will restrict admitting privileges to doctors likely to seek a "certain number of admissions per year." *Id.,* at ——, 136 S.Ct., at 2312 (internal quotation marks omitted). The likely effect of such requirements was that abortion providers "would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit." *Id.,* at ——, 136 S.Ct., at 2312. We also referred to "common prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures"; for example, requirements that doctors have "treated a high number of patients in the hospital setting in the past year, clinical data requirements, residency requirements, and other discretionary factors." *Ibid.*

To illustrate how these criteria impacted abortion providers, we noted the example of an obstetrician with 38 years' experience who had been denied admitting privileges for reasons " 'not based on clinical competence considerations.' " *Ibid.* This, we said, showed that the law served

no "relevant credentialing function," but prevented qualified providers from serving women who seek an abortion. *Id.,* at ——, 136 S.Ct., at 2313. And that, in turn, "help[ed] to explain why the new [law's admitting-privileges] requirement led to the closure of " so many Texas clinics. *Id.,* at ——, 136 S.Ct., at 2313.

The evidence on which the District Court relied in this case is even stronger and more detailed. The District Court supervised Does 1, 2, 5, and 6 for over a year and a half as they tried, and largely failed, to obtain conforming privileges from 13 relevant hospitals. See 250 F.Supp.3d at 77–78; App. 48–55, 64–82. The court heard direct evidence that some of the doctors' applications were denied for reasons that had nothing to do with their ability to perform abortions safely. 250 F.Supp.3d at 68–70, 76–77; App. 1310, 1435–1436. It also compiled circumstantial evidence that explains why other applications were denied and explains why, given the costs of applying ***2123** and the reputational risks that accompany rejection, some providers could have chosen in good faith *not* to apply to every qualifying hospital. *Id.,* at 1135, 1311 (discussing the costs associated with unsuccessful applications). That circumstantial evidence includes documents and testimony that described the processes Louisiana hospitals follow when considering applications for admitting privileges, including requirements like the ones we cited in *Whole Woman's Health* that are unrelated to a doctor's competency to perform abortions. See generally Brief for Medical Staff Professionals as *Amici Curiae* 11–30 (reviewing the hospital bylaws in the record).

The evidence shows, among other things, that the fact that hospital admissions for abortion are vanishingly rare means that, unless they also maintain active OB/GYN practices, abortion providers in Louisiana are unlikely to have any recent in-hospital experience. 250 F.Supp.3d at 49. Yet such experience can well be a precondition to obtaining privileges. Doe 2, a board-certified OB/GYN with nearly 40 years' experience, testified that he had not "done any in-hospital work in ten years" and that just two of his patients in the preceding 5 years had required hospitalization. App. 387, 400. As a result, he was unable to comply with one hospital's demand that he produce data on "patient admissions and management, consultations and procedures performed" in-hospital before his application could be "processed." *Id.,* at 1435; see *id.,* at 437–438. Doe 1, a board-certified family doctor with over 10 years' experience, was similarly unable to "submit documentation of hospital admissions and management of patients." *Id.,* at 1436.

The evidence also shows that many providers, even if they could initially obtain admitting privileges, would be unable to keep them. That is because, unless they have a practice that requires regular in-hospital care, they will lose the privileges for failing to use them. Doe 6, a board-certified OB/GYN practitioner with roughly 50 years' experience, provides only medication abortions. *Id.,* at 1308. Of the thousands of women he served over the decade before the District Court's decision, during which he also performed surgical abortions, just two required a direct transfer to a hospital and one of them was treated without being admitted. *Id.,* at 1309. That safety record would make

it impossible for Doe 6 to maintain privileges at any of the many Louisiana hospitals that require newly appointed physicians to undergo a process of "focused professional practice evaluation," in which they are observed by hospital staff as they perform in-hospital procedures. See Record 2635, 2637, 2681, 9054; Brief for Medical Staff Professionals as *Amici Curiae* 28–29 (describing this practice); cf. Record 10755 (requiring an "on-going review" of practice "in the Operating Room"). And it would likewise disqualify him at hospitals that require physicians to admit a minimum number of patients, either initially or on an ongoing basis. See, *e.g., id.,* at 9040, 9068–9069, 9150–9153; cf. App. 1193, 1182 (provider with no patient contacts in first year assigned to "Affiliate" status, without admitting privileges).

The evidence also shows that opposition to abortion played a significant role in some hospitals' decisions to deny admitting privileges. 250 F.Supp.3d at 48–49, 51–53 (collecting evidence). Some hospitals expressly bar anyone with privileges from performing abortions. App. 1180, 1205. Others are unwilling to extend privileges to abortion providers as a matter of discretion. *Id.,* at 1127–1129. For example, Doe 2 testified that he was told not to bother asking for admitting privileges at University Health in Shreveport because of his abortion work. *Id.,* at 383–384. And Doe 1 ***2124** was told that his abortion work was an impediment to his application. *Id.,* at 1315–1316.

Still other hospitals have requirements that abortion providers cannot satisfy because of the hostility they face in Louisiana. Many Louisiana hospitals require applicants to identify a doctor (called a "covering physician") willing to serve as a backup should the applicant admit a patient and then for some reason become unavailable. See Record 9154, 9374, 9383, 9478, 9667, 10302, 10481, 10637, 10659–10661, 10676. The District Court found "that opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician." 250 F.Supp.3d at 49; cf. *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct., at 2313 (citing testimony describing similar problems faced by Texas providers seeking covering physicians). Doe 5 is a board-certified OB/GYN who had been practicing for more than nine years at the time of trial. Of the thousands of abortions he performed in the three years prior to the District Court's decision, not one required a direct transfer to a hospital. App. 1134. Yet he was unable to secure privileges at three Baton Rouge hospitals because he could not find a covering physician willing to be publicly associated with an abortion provider. *Id.,* at 1335–1336. Doe 3, a board-certified OB/GYN with nearly 45 years of experience, testified that he, too, had difficulty arranging coverage because of his abortion work. *Id.,* at 200–202.

Just as in *Whole Woman's Health*, the experiences of the individual doctors in this case support the District Court's factual finding that Louisiana's admitting-privileges requirement, like that in Texas' law, serves no " 'relevant credentialing function.' " 250 F.Supp.3d at 87 (quoting *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct., at 2313).

2

The Court of Appeals found another explanation for the doctors' inability to obtain privileges more compelling. It conceded that Doe 1 would not be able to obtain admitting privileges in spite of his good-faith attempts. It concluded, however, that Does 2, 5, and 6 had acted in bad faith. 905 F.3d at 807. The problem is that the law requires appellate courts to review a trial court's findings under the deferential clear-error standard we have described. See *supra,* at 2120 – 2121. Our review of the record convinces us that the Court of Appeals misapplied that standard.

Justice ALITO does not dispute that the District Court's findings are not "clearly erroneous." He argues instead that both the District Court and the Court of Appeals applied the wrong legal standard to the record in this case. By asking whether the doctors acted in "good faith," he contends, the courts below failed to account for the doctors' supposed "incentive to do as little as" possible to obtain conforming privileges. *Post*, at 2158 – 2160 (dissenting opinion); cf. *post,* at 2176 – 2177 (GORSUCH, J., dissenting). But that is not a legal argument at all. It is simply another way of saying that the doctors acted in *bad* faith. The District Court, after monitoring the doctors' efforts for a year and a half, found otherwise. And "[w]hen the record is examined in light of the appropriately deferential standard, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous." *Anderson*, 470 U.S. at 577, 105 S.Ct. 1504.

Doe 2

The District Court found that Doe 2 tried in good faith to get admitting privileges within 30 miles of his Shreveport-area ***2125** clinic. 250 F.Supp.3d at 68. The Court of Appeals thought that conclusion clearly erroneous for three reasons.

First, the appeals court suggested that Doe 2 failed to submit the data needed to process his application to Bossier's Willis-Knighton Health Center. 905 F.3d at 808. It is true that Doe 2 submitted no additional information in response to the last letter he received from Willis-Knighton. But the record explains that failure. Doe 2 reasonably believed there was no point in doing so. The hospital's letter explained that the data Doe 2 had already "submitted supports the outpatient [abortion] procedures you perform[ed]." App. 1435. But, the letter added, this data did "not support your request for hospital privileges" because it did not allow the hospital to "evaluate patient admissions and management, consultations, and procedures performed." *Ibid.* Doe 2 testified at trial that he understood this to mean that he would have to submit records of *hospital* admissions,

even though he had not "done any in-hospital work in ten years." *Id.,* at 387; see *id.,* at 437 ("I've explained that that information doesn't exist"). Doe 2's understanding was consistent with Willis-Knighton's similar letter to Doe 1, which explicitly stated that "we require that you submit documentation of hospital admissions and management of patients ...." *Id.,* at 1436. The record also shows that Doe 2 could not have maintained the "adequate number of inpatient contacts" Willis-Knighton requires to support continued privileges. Record 9640; see App. 387–390, 404. Justice ALITO faults Doe 2 for failing to pursue an application for "courtesy staff" privileges. See *post,* at 2162 – 2163. For one thing, it is far from clear that courtesy privileges entitle a physician to admit patients, as Act 620 requires. Compare, *e.g.,* Record 9640 with *id.,* at 9643. For another, that would not solve the problem that Doe 2 lacked the required in-hospital experience. Justice ALITO wonders whether Willis-Knighton might have conferred courtesy privileges even without that experience. But the factors the hospital considers for both tiers of privileges are facially identical. *Id.,* at 9669. We have no license to reverse a trial court's factual findings based on speculative inferences from facts not in evidence.

Second, the Court of Appeals found Doe 2's explanation that Christus Schumpert Hospital "would not staff an abortion provider" to be "blatantly contradicted by the record." 905 F.3d at 808. The record, however, contains Christus' bylaws. They state that "[n]o activity prohibited by" the Ethical and Religious Directives to which the hospital subscribes "shall be engaged in by any Medical Staff appointee or any other person exercising clinical privileges at the Health System." App. 1180. These directives provide that abortion "is never permitted." *Id.,* at 1205. And they warn against "the danger of scandal in any association with abortion providers." *Ibid*.

The State suggests that the Court of Appeals, in speaking of a "contradic[tion]," was referring to the fact that Doe 3 had admitting privileges at Christus, as had Doe 2 at an earlier time. Brief for Respondent 75. Doe 3 testified, however, that he did not know whether Christus was "aware that I was performing abortions" and that he did not "feel like testing the waters there"—*i.e.,* by "asking [Christus] how they would feel" if they were aware that he "was performing abortions." App. 273. And nothing in the record suggests that Christus, 10 years earlier, was aware of Doe 2's connection with abortion. Justice ALITO imagines a number of ways that Christus may have become aware of Doe 2 or Doe 3's abortion practice. See *post,* at 2161 – 2162, and n. 10 (dissenting opinion). The State apparently did not see fit to test these theories or probe the doctors' accounts ***2126** on cross-examination, however. And the District Court's finding of good faith is plainly permissible on the record before us.

Finally, the Court of Appeals faulted Doe 2 for failing to apply to Minden Hospital. The record also explains that decision. Minden subjects all new appointees to "not less than" six months of "focused professional practice evaluation." Record 9281; see also *id.,* at 9252. That evaluation requires an assessment of the provider's in-hospital work. See *supra,* at 2123 – 2124. Doe 2 could not meet that requirement because, as we have said, Doe 2 does not do in-hospital work, and

only two of his patients in the past five years have required hospitalization. App. 400. Moreover, Minden's bylaws express a preference for applicants whom "members of the current Active Staff of the Hospital" have recommended. *Id.,* at 1211. Doe 2 testified that Minden Hospital was "a smaller hospital," "very close to the [geographic] limits," where he "[did]n't really know anyone." *Id.,* at 454. He applied to those hospitals where he believed he had the highest likelihood of success. *Ibid.* Given this evidence, the Fifth Circuit was wrong to conclude that the District Court's findings in respect to Doe 2 were "clearly erroneous." See *Anderson*, 470 U.S. at 575, 105 S.Ct. 1504.

Doe 5

The District Court found that Doe 5 was unable to obtain admitting privileges at three hospitals in range of his Baton Rouge clinic in spite of his good-faith efforts to satisfy each hospital's requirement that he find a covering physician. 250 F.Supp.3d at 76; see App. 1334–1335 (Women's Hospital); Record 2953 (Baton Rouge General), 10659–10661 (Lane Regional). The Court of Appeals disagreed. It thought that Doe 5's efforts reflected a "lackluster approach" because he asked only one doctor to cover him. 905 F.3d at 809.

The record shows, however, that Doe 5 asked the doctor most likely to respond affirmatively: the doctor with whom Doe 5's Baton Rouge clinic already had a patient transfer agreement. App. 1135. Yet Doe 5 testified that even this doctor was "too afraid to be my covering physician at the hospital" because, while the transfer agreement could apparently be "kept confidential," he feared that an agreement to serve as a covering physician would not remain a secret. *Id.,* at 1135–1136. And, if the matter became well known, the doctor whom Doe 5 asked worried that it could make him a target of threats and protests. *Ibid*.

Doe 5 was familiar with the problem. Anti-abortion protests had previously forced him to leave his position as a staff member of a hospital northeast of Baton Rouge. *Id.,* at 1137–1138, 1330. And activists had picketed the school attended by the children of a former colleague, who then stopped performing abortions as a result. Record 14036–14037.

With his own experience and their existing relationship in mind, Doe 5 could have reasonably thought that, if this doctor wouldn't serve as his covering physician, no one would. And it was well within the District Court's discretion to credit that reading of the record. Cf. *Cooper*, 581 U. S., at ——, 137 S.Ct., at 1465. Doe 5's testimony was internally consistent and consistent with what the District Court called the "mountain of un-contradicted and un-objected to evidence" in the record that supported its general finding "that opposition to abortion can present a major, if not insurmountable hurdle, for an applicant getting the required covering physician," including Doe 3's similar experience. 250 F.Supp.3d at 51, 49; see *id.,* at 51–53; App. 200–202.

***2127** The Court of Appeals did not address this general finding or the evidence the District Court relied on to support it, and neither do our dissenting colleagues. Cf. *post*, at 2163 – 2164 (opinion of ALITO, J.); *post*, at 2177 (opinion of GORSUCH, J.). The Court of Appeals pointed to what it described as Doe 4's testimony that "finding a covering physician is not overly burdensome." 905 F.3d at 809. Doe 4's actual testimony was that he did not believe requiring doctors to obtain a covering physician was "an overburdensome requirement for admitting privileges." Record 14154. In context, that statement is most naturally read as saying that such a requirement was reasonable, not that it was easy to fulfill. In fact, Doe 4 testified that he had been unable to apply to two hospitals for admitting privileges because he could not find a covering physician. *Id.,* at 14154–14155. Moreover, Doe 4's statement referred to his efforts to obtain admitting privileges in New Orleans, not in Baton Rouge. *Ibid.* Doe 5 testified that he could more easily find a covering physician in New Orleans (where he did obtain privileges) because attitudes toward abortion there were less hostile than in Baton Rouge, so the doctors' testimony would be consistent even under the Fifth Circuit's view. App. 1335–1336. Once again, the appeals court's conclusion cannot be squared with the standard of review. Cf. *Anderson*, 470 U.S. at 575, 105 S.Ct. 1504.

Doe 6

Finally, the District Court found that, notwithstanding his good-faith efforts, Doe 6 would not be able to obtain admitting privileges within 30 miles of the clinic in New Orleans where he worked. The Court of Appeals did not question Doe 6's decision not to apply to Tulane Hospital. Nor did it take issue with the District Court's finding that his application to East Jefferson Hospital had been denied *de facto* through no fault of his own. 250 F.Supp.3d at 77; App. 54. But the appeals court reversed the District Court's finding on the ground that Doe 6 should have (but did not) apply for admitting privileges at seven other hospitals in New Orleans, including Touro Hospital, which had granted limited privileges to Doe 5. 905 F.3d at 809–810.

Doe 6 testified that he did not apply to other hospitals because he did not admit a sufficient number of patients to receive active admitting privileges. App. 1310. As we have explained, *supra,* at 2122 – 2124, Doe 6 provides only medication abortions involving no surgical intervention. See App. 1308. The *State*'s own admitting-privileges expert, Dr. Robert Marier, testified that a doctor in Doe 6's position would "probably not" be able to obtain "active admitting and surgical privileges" at *any* hospital. *Id.,* at 884; see 250 F.Supp.3d at 44 (finding Dr. Marier "generally well qualified" to express an opinion on "the issue of admitting privileges and hospital credentialing").

The record contains the bylaws of four of the seven hospitals to which the Court of Appeals referred. All four directly support the testimony of Doe 6 and the State's expert. Three hospitals

require doctors who receive admitting privileges to undergo a process of "focused professional practice evaluation." See Record 2635, 2637, 2681 (Touro Hospital), 9054 (New Orleans East Hospital), 10755 (East Jefferson Hospital). As we have explained, this evaluation requires hospital staff to observe a doctor with admitting privileges while he or she performs a certain number of procedures. See *supra,* at 2123 – 2124. If the doctor admits no patients (and Doe 6 has no patients requiring admission), there is nothing to observe. Another hospital requires physicians to admit a minimum number of patients, either initially or after ***2128** receiving admitting privileges. Record 9150–9153 (West Jefferson Hospital). And one requires both. *Id.,* at 9040, 9069 (New Orleans East Hospital). The record apparently is silent as to the remaining three hospitals, but that silence cannot contradict the well-supported testimony of Doe 6 and the State's expert that Doe 6 would not receive admitting privileges from any of them. Good faith does not require an exercise in futility.

We recognize that Doe 5 was able to secure limited admitting privileges at Touro Hospital, to which Doe 6 did not apply. But, unlike Doe 6, Doe 5 primarily performs surgical abortions. App. 1330. And while Doe 5 was a hospital-based physician as recently as 2012, Doe 6 has not held privileges at any hospital since 2005. *Id.,* at 1310, 1329. Doe 5's success therefore does not directly contradict the evidence that we have described in respect to Doe 6 or render the District Court's conclusion as to Doe 6 clearly erroneous. And, as we have said, "[a] finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper*, 581 U. S., at ——, 137 S.Ct., at 1465.

Without actually disputing any of the evidence we have discussed, Justice ALITO maintains that the plaintiffs could have introduced still more evidence to support the District Court's determination. See *post*, at 2163. As we have said, however, "the trial on the merits should be 'the "main event" ... rather than a "tryout on the road." ' " *Anderson*, 470 U.S. at 575, 105 S.Ct. 1504. "[T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level"—let alone another nine in this Court —"is requiring too much." *Ibid.*

Other Doctors

Finally, Justice ALITO and Justice GORSUCH suggest that the District Court failed to account for the possibility that new abortion providers might eventually replace Does 1, 2, 3, 5, and 6. See *post,* at 2158 – 2159 (opinion of ALITO, J.); *post,* at 2176 – 2177 (opinion of GORSUCH, J.). But the Court of Appeals did not dispute, and the record supports, the District Court's additional finding that, for "the same reasons that Does 1, 2, 4, 5, and 6 have had difficulties getting active admitting

privileges, reasons unrelated to their competence ... it is unlikely that the [a]ffected clinics will be able to comply with the Act by recruiting new physicians who have or can obtain admitting privileges." 250 F.Supp.3d at 82.

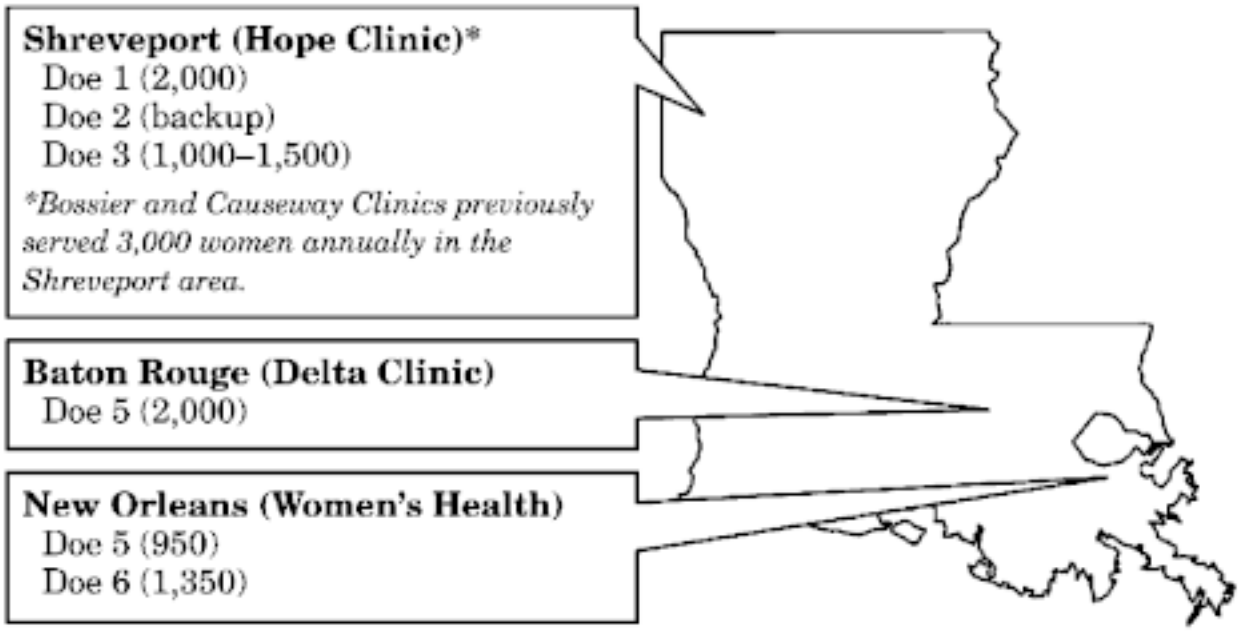
B

Act 620's Impact on Abortion Access

The District Court drew from the record evidence, including the factual findings we have just discussed, several conclusions in respect to the burden that Act 620 is likely to impose upon women's ability to access abortions in Louisiana. To better understand the significance of these conclusions, the reader should keep in mind the geographic distribution of the doctors and their clinics. Figure 1 shows the distribution of doctors and clinics at the time of the District Court's decision. Figure 2 shows the projected distribution if the admitting-privileges requirement were enforced, as found by the District Court. The figures in parentheses indicate the approximate number of abortions each physician performed annually, according to the District Court.

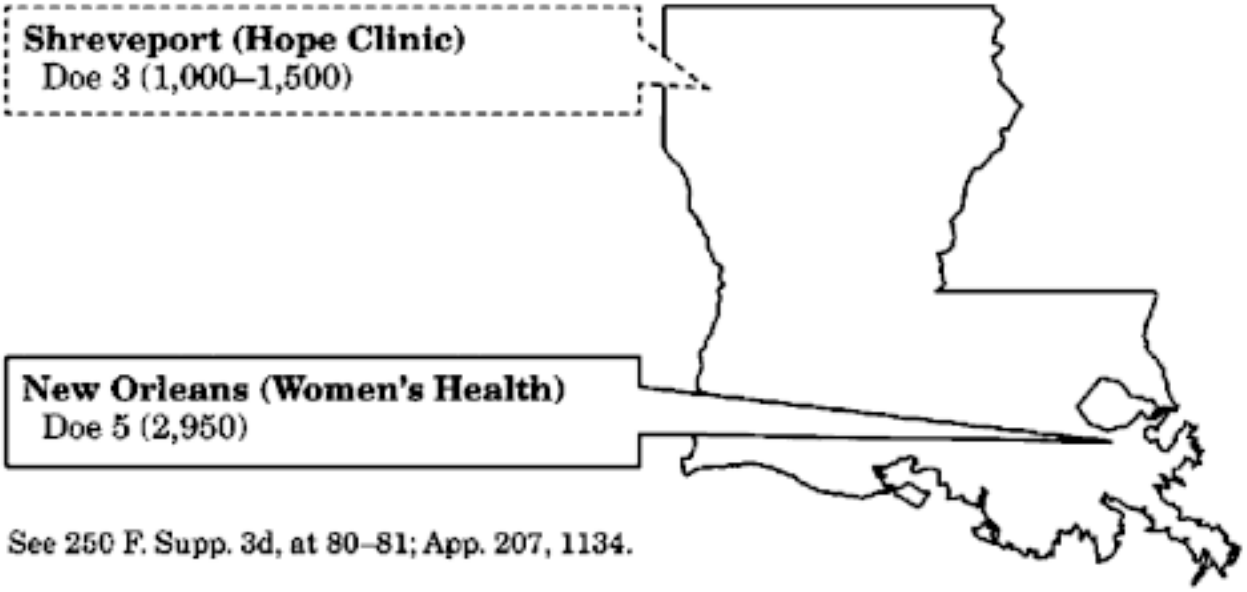
Figure 1 — Distribution of Abortion Clinics and Providers at the Time of the District Court's Decision

***2129**



See 250 F. Supp. 3d, at 40–41; App. 1122, 1125, 1134, 1138, 1141, 1256.

Figure 2 — Projected Distribution of Abortion Clinics and Providers Following Enforcement of Act 620



1

As we have seen, enforcing the admitting-privileges requirement would eliminate Does 1, 2, and 6. The District Court credited Doe 3's uncontradicted, in-court testimony that he would stop performing abortions if he was the last provider in northern Louisiana. 250 F.Supp.3d at 79; see App. 263–265. So the departure of Does 1 and 2 would also eliminate Doe 3. That would leave only Doe 5. And Doe 5's inability to obtain privileges in the Baton Rouge area would leave Louisiana with just one clinic with one provider to serve the 10,000 women annually who seek abortions in the State. 250 F.Supp.3d at 80, 87–88; cf. *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 26).

Working full time in New Orleans, Doe 5 would be able to absorb no more than about 30% of the annual demand for abortions in Louisiana. App. 1134, 1331; see *id.,* at 1129. And because Doe 5 does not perform abortions beyond 18 weeks, women between 18 weeks and the state legal limit of 20 weeks would have little or no way to exercise their constitutional right to an abortion. *Id.,* at 1330–1331.

Those women not altogether prevented from obtaining an abortion would face other burdens. As in *Whole Woman's Health*, the reduction in abortion providers caused ***2130** by Act 620 would inevitably mean "longer waiting times, and increased crowding." 579 U. S., at ——, 136 S.Ct. (slip op., at 26). The District Court heard testimony that delays in obtaining an abortion increase the

risk that a woman will experience complications from the procedure and may make it impossible for her to choose a noninvasive medication abortion. App. 220, 290, 312–313; see also *id.,* at 1139, 1305, 1313, 1316, 1323.

Even if they obtain an appointment at a clinic, women who might previously have gone to a clinic in Baton Rouge or Shreveport would face increased driving distances. New Orleans is nearly a five hour drive from Shreveport; it is over an hour from Baton Rouge; and Baton Rouge is more than four hours from Shreveport. The impact of those increases would be magnified by Louisiana's requirement that every woman undergo an ultrasound and receive mandatory counseling at least 24 hours before an abortion. La. Rev. Stat. Ann. § 40:1061.10(D). A Shreveport resident seeking an abortion who might previously have obtained care at one of that city's local clinics would either have to spend nearly 20 hours driving back and forth to Doe 5's clinic twice, or else find overnight lodging in New Orleans. As the District Court stated, both experts and laypersons testified that the burdens of this increased travel would fall disproportionately on poor women, who are least able to absorb them. App. 106–107, 178, 502–508, 543; see also *id.,* at 311–312.

2

We note that the Court of Appeals also faulted the District Court for factoring Doe 3's departure into its calculations. The appeals court thought that Doe 3's personal choice to stop practicing could not be attributed to Act 620. 905 F.3d at 810–811. That is beside the point. Even if we pretended as though (contrary to the record evidence) Doe 3 would continue to provide abortions at Shreveport-based Hope Clinic, the record nonetheless supports the District Court's alternative finding that Act 620's burdens would remain substantial. See 250 F.Supp.3d at 80–81, 84, 87.

The record tells us that Doe 3 is presently able to see roughly 1,000–1,500 women annually. *Id.,* at 81; see App. 207, 243–244. Doe 3 testified that this was in addition to "working very, very long hours maintaining [his] private [OB/GYN] practice." *Id.,* at 265, 1323; see *id.,* at 118, 1147. And, the District Court found that Doe 5 can perform no more than roughly 3,000 abortions annually. See *supra,* at 2129. So even if Doe 3 remained active in Shreveport, the annual demand for abortions in Louisiana would be more than double the capacity. And although the availability of abortions in Shreveport might lessen the driving distances faced by some women, it would still leave thousands of Louisiana women with no practical means of obtaining a safe, legal abortion, and it would not meaningfully address the health risks associated with crowding and delay for those able to secure an appointment with one of the State's two remaining providers.

* * *

Taken together, we think that these findings and the evidence that underlies them are sufficient to support the District Court's conclusion that Act 620 would place substantial obstacles in the path of women seeking an abortion in Louisiana.

V

Benefits

We turn finally to the law's asserted benefits. The District Court found that there was " 'no significant health-related problem that the new law helped to cure.' " 250 F.Supp.3d at 86 (quoting ***2131** *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 22)). It found that the admitting-privileges requirement "[d]oes [n]ot [p]rotect [w]omen's [h]ealth," provides "no significant health benefits," and makes no improvement to women's health "compared to prior law." 250 F.Supp.3d at 86 (boldface deleted). Our examination of the record convinces us that these findings are not "clearly erroneous."

First, the District Court found that the admitting-privileges requirement serves no "relevant credentialing function." *Id.,* at 87 (quoting *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 25)). As we have seen, hospitals can, and do, deny admitting privileges for reasons unrelated to a doctor's ability safely to perform abortions. And Act 620's requirement that physicians obtain privileges at a hospital within 30 miles of the place where they perform abortions further constrains providers for reasons that bear no relationship to competence.

Moreover, while "competency is a factor" in credentialing decisions, 250 F.Supp.3d at 46, hospitals primarily focus upon a doctor's ability to perform the inpatient, hospital-based procedures for which the doctor seeks privileges—not outpatient abortions. App. 877, 1373; see *id.,* at 907; Brief for Medical Staff Professionals as *Amici Curiae* 26; Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 12. Indeed, the State's admitting-privileges expert, Dr. Robert Marier, testified that, when he served as the Executive Director of Louisiana's Board of Medical Examiners, he concurred in the Board's position that a physician was competent to perform first-trimester surgical abortions and to "recognize and address complications from the procedure" so long as they had completed an accredited residency in obstetrics and gynecology or been trained in abortion procedures during another residency—irrespective of their affiliation with any hospital. App. 872–873, 1305; cf. *post,* at 2155 – 2156 (ALITO, J., dissenting). And nothing in the record indicates that the background vetting for admitting privileges adds significantly to the vetting that the State Board of Medical Examiners already provides. 250 F.Supp.3d at 87; App. 1355–1356, 1358–1359.

Second, the District Court found that the admitting-privileges requirement "does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana." 250 F.Supp.3d at 64; see *id.*, at 64–66. As in *Whole Woman's Health*, the expert and lay testimony presented at trial shows that:

- "Complications from surgical abortion are relatively rare," and "[t]hey very rarely require transfer to a hospital or emergency room and are generally not serious." App. 287; see *id.*, at 129; cf. *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 22–23).

- For those patients who do experience complications at the clinic, the transfer agreement required by existing law is "sufficient to ensure continuity of care for patients in an emergency." App. 1050; see *id.*, at 194, 330–332, 1059.

- The "standard protocol" when a patient experiences a complication after returning home from the clinic is to send her "to the hospital that is nearest and able to provide the service that the patient needs," which is not necessarily a hospital within 30 miles of the clinic. *Id.*, at 351; see *id.*, at 115–116, 180, 793; La. Rev. Stat. Ann. § 40:1061.10(A)(2)(b)(ii) (requiring abortion providers to furnish patients with the name and telephone number of the hospital nearest to ***2132** their home); cf. *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 23).

As in *Whole Woman's Health*, the State introduced no evidence "showing that patients have better outcomes when their physicians have admitting privileges" or "of any instance in which an admitting privileges requirement would have helped even one woman obtain better treatment." 250 F.Supp.3d at 64; *Whole Woman's Health*, 579 U. S., at —— – ——, 136 S.Ct. (slip op., at 23–24); see also Centers for Medicare and Medicaid Services, 84 Fed. Reg. 51790–51791 (2019) ("Under modern procedures, emergency responders (and patients themselves) take patients to hospital emergency rooms without regard to prior agreements between particular physicians and particular hospitals"); Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 6 (local admitting-privileges requirements for abortion providers offer no medical benefit and do not meaningfully advance continuity of care).

VI

Conclusion

We conclude, in light of the record, that the District Court's significant factual findings—both as to burdens and as to benefits—have ample evidentiary support. None is "clearly erroneous." Given the facts found, we must also uphold the District Court's related factual and legal determinations. These include its determination that Louisiana's law poses a "substantial obstacle" to women seeking an abortion; its determination that the law offers no significant health-related benefits; and its determination that the law consequently imposes an "undue burden" on a woman's constitutional right to choose to have an abortion. We also agree with its ultimate legal conclusion that, in light of these findings and our precedents, Act 620 violates the Constitution.

VII

As a postscript, we explain why we have found unconvincing several further arguments that the State has made. First, the State suggests that the record supports the Court of Appeals' conclusion that Act 620 poses no substantial obstacle to the abortion decision. See Brief for Respondent 73, 80. This argument misconceives the question before us. "The question we must answer" is "not whether the [Fifth] Circuit's interpretation of the facts was clearly erroneous, but whether the *District Court's* finding[s were] clearly erroneous." *Anderson*, 470 U.S. at 577, 105 S.Ct. 1504 (emphasis added). As we have explained, we think the District Court's factual findings here are plausible in light of the record as a whole. Nothing in the State's briefing furnishes a basis to disturb that conclusion.

Second, the State says that the record does not show that Act 620 will burden *every* woman in Louisiana who seeks an abortion. Brief for Respondent 69–70 (citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). True, but beside the point. As we stated in *Casey*, a State's abortion-related law is unconstitutional on its face if "it will operate as a substantial obstacle to a woman's choice to undergo an abortion" in "a large fraction of the cases in which [it] is relevant." 505 U.S. at 895, 112 S.Ct. 2791 (majority opinion). In *Whole Woman's Health*, we reaffirmed that standard. We made clear that the phrase refers to a large fraction of "those women for whom the provision is an actual rather than an irrelevant restriction." 579 U. S., at —— (slip op., at 39) (quoting *Casey*, 505 U.S. at 895, 112 S.Ct. 2791; brackets omitted). ***2133** That standard, not an "every woman" standard, is the standard that must govern in this case.

Third, the State argues that Act 620 would not make it "nearly impossible" for a woman to obtain an abortion. Brief for Respondent 71–72. But, again, the words "nearly impossible" do not describe the legal standard that governs here. Since *Casey*, we have repeatedly reiterated that the plaintiff's burden in a challenge to an abortion regulation is to show that the regulation's "purpose or effect" is to "plac[e] a substantial obstacle in the path of a woman seeking an abortion of a

nonviable fetus." 505 U.S. at 877, 112 S.Ct. 2791 (plurality opinion); see *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 8); *Gonzales*, 550 U.S. at 156, 127 S.Ct. 1610; *Stenberg*, 530 U.S. at 921, 120 S.Ct. 2597; *Mazurek*, 520 U.S. at 971, 117 S.Ct. 1865.

Finally, the State makes several arguments about the standard of review that it would have us apply in cases where a regulation is found *not* to impose a substantial obstacle to a woman's choice. Brief for Respondent 60–66. That, however, is not this case. The record here establishes that Act 620's admitting-privileges requirement places a substantial obstacle in the path of a large fraction of those women seeking an abortion for whom it is a relevant restriction.

* * *

This case is similar to, nearly identical with, *Whole Woman's Health.* And the law must consequently reach a similar conclusion. Act 620 is unconstitutional. The Court of Appeals' judgment is erroneous. It is

Reversed.

CHIEF JUSTICE ROBERTS, concurring in the judgment.
In July 2013, Texas enacted a law requiring a physician performing an abortion to have "active admitting privileges at a hospital ... located not further than 30 miles from the location at which the abortion is performed." Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A) (West Cum. Supp. 2019). The law caused the number of facilities providing abortions to drop in half. In *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016), the Court concluded that Texas's admitting privileges requirement "places a substantial obstacle in the path of women seeking a previability abortion" and therefore violated the Due Process Clause of the Fourteenth Amendment. *Id.,* at ——, 136 S.Ct. (slip op., at 2) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion)).

I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case. See *Moore* v. *Texas*, 586 U. S. ——, ——, 139 S.Ct. 666, 203 L.Ed.2d 1 (2019) (ROBERTS, C. J., concurring) (slip op., at 1).

Today's case is a challenge from several abortion clinics and providers to a Louisiana law nearly identical to the Texas law struck down four years ago in *Whole Woman's Health*. Just like the

Texas law, the Louisiana law requires physicians performing abortions to have "active admitting privileges at a hospital ... located not further than thirty miles from the location at which the abortion is performed." La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a) (West Cum. Supp. 2020). Following a six-day bench trial, the District Court found that Louisiana's law would "result in a drastic reduction in the number and geographic ***2134** distribution of abortion providers." *June Medical Services LLC v. Kliebert*, 250 F.Supp.3d 27, 87 (MD La. 2017). The law would reduce the number of clinics from three to "one, or at most two," and the number of physicians providing abortions from five to "one, or at most two," and "therefore cripple women's ability to have an abortion in Louisiana." *Id.*, at 87–88.

The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents.

I

Stare decisis ("to stand by things decided") is the legal term for fidelity to precedent. Black's Law Dictionary 1696 (11th ed. 2019). It has long been "an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 W. Blackstone, Commentaries on the Laws of England 69 (1765). This principle is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them. Because the "private stock of reason ... in each man is small, ... individuals would do better to avail themselves of the general bank and capital of nations and of ages." 3 E. Burke, Reflections on the Revolution in France 110 (1790).

Adherence to precedent is necessary to "avoid an arbitrary discretion in the courts." The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). The constraint of precedent distinguishes the judicial "method and philosophy from those of the political and legislative process." Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944).

The doctrine also brings pragmatic benefits. Respect for precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). It is the "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). In that way, "*stare decisis* is an old friend of the common lawyer." *Jackson*, *supra,* at 334, 73 S.Ct. 1031.

Stare decisis is not an "inexorable command." *Ramos* v. *Louisiana*, 590 U. S. ——, ——, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020) (slip op., at 20) (internal quotation marks omitted). But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered. See *Janus* v. *State, County, and Municipal Employees,* 585 U. S. ——, —— – ——, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018) (slip op., at 34–35).

Stare decisis principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following" the recent departure. ***2135** *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 231, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (plurality opinion). *Stare decisis* is pragmatic and contextual, not "a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940).

II

A

Both Louisiana and the providers agree that the undue burden standard announced in *Casey* provides the appropriate framework to analyze Louisiana's law. Brief for Petitioners in No. 18–1323, pp. 45–47; Brief for Respondent in No. 18–1323, pp. 60–62. Neither party has asked us to reassess the constitutional validity of that standard.

Casey reaffirmed "the most central principle of *Roe* v. *Wade*," "a woman's right to terminate her pregnancy before viability." *Casey*, 505 U.S. at 871, 112 S.Ct. 2791 (plurality opinion). [1] At the same time, it recognized that the State has "important and legitimate interests in ... protecting the health of the pregnant woman and in protecting the potentiality of human life." *Id.,* at 875–876, 112 S.Ct. 2791 (internal quotation marks and brackets omitted).

To serve the former interest, the State may, "[a]s with any medical procedure," enact "regulations to further the health or safety of a woman seeking an abortion." *Id.,* at 878, 112 S.Ct. 2791. To serve the latter interest, the State may, among other things, "enact rules and regulations designed

to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term." *Id.,* at 872, 112 S.Ct. 2791. The State's freedom to enact such rules is "consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn." *Id.,* at 873, 112 S.Ct. 2791.

Under *Casey*, the State may not impose an undue burden on the woman's ability to obtain an abortion. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.,* at 877, 112 S.Ct. 2791. Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are "reasonably related" to a legitimate state interest. *Id.,* at 878, 112 S.Ct. 2791.

After faithfully reciting this standard, the Court in *Whole Woman's Health* added the following observation: "The rule announced in *Casey* ... requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 579 U. S., at —— – ——, 136 S.Ct. (slip op., at 19–20). The plurality repeats today that the undue burden standard requires courts "to weigh the law's asserted benefits against the burdens it imposes on abortion access." *Ante,* at 2112 (internal quotation marks omitted).

Read in isolation from *Casey*, such an inquiry could invite a grand "balancing test in which unweighted factors mysteriously are weighed." *Marrs v. Motorola, Inc.*, 577 F.3d 783, 788 (CA7 2009). Under such tests, "equality of treatment is ... impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired." Scalia, ***2136** The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989).

In this context, courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other. *Casey*, 505 U.S. at 851, 112 S.Ct. 2791 (opinion of the Court); *id.,* at 871, 112 S.Ct. 2791 (plurality opinion) (internal quotation marks omitted). There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy," *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (Scalia, J., concurring in judgment). Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an

"unanalyzed exercise of judicial will" in the guise of a "neutral utilitarian calculus." *New Jersey v. T. L. O.*, 469 U.S. 325, 369, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (Brennan, J., concurring in part and dissenting in part).

Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have explained that the "traditional rule" that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty" is "consistent with *Casey*." *Gonzales v. Carhart*, 550 U.S. 124, 163, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007). *Casey* instead focuses on the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts. See, *e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694–695, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014) (asking whether the government "substantially burdens a person's exercise of religion" under the Religious Freedom Restoration Act); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011) (asking whether a law "imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups"); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999) (asking, in the context of the Americans with Disabilities Act, whether an individual's impairment "substantially limits one or more major life activities" (internal quotation marks omitted)).

Casey's analysis of the various restrictions that were at issue in that case is illustrative. For example, the opinion recognized that Pennsylvania's 24-hour waiting period for abortions "has the effect of increasing the cost and risk of delay of abortions," but observed that the District Court did not find that the "increased costs and potential delays amount to substantial obstacles." 505 U.S. at 886, 112 S.Ct. 2791 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (internal quotation marks omitted). The opinion concluded that "given the statute's definition of medical emergency," the waiting period did not "impose[ ] a real health risk." *Ibid.* Because the law did not impose a substantial obstacle, *Casey* upheld it. And it did so notwithstanding the District Court's finding that the law did "not further the state interest in maternal health." *Ibid.* (internal quotation marks omitted).

Turning to the State's various recordkeeping and reporting requirements, *Casey* found those requirements do not "impose ***2137** a substantial obstacle to a woman's choice" because "[a]t most they increase the cost of some abortions by a slight amount." *Id.*, at 901, 112 S.Ct. 2791. "While at some point increased cost could become a substantial obstacle," there was "no such showing on the record" before the Court. *Ibid.* The Court did not weigh this cost against the benefits of the law.

The same was true for Pennsylvania's parental consent requirement. *Casey* held that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided there is an adequate judicial bypass procedure." *Id.*, at 899, 112 S.Ct. 2791 (citing, among other cases, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510–519, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990)). *Casey* relied on precedent establishing that judicial bypass procedures "prevent another person from having an absolute veto power over a minor's decision to have an abortion." *Akron*, 497 U.S. at 510, 110 S.Ct. 2972. Without a judicial bypass, parental consent laws impose a substantial obstacle to a minor's ability to obtain an abortion and therefore constitute an undue burden. See *Casey*, 505 U.S. at 899, 112 S.Ct. 2791 (joint opinion).

The opinion similarly looked to whether there was a substantial burden, not whether benefits outweighed burdens, in analyzing Pennsylvania's requirement that physicians provide certain "truthful, nonmisleading information" about the nature of the abortion procedure. *Id.*, at 882, 112 S.Ct. 2791. The opinion concluded that the requirement "cannot be considered a substantial obstacle to obtaining an abortion, and, *it follows*, there is no undue burden." *Id.*, at 883, 112 S.Ct. 2791 (emphasis added).

With regard to the State's requirement that a physician, as opposed to a qualified assistant, provide the woman this information, the opinion reasoned: "*Since* there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden." *Id.*, at 884–885, 112 S.Ct. 2791 (emphasis added). This was so "even if an objective assessment might suggest that those same tasks could be performed by others," meaning the law had little if any benefit. *Id.*, at 885, 112 S.Ct. 2791.

The only restriction *Casey* found unconstitutional was Pennsylvania's spousal notification requirement. On that score, the Court recited a bevy of social science evidence demonstrating that "millions of women in this country ... may have justifiable fears of physical abuse" or "devastating forms of psychological abuse from their husbands." *Id.*, at 893, 112 S.Ct. 2791 (opinion of the Court). In addition to "physical violence" and "child abuse," women justifiably feared "verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends." *Ibid.* The spousal notification requirement was "thus likely to prevent a significant number of women from obtaining an abortion." *Ibid.* It did not "merely make abortions a little more difficult or expensive to obtain; for many women, it [imposed] a substantial obstacle." *Id.*, at 893–894, 112 S.Ct. 2791. The Court emphasized that it would not "blind [itself] to the fact that the

significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Id.*, at 894, 112 S.Ct. 2791.

***2138** The upshot of *Casey* is clear: The several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional.

To be sure, the Court at times discussed the benefits of the regulations, including when it distinguished spousal notification from parental consent. See *Whole Woman's Health*, 579 U. S., at ——— – ———, 136 S.Ct. (slip op., at 19–20) (citing *Casey*, 505 U.S. at 887–898, 112 S.Ct. 2791 (opinion of the Court); *id.*, at 899–901, 112 S.Ct. 2791 (joint opinion). But in the context of *Casey*'s governing standard, these benefits were not placed on a scale opposite the law's burdens. Rather, *Casey* discussed benefits in considering the threshold requirement that the State have a "legitimate purpose" and that the law be "reasonably related to that goal." *Id.*, at 878, 112 S.Ct. 2791 (plurality opinion); *id.*, at 882, 112 S.Ct. 2791 (joint opinion).

So long as that showing is made, the only question for a court is whether a law has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*, at 877, 112 S.Ct. 2791 (plurality opinion). *Casey* repeats that "substantial obstacle" standard nearly verbatim no less than 15 times. *Id.*, at 846, 894, 895, 112 S.Ct. 2791 (opinion of the Court); *id.*, at 877, 878, 112 S.Ct. 2791 (plurality opinion); *id.*, at 883, 884, 885, 886, 887, 901, 112 S.Ct. 2791 (joint opinion). [2]

The only place a balancing test appears in *Casey* is in Justice Stevens's partial dissent. "Weighing the State's interest in potential life and the woman's liberty interest," Justice Stevens would have gone further than the plurality to strike down portions of the State's informed consent requirements and 24-hour waiting period. *Id.*, at 916–920, 112 S.Ct. 2791 (opinion concurring in part and dissenting in part). But that approach did not win the day.

Mazurek v. *Armstrong* places this understanding of *Casey*'s undue burden standard beyond doubt. *Mazurek* involved a challenge to a Montana law restricting the performance of abortions to licensed physicians. 520 U.S. at 969, 117 S.Ct. 1865. It was "uncontested that there was insufficient evidence of a 'substantial obstacle' to abortion." *Id.*, at 972, 117 S.Ct. 1865. Therefore, once the Court found that the Montana Legislature had not acted with an "unlawful motive," the Court's work was complete. *Ibid.* In fact, the Court found the challengers' argument

—that the law was invalid because "all health evidence contradicts the [State's] claim that there is any health basis for the law"—to be "*squarely foreclosed* by *Casey* itself." *Id.*, at 973, 117 S.Ct. 1865 (internal quotation marks omitted; emphasis added).

We should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*. The opinion in *Whole Woman's Health* began by saying, "We must here decide ***2139** whether two provisions of [the Texas law] violate the Federal Constitution as interpreted in *Casey*." 579 U. S., at ——, 136 S.Ct. (slip op., at 1). Nothing more. The Court explicitly stated that it was applying "the standard, as described in *Casey*," and reversed the Court of Appeals for applying an approach that did "not match the standard that this Court laid out in *Casey*." *Id.*, at ——, ——, 136 S.Ct. (slip op., at 19, 20).

Here the plurality expressly acknowledges that we are not considering how to analyze an abortion regulation that does not present a substantial obstacle. "That," the plurality explains, "is not this case." *Ante*, at 2133. In this case, *Casey*'s requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in *Whole Woman's Health*. In neither case, nor in *Casey* itself, was there call for consideration of a regulation's benefits, and nothing in *Casey* commands such consideration. Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law. Under those same principles, I would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation.

B

Whole Woman's Health held that Texas's admitting privileges requirement placed "a substantial obstacle in the path of women seeking a previability abortion," independent of its discussion of benefits. 579 U. S., at ——, 136 S.Ct. (slip op., at 2) (citing *Casey*, 505 U.S. at 878, 112 S.Ct. 2791 (plurality opinion)). [3] Because Louisiana's admitting privileges requirement would restrict women's access to abortion to the same degree as Texas's law, it also cannot stand under our precedent. [4]

To begin, the two laws are nearly identical. Prior to enactment of the Texas law, abortion providers were required either to possess local hospital admitting privileges or to have a transfer agreement with a physician who had such privileges. Tex. Admin. Code, tit. 25, § 139.56(a) (2009). The

new law, adopted in 2013, eliminated the option of having a transfer agreement. Providers were required to "[h]ave active admitting privileges at a hospital ... located not further than 30 miles from the location at which the abortion is performed." Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A).

Likewise, Louisiana law previously required abortion providers to have either admitting privileges or a transfer agreement. ***2140** La. Admin. Code, tit. 48, pt. I, § 4407(A)(3) (2003), 29 La. Reg. 706–707 (2003). In 2014, Louisiana removed the option of having a transfer agreement. Just like Texas, Louisiana now requires abortion providers to "[h]ave active admitting privileges at a hospital ... located not further than thirty miles from the location at which the abortion is performed." La. Rev. Stat. § 40:1061.10(A)(2)(a).

Crucially, the District Court findings indicate that Louisiana's law would restrict access to abortion in just the same way as Texas's law, to the same degree or worse. In Texas, "as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20." *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 24). Eight abortion clinics closed in the months prior to the law's effective date. *Ibid.* Another 11 clinics closed on the day the law took effect. *Ibid.*

Similarly, the District Court found that the Louisiana law would "result in a drastic reduction in the number and geographic distribution of abortion providers." 250 F.Supp.3d at 87. At the time of the District Court's decision, there were three clinics and five physicians performing abortions in Louisiana. *Id.*, at 40, 41. The District Court found that the new law would reduce "the number of clinics to one, or at most two," and the number of physicians in Louisiana to "one, or at most two," as well. *Id.*, at 87. Even in the best case, "the demand for services would vastly exceed the supply." *Ibid.*

Whole Woman's Health found that the closures of the abortion clinics led to "fewer doctors, longer waiting times, and increased crowding." 579 U. S., at ——, 136 S.Ct. (slip op., at 26). The Court also found that "the number of women of reproductive age living in a county more than 150 miles from a provider increased from approximately 86,000 to 400,000 and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." *Ibid.* (internal quotation marks and alterations omitted).

The District Court here likewise found that the Louisiana law would result in "longer waiting times for appointments, increased crowding and increased associated health risk." 250 F.Supp.3d at 81. The court found that Louisiana women already "have difficulty affording or arranging for transportation and childcare on the days of their clinic visits" and that "[i]ncreased travel distance"

would exacerbate this difficulty. *Id.,* at 83. The law would prove "particularly burdensome for women living in northern Louisiana ... who once could access a clinic in their own area [and] will now have to travel approximately 320 miles to New Orleans." *Ibid.*

In Texas, "common prerequisites to obtaining admitting privileges that [had] nothing to do with ability to perform medical procedures," including "clinical data requirements, residency requirements, and other discretionary factors," made it difficult for well-credentialed abortion physicians to obtain such privileges. *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 25). In particular, the Court found that "hospitals often condition[ed] admitting privileges on reaching a certain number of admissions per year." *Id.,* at ——, 136 S.Ct. (slip op., at 24) (internal quotation marks omitted). But because complications requiring hospitalization are relatively rare, abortion providers were "unlikely to have any patients to admit" and thus were "unable to maintain admitting privileges or obtain those privileges for the future." *Id.,* at ——, 136 S.Ct. (slip op., at 25).

So too here. "While a physician's competency is a factor in assessing an applicant ***2141** for admitting privileges" in Louisiana, "it is only one factor that hospitals consider in whether to grant privileges." 250 F.Supp.3d at 46. Louisiana hospitals "may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency," including "the physician's expected usage of the hospital and intent to admit and treat patients there, the number of patients the physician has treated in the hospital in the recent past, the needs of the hospital, the mission of the hospital, or the business model of the hospital." *Ibid.* [5]

And the District Court found that, as in Texas, Louisiana "hospitals often grant admitting privileges to a physician because the physician plans to provide services in the hospital" and that "[i]n general, hospital admitting privileges are not provided to physicians who never intend to provide services in a hospital." *Id.,* at ——, 136 S.Ct., at ——. But "[b]ecause, by all accounts, abortion complications are rare, an abortion provider is unlikely to have a consistent need to admit patients." *Id.,* at ——, 136 S.Ct., at (citations omitted). [6]

Importantly, the District Court found that "since the passage of [the Louisiana law], all five remaining doctors have attempted *in good faith* to comply" with the law by applying for admitting privileges, yet have had very little success. *Id.,* at 78 (emphasis added). This finding was necessary to ensure that the physicians' inability to obtain admitting privileges was attributable to the new law rather than a halfhearted attempt to obtain privileges. Only then could the District Court accurately identify the Louisiana law's burden on abortion access.

The question is not whether we would reach the same findings from the same record. These District Court findings "entail[ed] primarily ... factual work" and therefore are "review[ed] only for clear error." *U. S. Bank N. A.* v. *Village at Lakeridge, LLC*, 583 U. S. ——, ——, ——, 138 S.Ct. 960, 200 L.Ed.2d 218 (2018) (slip op., at 6, 9). Clear error review follows from a candid appraisal of the comparative advantages of trial courts and appellate courts. "While we review transcripts for a living, they listen to witnesses for a living. While we largely read briefs for a living, they largely assess the credibility of parties and witnesses for a living." *Taglieri v. Monasky*, 907 F.3d 404, 408 (CA6 2018) (en banc).

We accordingly will not disturb the factual conclusions of the trial court unless we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948). In my view, the District Court's work reveals no such clear error, for the reasons the plurality explains. *Ante,* at 2138 – 2142. The District Court findings therefore bind us in this case.

* * *

Stare decisis instructs us to treat like cases alike. The result in this case is controlled ***2142** by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.

Justice THOMAS, dissenting.

Today a majority of the Court perpetuates its ill-founded abortion jurisprudence by enjoining a perfectly legitimate state law and doing so without jurisdiction. As is often the case with legal challenges to abortion regulations, this suit was brought by abortionists and abortion clinics. Their sole claim before this Court is that Louisiana's law violates the purported substantive due process right of a woman to abort her unborn child. But they concede that this right does not belong to them, and they seek to vindicate no private rights of their own. Under a proper understanding of Article III, these plaintiffs lack standing to invoke our jurisdiction.

Despite the fact that we granted Louisiana's petition specifically to address whether "abortion providers [can] be presumed to have third-party standing to challenge health and safety regulations on behalf of their patients," Conditional Cross-Pet. in No. 18–1460, p. i, a majority of the Court all but ignores the question. The plurality and THE CHIEF JUSTICE ultimately cast aside this jurisdictional barrier to conclude that Louisiana's law is unconstitutional under our precedents. But those decisions created the right to abortion out of whole cloth, without a shred of support from

the Constitution's text. Our abortion precedents are grievously wrong and should be overruled. Because we have neither jurisdiction nor constitutional authority to declare Louisiana's duly enacted law unconstitutional, I respectfully dissent.

I

For most of its history, this Court maintained that private parties could not bring suit to vindicate the constitutional rights of individuals who are not before the Court. *Kowalski v. Tesmer*, 543 U.S. 125, 135, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (THOMAS, J., concurring) (citing *Clark v. Kansas City*, 176 U.S. 114, 118, 20 S.Ct. 284, 44 L.Ed. 392 (1900)). But in the 20th century, the Court began to deviate from this traditional rule against third-party standing. See *Truax v. Raich*, 239 U.S. 33, 38–39, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *Pierce v. Society of Sisters*, 268 U.S. 510, 535–536, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). From these deviations emerged our prudential third-party standing doctrine, which allows litigants to vicariously assert the constitutional rights of others when "the party asserting the right has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski*, *supra,* at 130, 125 S.Ct. 564 (quoting *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)). [1]

***2143** The plurality feints toward this doctrine, claiming that third-party standing for abortionists is well settled by our precedents. But, ultimately, it dodges the question, claiming that Louisiana's standing challenge was waived below. Both assertions are erroneous. First, there is no controlling precedent that sets forth the blanket rule advocated for by plaintiffs here—*i.e.*, abortionists may challenge health and safety regulations based solely on their role in the abortion process. Second, I agree with Justice ALITO that Louisiana did not waive its standing challenge below. *Post*, at 2165 – 2166 (dissenting opinion).

But even if there were a waiver, it would not be relevant. Louisiana argues that the abortionists and abortion clinics lack standing under Article III to assert the putative rights of their potential clients. No waiver, however explicit, could relieve us of our independent obligation to ensure that we have jurisdiction before addressing the merits of a case. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006). And under a proper understanding of Article III's case-or-controversy requirement, plaintiffs lack standing to invoke our jurisdiction because they assert no private rights of their own, seeking only to vindicate the putative constitutional rights of individuals not before the Court.

A

The Court has previously asserted that the traditional rule against third-party standing is "not constitutionally mandated, but rather stem[s] from a salutary 'rule of self-restraint' " motivated by "prudential" concerns. *Craig v. Boren*, 429 U.S. 190, 193, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (quoting *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953)). The plurality repeats this well-rehearsed claim, accepting its validity without question. See *ante*, at 2117 – 2118. But support for this assertion is shallow, to say the least, and it is inconsistent with our more recent standing precedents.

As an initial matter, this Court has never provided a coherent explanation for why the rule against third-party standing is properly characterized as prudential. Many cases reciting this claim rely on the Court's decision in *Barrows*, which stated that the rule against third-party standing is a "rule of self-restraint" "[a]part from the jurisdictional requirement" of Article III, 346 U.S. at 255, 73 S.Ct. 1031. But *Barrows* provides no reasoning to support that distinction and even admits that the rule against third-party standing is "not always clearly distinguished from the constitutional limitation[s]" on standing. *Ibid.* The sole authority *Barrows* cites in support of the rule's "prudential" label is a single-Justice concurrence in *Ashwander v. TVA*, 297 U.S. 288, 346–348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (opinion of Brandeis, J.).

Justice Brandeis' concurrence, however, raises more questions than it answers. The opinion does not directly reference third-party standing. It only obliquely refers to the concept by invoking the broader requirement ***2144** that a plaintiff must "show that he is injured by [the law's] operation." *Id.*, at 347, 56 S.Ct. 466. Justice Brandeis claims that this requirement was adopted by the Court "for its own governance in cases confessedly within its jurisdiction." *Id.*, at 346, 56 S.Ct. 466. But most of the cases he cites frame the matter in terms of the Court's jurisdiction and authority; none of them invoke prudential justifications. See, *e.g.*, *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 407–410, 21 S.Ct. 206, 45 L.Ed. 252 (1900); *Hendrick v. Maryland*, 235 U.S. 610, 621, 35 S.Ct. 140, 59 L.Ed. 385 (1915); *Massachusetts v. Mellon*, 262 U.S. 447, 480, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). Thus, the "prudential" label for the rule against third-party standing remains a bit of a mystery.

It is especially puzzling that a majority of the Court insists on continuing to treat the rule against third-party standing as prudential when our recent decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U. S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014), questioned the validity of our prudential standing doctrine more generally. In that case, we acknowledged that requiring

a litigant who has Article III standing to also demonstrate "prudential standing" is inconsistent "with our recent reaffirmation of the principle that 'a federal court's "obligation" to hear and decide' cases within its jurisdiction 'is "virtually unflagging." ' " *Id.*, at 125–126, 134 S.Ct. 1377 (quoting *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77, 134 S.Ct. 584, 187 L.Ed.2d 505 (2013)). The Court therefore suggested that the "prudential" label for these doctrines was "inapt." *Lexmark*, 572 U.S. at 127, n. 3, 134 S.Ct. 1377. As an example, it noted that the Court previously considered the rule against generalized grievances to be "prudential" but now recognizes that rule to be a part of Article III's case-or-controversy requirement. *Ibid.* The Court specifically questioned the prudential label for the rule against third-party standing, but because *Lexmark* did not involve any questions of third-party standing, the Court stated that "consideration of that doctrine's proper place in the standing firmament [could] await another day." *Id.*, at 128, n. 3, 134 S.Ct. 1377.

The Court's previous statements on the rule against third-party standing have long suggested that the "proper place" for that rule is in Article III's case-or-controversy requirement. The Court has acknowledged that the traditional rule against third-party standing is "closely related to Art[icle] III concerns." *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). It has repeatedly noted that the rule "is not completely separable from Art[icle] III's requirement that a plaintiff have a sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy." *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955, n. 5, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) (internal quotation marks omitted); see also *Barrows*, *supra*, at 255, 73 S.Ct. 1031 (the rule against third-party standing is "not always clearly distinguished from the constitutional limitation[s]" on standing). Moreover, the Court has even expressly stated that the rule against third-party standing is "grounded in Art[icle] III limits on the jurisdiction of federal courts to actual cases and controversies." *New York v. Ferber*, 458 U.S. 747, 767, n. 20, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

And most recently, in *Spokeo, Inc.* v. *Robins*, 578 U. S. ——, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016), the Court appeared to incorporate the rule against third-party standing into its understanding of Article III's injury-in-fact requirement. There, the Court stated that to establish an injury-in-fact a plaintiff must "show that he or she suffered 'an invasion of a legally protected ***2145** interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Id.*, at ——, 136 S.Ct., at (slip op., at 7) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The Court further explained that whether a plaintiff "alleges that [the defendant] violated *his* statutory rights " rather than "the statutory rights of other people " was a question of "particularization" for an Article III injury. 578 U. S., at ——, 136 S.Ct., at (slip op., at 8) (internal quotation marks omitted). It is hard

to reconcile this language in *Spokeo* with the plurality's assertion that third-party standing is permitted under Article III.

B

A brief historical examination of Article III's case-or-controversy requirement confirms what our recent decisions suggest: The rule against third-party standing is constitutional, not prudential. The judicial power is limited to " ' "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." ' " *Id.*, at ——, 136 S.Ct., at (THOMAS, J., concurring) (slip op., at 1) (quoting *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000)); see also *Muskrat v. United States*, 219 U.S. 346, 356–357, 31 S.Ct. 250, 55 L.Ed. 246 (1911). Thus, to ascertain the scope of Article III's case-or-controversy requirement, "we must 'refer directly to the traditional, fundamental limitations upon the powers of common-law courts.' " *Spokeo*, *supra,* at ——, 136 S.Ct., at (THOMAS, J., concurring) (slip op., at 2) (quoting *Honig v. Doe*, 484 U.S. 305, 340, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (Scalia, J., dissenting)). "One focus" of these traditional limitations was "on the particular parties before the court, and whether the rights that they [were] invoking [were] really theirs to control." Woolhandler & Nelson, Does History Defeat Standing Doctrine? 102 Mich. L. Rev. 689, 732 (2004). An examination of these limitations reveals that a plaintiff could not establish a case or controversy by asserting the constitutional rights of others.

The limitations imposed on suits at common law varied based on the type of right the plaintiff sought to vindicate. *Spokeo*, 578 U. S., at ——, 136 S.Ct., at (THOMAS, J., concurring) (slip op., at 2). The rights adjudicated by common-law courts generally fell into one of two categories: public or private. Public rights are those "owed 'to the whole community ... in its social aggregate capacity.' " *Id.*, at ——, 136 S.Ct., at (slip op., at 3) (quoting 4 W. Blackstone, Commentaries *5). Private rights, on the other hand, are those " 'belonging to individuals, considered as individuals.' " *Spokeo*, *supra*, at ——, 136 S.Ct., at (THOMAS, J., concurring) (slip op., at 2) (quoting 3 Blackstone, Commentaries *2).

When a plaintiff sought to vindicate a private right, "courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded." *Spokeo*, *supra,* at ——, 136 S.Ct., at (THOMAS, J., concurring) (slip op., at 2). But a plaintiff generally "need[ed] to have a private interest of his or her own to litigate; otherwise, no sufficient interest [was] at stake on the plaintiff's side, and the clash of interests necessary for a 'Case' or 'Controversy' [did] not exist." Woolhandler & Nelson, *supra*, at 723. Thus, 19th-century judges uniformly refused to "listen to an objection made to the constitutionality of an act by a party whose rights" were not

at issue. *Clark*, 176 U.S. at 118, 20 S.Ct. 284 (internal quotation marks omitted); see also, *e.g.*, *Tyler*, 179 U.S. at 406–407, 21 S.Ct. 206; ***2146** *Supervisors v. Stanley*, 105 U.S. 305, 311, 26 L.Ed. 1044 (1882); *United States v. Ferreira*, 13 How. 40, 51–52, 14 L.Ed. 40 (1852)*United States v. Ferreira*, 13 How. 40, 51–52, 14 L.Ed. 40 (1852); *Owings v. Norwood's Lessee*, 5 Cranch 344, 348, 9 U.S. 344, 3 L.Ed. 120 (1809) (Marshall, C. J.); *In re Wellington*, 33 Mass. 87, 96 (1834) (Shaw, C. J.). [2]

Moreover, it was not enough for a plaintiff to allege *damnum*—*i.e.*, real-world damages or practical injury—if the law he was challenging did not violate a legally protected interest of his own. At common law, this sort of "factual harm without a legal injury was *damnum absque injuria* and provided no basis for relief." Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L. Rev. 275, 280–281 (2008). As Justice Dodderidge explained in 1625, "injuria & damnum are the two grounds for the having [of] all actions, and without [both of] these, no action lieth." *Cable* v. *Rogers*, 3 Bulst. 311, 312, 81 Eng. Rep. 259. In the 18th century, many common-law courts ceased requiring *damnum* in suits alleging violations of private rights. See, *e.g., Ashby* v. *White*, 2 Raym. Ld. 938, 92 Eng. Rep. 126, 137 (K. B.) (Holt, C. J.), aff'd, 3 Raym. Ld. 320, 92 Eng. Rep. 710, 712 (H. L. 1703); see also *Webb v. Portland Mfg. Co.*, 29 F.Cas. 506, 507, (No. 17322) (CC Me. 1838) (Story, J.). But they continued to require legal injury, adhering to the "obvious" and "ancient maxim" that one's real-world damages alone cannot "lay the foundation of an action." *Parker v. Griswold*, 17 Conn. 288, 302–303 (1846). Thus, a plaintiff had to assert "[a]n injury, [which,] legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right." *Id.*, at 302.

This brief historical review demonstrates that third-party standing is inconsistent with the case-or-controversy requirement of Article III. When a private plaintiff seeks to vindicate someone else's legal injury, he has no private right of his own genuinely at stake in the litigation. Even if the plaintiff has suffered damages as a result of another's legal injury, he has no standing to challenge a law that does not violate his own private rights.

C

Applying these principles to the case at hand, plaintiffs lack standing under Article III and we, in turn, lack jurisdiction to decide these cases. Thus, "[i]n light of th[e] 'overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to "settle" it for the sake of convenience and efficiency.' " *Hollingsworth v. Perry*, 570 U.S. 693, 704–705, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013) (ROBERTS, C. J., for the Court) (quoting *Raines v. Byrd*, 521 U.S. 811, 820, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)).

1

Contrary to the plurality's assertion otherwise, *ante*, at 2150, abortionists' standing to assert the putative rights of their clients has not been settled by our precedents. It is true that this Court has reflexively allowed abortionists and abortion clinics to vicariously assert a woman's putative right to abortion. But oftentimes the Court has ***2147** not so much as addressed standing in those cases. See, *e.g.*, *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, ——, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016); *Gonzales v. Carhart*, 550 U. S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007); *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006); *Stenberg v. Carhart*, 530 U. S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000); *Mazurek v. Armstrong*, 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (*per curiam*); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). And questions "merely lurk[ing] in the record, neither brought to the attention of the court nor ruled upon," are not "considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925); see also *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979). Specifically, when it comes "to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 73 S.Ct. 67, 97 L.Ed. 54 (1952) (citing *United States v. More*, 3 Cranch 159, 7 U.S. 159, 2 L.Ed. 397 (1805) (Marshall, C. J., for the Court)).

The first—and only—time the Court squarely addressed this question with a reasoned decision was in *Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).[3] In that case, a fractured Court concluded that two abortionists had standing to challenge a State's refusal to provide Medicaid reimbursements for abortions. Perfunctorily applying this Court's requirements for third-party standing, Justice Blackmun, joined by three other Justices, asserted that abortionists generally had standing to litigate their clients' rights. *Id.*, at 113–118, 96 S.Ct. 2868 (plurality opinion). Justice Stevens concurred on considerably narrower grounds, reasoning that the abortionists had standing because they had a financial stake in the outcome of the litigation and sought to vindicate their own constitutional rights as well. *Id.*, at 121, 96 S.Ct. 2868 (opinion concurring in part). Notably, Justice Stevens declined to join the plurality's discussion of third-party standing, explaining that he was "not sure whether [that analysis] would, or should, ***2148** sustain the doctors' standing, apart from" their own legal rights and financial interests being at stake in that specific case. *Id.*, at 122, 96 S.Ct. 2868. The four remaining Justices dissented in

part, concluding that the abortionists lacked standing to litigate the rights of their clients. *Id.*, at 122–131, 96 S.Ct. 2868 (Powell, J., concurring in part and dissenting in part). Because Justice Stevens' opinion "concurred in the judgmen[t] on the narrowest grounds," it is the controlling opinion regarding abortionists' third-party standing. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). [4]

To the extent Justice Stevens' opinion could be read as concluding that abortionists have standing to vicariously assert their clients' rights so long as the abortionists establish standing on their own legal claims, his position has been abrogated by this Court's more recent decisions, which have "confirm[ed] that a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp.*, 547 U.S. at 352, 126 S.Ct. 1854. But more importantly, Justice Stevens' opinion does not support the abortionists in these cases, because his opinion rested on case-specific facts not implicated here—namely, the fact that the abortionists would directly receive Medicaid payments from the defendant agency if they prevailed and that they asserted violations of *their own* constitutional rights. In these cases, there is no dispute that the abortionists' sole claim before this Court is that Louisiana's law violates the purported substantive due process rights *of their clients*.

2

Under a proper understanding of Article III, plaintiffs lack standing. As explained above, in suits seeking to vindicate private rights, the owners of those rights can establish a sufficient injury simply by asserting that their rights have been violated. Constitutional rights are generally considered "private rights" to the extent they " ' belon[g] to individuals, considered as individuals.' " *Spokeo*, 578 U. S., at ——, 136 S.Ct., at (THOMAS, J., concurring) (slip op., at 3) (quoting 3 Blackstone, Commentaries *2); see also *United States* v. *Sineneng-Smith*, 590 U. S. ——, ——, 140 S.Ct. 1575, —— L.Ed.2d —— (2020) (THOMAS, J., concurring) (slip op., at 8). And the purported substantive due process right to abort an unborn child is no exception—it is an individual right that is inherently personal. After all, the Court "creat[ed the] right" based on the notion that abortion " ' involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.' " *Whole Women's Health*, 579 U. S., at ——, 136 S.Ct., at (THOMAS, J., dissenting) (slip op., at 5) (quoting *Casey*, 505 U.S. at 851, 112 S.Ct. 2791 (majority opinion)). Because this right belongs to the woman making that choice, not to those who provide abortions, plaintiffs cannot establish a personal legal injury by asserting that this right has been violated. [5]

***2149** The only injury asserted by plaintiffs in this suit is the possibility of facing criminal sanctions if the abortionists conduct abortions without admitting privileges in violation of the law.

See Response and Reply for Petitioners (No. 18–1460)/Cross-Respondents (No. 181323), p. 34, 764 Fed.Appx. 224. But plaintiffs do not claim any right to provide abortions, nor do they contest that the State has authority to regulate such procedures. [6] They have therefore demonstrated only real-world damages (or more accurately, the *possibility* of real-world damages), but no legal injury, or "invasion of a legally protected interest," that belongs to them. *Spokeo*, *supra,* at ——, 136 S.Ct., at (slip op., at 7) (internal quotation marks omitted). Thus, under a proper understanding of Article III, plaintiffs lack standing and, consequently, this Court lacks jurisdiction.

II

Even if the plaintiffs had standing, the Court would still lack the authority to enjoin Louisiana's law, which represents a constitutionally valid exercise of the State's traditional police powers. The plurality and THE CHIEF JUSTICE claim that the Court's judgment is dictated by "our precedents," particularly *Whole Woman's Health*. *Ante*, at 2131 – 2132 (plurality opinion); see also *ante,* at 2133 – 2134, 2138 – 2142 (ROBERTS, C. J., concurring in judgment). For the detailed reasons explained by Justice ALITO, this is not true. *Post*, at 2153 – 2165 (dissenting opinion).

But today's decision is wrong for a far simpler reason: The Constitution does not constrain the States' ability to regulate or even prohibit abortion. This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the "legal fiction" of substantive due process, *McDonald v. Chicago*, 561 U.S. 742, 811, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment). As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone.

A

The Court first conceived a free-floating constitutional right to privacy in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). In that case, the Court declared unconstitutional a state law prohibiting the use of contraceptives, finding that it violated a married couple's "right of privacy." *Id.*, at 486, 85 S.Ct. 1678. The Court explained that this right could be found in the "penumbras" of *five* different Amendments to the Constitution—the First, Third, Fourth, Fifth, and Ninth. *Id.,* at 484, 85 S.Ct. 1678. Rather than explain what free speech or the quartering of troops had to do with contraception, the Court simply declared that these rights had created "zones of privacy" with their "penumbras," which were "formed by emanations from those guarantees that help give them life and substance." *Ibid.* This reasoning is as mystifying as it is baseless.

As Justice Black observed in his dissent, this general "right of privacy" was never before considered a constitutional guarantee protecting citizens from governmental intrusion. *Id.,* at 508–510, 85 S.Ct. 1678. Rather, the concept was one of tort law, ***2150** championed by Samuel Warren and the future Justice Louis Brandeis in their 1890 Harvard Law Review article entitled, "The Right to Privacy." 4 Harv. L. Rev. 193. Over 20 years after the Fourteenth Amendment was ratified and a century after the Bill of Rights was adopted, Warren and Brandeis were among the first to advocate for this privacy right in the context of tort relief for those whose personal information and private affairs were exploited by others. *Id.,* at 193, 195–196, 214–220. By "exalting a phrase ... used in discussing grounds for tort relief, to the level of a constitutional rule," the Court arrogated to itself the "power to invalidate any legislative act which [it] find[s] irrational, unreasonable[,] or offensive" as an impermissible "interfere[nce] with 'privacy.' " *Griswold, supra*, at 510, n. 1, 511, 85 S.Ct. 1678 (Black, J., dissenting).

Just eight years later, the Court utilized its newfound power in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There, the Court struck down a Texas law restricting abortion as a violation of a woman's constitutional "right of privacy," which it grounded in the "concept of personal liberty" purportedly protected by the Due Process Clause of the Fourteenth Amendment. *Id.*, at 153, 93 S.Ct. 705. The Court began its legal analysis by openly acknowledging that the Constitution's text does not "mention any right of privacy." *Id.,* at 152, 93 S.Ct. 705. The Court nevertheless concluded that it need not bother with our founding document's text, because the Court's prior decisions—chief among them *Griswold*—had already divined such a right from constitutional penumbras. *Roe*, 410 U.S. at 152, 93 S.Ct. 705. Without any legal explanation, the Court simply concluded that this unwritten right to privacy was "broad enough to encompass a woman's [abortion] decision." *Id.*, at 153, 93 S.Ct. 705.

B

Roe is grievously wrong for many reasons, but the most fundamental is that its core holding —that the Constitution protects a woman's right to abort her unborn child—finds no support in the text of the Fourteenth Amendment. *Roe* suggests that the Due Process Clause's reference to "liberty" could provide a textual basis for its novel privacy right. *Ibid*. But that Clause does not guarantee liberty *qua* liberty. Rather, it expressly contemplates the *deprivation* of liberty and requires only that such deprivations occur through "due process of law." Amdt. 14, § 1. As I have previously explained, there is " 'considerable historical evidence support[ing] the position that "due process of law" was [originally understood as] a separation-of-powers concept ... forbidding

only deprivations not authorized by legislation or common law.' " *Johnson* v. *United States*, 576 U. S. 591, 623, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (opinion concurring in judgment) (quoting D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 272 (1985)). Others claim that the original understanding of this Clause requires that "statutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees [be] subject to judicial review." Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1679 (2012). But, whatever the precise requirements of the Due Process Clause, "the notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *McDonald*, 561 U.S. at 811, 130 S.Ct. 3020 (opinion of THOMAS, J.).

***2151** More specifically, the idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical. See *Roe*, 410 U.S. at 174–175, 93 S.Ct. 705 (Rehnquist, J., dissenting). In 1868, when the Fourteenth Amendment was ratified, a majority of the States and numerous Territories had laws on the books that limited (and in many cases nearly prohibited) abortion. See *id.*, at 175, n. 1, 93 S.Ct. 705.[7] It would no doubt shock the public at that time to learn that one of the new constitutional Amendments contained hidden within the interstices of its text a right to abortion. The fact that it took this Court over a century to find that right all but proves that it was more than hidden—it simply was not (and is not) there.

C

Despite the readily apparent illegitimacy of *Roe*, "the Court has doggedly adhered to [its core holding] again and again, often to disastrous ends." *Gamble* v. *United States*, 587 U. S. ——, ——, 139 S.Ct. 1960, 204 L.Ed.2d 322 (2019) (THOMAS, J., concurring) (slip op., at 16). In doing so, the Court has repeatedly invoked *stare decisis*. See, *e.g.*, *Casey*, 505 U.S. at 854–869, 112 S.Ct. 2791. And today, a majority of the Court insists that this doctrine compels its result. See *ante*, at 2133 (plurality opinion); *ante,* at 2133 – 2134, 2138 – 2139 (opinion of ROBERTS, C. J.).

The Court's current "formulation of the *stare decisis* standard does not comport with our judicial duty under Article III," which requires us to faithfully interpret the Constitution. *Gamble*, 587 U. S., at ——, 139 S.Ct., at (THOMAS, J., concurring) (slip op., at 2). Rather, when our prior decisions clearly conflict with the text of the Constitution, we are required to "privilege [the] text over our own precedents." *Id.*, at ——, 139 S.Ct., at (slip op., at 10). Because *Roe* and its progeny are premised on a "demonstrably erroneous interpretation of the Constitution," we should not apply them here. 587 U. S., at ——, 139 S.Ct., at (THOMAS, J., concurring) (slip op., at 10).

Even under THE CHIEF JUSTICE's approach to *stare decisis*, continued adherence to these precedents cannot be justified. *Stare decisis* is "not an inexorable command," *ante*, at 2134 (internal quotation marks omitted), and this Court has recently overruled a number of poorly reasoned precedents that have proved themselves ***2152** to be unworkable, see *Knick* v. *Township of Scott*, 588 U. S. ——, —— – ——, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019) (ROBERTS, C. J., for the Court) (slip op., at 20–23); *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. ——, —— – ——, 139 S.Ct. 1485, 203 L.Ed.2d 768 (2019) (slip op., at 16–17); *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ——, —— – ——, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018) (slip op., at 33–47). As I have already demonstrated, *supra,* at 2149 – 2151, *Roe*'s reasoning is utterly deficient—in fact, not a single Justice today attempts to defend it.

Moreover, the fact that no five Justices can agree on the proper interpretation of our precedents today evinces that our abortion jurisprudence remains in a state of utter entropy. Since the Court decided *Roe*, Members of this Court have decried the unworkability of our abortion case law and repeatedly called for course corrections of varying degrees. See, *e.g.,* 410 U.S. at 171–178, 93 S.Ct. 705 (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 221–223, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973) (White, J., dissenting); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452–466, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (O'Connor, J., dissenting); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 785–797, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (White, J., dissenting); *Webster v. Reproductive Health Services*, 492 U.S. 490, 532–537, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Scalia, J., concurring in part and concurring in judgment); *Casey*, 505 U.S. at 944–966, 112 S.Ct. 2791 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.,* at 979–1002, 112 S.Ct. 2791 (Scalia, J., concurring in judgment in part and dissenting in part); *Stenberg*, 530 U.S. at 953–956, 120 S.Ct. 2597 (Scalia, J., dissenting); *id.,* at 980–983, 120 S.Ct. 2597 (THOMAS, J., dissenting); *Whole Woman's Health*, 579 U. S., at ——– – ———, 136 S.Ct., at (THOMAS, J., dissenting) (slip op., at 5–11). In *Casey*, the majority claimed to clarify this "jurisprudence of doubt," 505 U.S. at 844, 112 S.Ct. 2791, but our decisions in the decades since then have only demonstrated the folly of that assertion, see *Stenberg*, 530 U.S. at 953–956, 120 S.Ct. 2597 (Scalia, J., dissenting); *id.,* at 960–979, 120 S.Ct. 2597 (Kennedy, J., dissenting); *Whole Woman's Health*, *supra*, at —— – ——, 136 S.Ct. 2292 (THOMAS, J., dissenting) (slip op., at 5–11). They serve as further evidence that this Court's abortion jurisprudence has failed to deliver the " 'principled and intelligible' " development of the law that *stare decisis* purports to secure. *Ante,* at 2134 (opinion of ROBERTS, C. J.) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)).

THE CHIEF JUSTICE advocates for a Burkean approach to the law that favors adherence to " 'the general bank and capital of nations and of ages.' " *Ante*, at 2134 (quoting 3 E. Burke, Reflections on the Revolution in France 110 (1790)). But such adherence to precedent was conspicuously absent when the Court broke new ground with its decisions in *Griswold* and *Roe*. And no one could seriously claim that these revolutionary decisions—or *Whole Woman's Health*, decided just four Terms ago—are part of the "*inheritance from our forefathers*," fidelity to which demonstrates "reverence to antiquity." E. Burke, Reflections on the Revolution in France 27–28 (J. Pocock ed. 1987).

More importantly, we exceed our constitutional authority whenever we "appl[y] demonstrably erroneous precedent instead of the relevant law's text." *Gamble*, *supra,* at ——, 139 S.Ct., at (THOMAS, J., concurring) (slip op., at 2). Because we can reconcile neither *Roe* nor its progeny with ***2153** the text of our Constitution, those decisions should be overruled.

* * *

Because we lack jurisdiction and our abortion jurisprudence finds no basis in the Constitution, I respectfully dissent. [8]

Justice ALITO, with whom Justice GORSUCH joins, with whom Justice THOMAS joins except as to Parts III–C and IV–F, and with whom Justice KAVANAUGH joins as to Parts I, II, and III, dissenting.

The majority bills today's decision as a facsimile of *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, ——, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016), and it's true they have something in common. In both, the abortion right recognized in this Court's decisions is used like a bulldozer to flatten legal rules that stand in the way.

In *Whole Woman's Health*, res judicata and our standard approach to severability were laid low. Even *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), was altered.

Today's decision claims new victims. The divided majority cannot agree on what the abortion right requires, but it nevertheless strikes down a Louisiana law, Act 620, that the legislature enacted for the asserted purpose of protecting women's health. To achieve this end, the majority misuses the doctrine of *stare decisis*, invokes an inapplicable standard of appellate review, and distorts the record.

The plurality eschews the constitutional test set out in *Casey* and instead employs the balancing test adopted in *Whole Woman's Health.* The plurality concludes that the Louisiana law does nothing to protect the health of women, but that is disproved by substantial evidence in the record. And the plurality upholds the District Court's finding that the Louisiana law would cause a drastic reduction in the number of abortion providers in the State even though this finding was based on an erroneous legal standard and a thoroughly inadequate factual inquiry.

THE CHIEF JUSTICE stresses the importance of *stare decisis* and thinks that precedent, namely *Whole Woman's Health,* dooms the Louisiana law. But at the same time, he votes to overrule *Whole Woman*'s *Health* insofar as it changed the *Casey* test.

Both the plurality and THE CHIEF JUSTICE hold that abortion providers can invoke a woman's abortion right when they attack state laws that are enacted to protect a woman's health. Neither waiver nor *stare decisis* can justify this holding, which clashes with our general rule on third-party standing. And the idea that a regulated party can invoke the right of a third party for the purpose of attacking legislation enacted to protect the third party is stunning. Given the apparent conflict of interest, that concept would be rejected out of hand in a case not involving abortion.

For these reasons, I cannot join the decision of the Court. I would remand the case to the District Court and instruct that court, before proceeding any further, to require the joinder of a plaintiff with standing. If a proper plaintiff is added, the ***2154** District Court should conduct a new trial and determine, based on proper evidence, whether enforcement of Act 620 would diminish the number of abortion providers in the State to such a degree that women's access to abortions would be substantially impaired. In making that determination, the court should jettison the nebulous "good faith" test that it used in judging whether the physicians who currently lack admitting privileges would be able to obtain privileges and thus continue to perform abortions if Act 620 were permitted to take effect. Because the doctors in question (many of whom are or were plaintiffs in this case) stand to lose, not gain, by obtaining privileges, the court should require the plaintiffs to show that these doctors sought admitting privileges with the degree of effort that they would expend if their personal interests were at stake.

I

Under our precedent, the critical question in this case is whether the challenged Louisiana law places a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877, 112 S.Ct. 2791 (plurality opinion). If a law like that at issue here does not have that effect, it is constitutional. *Id.*, at 884, 112 S.Ct. 2791 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

The petitioners urge us to adopt a rule that is more favorable to abortion providers. At oral argument, their attorney maintained that a law that has no effect on women's access to abortion is nevertheless unconstitutional if it is not needed to protect women's health. See Tr. of Oral Arg. 18–19. Of course, that is precisely the argument one would expect from a business that wishes to be free from burdensome regulations. But unless an abortion law has an adverse effect *on women*, there is no reason why the law should face greater constitutional scrutiny than any other measure that burdens a regulated entity in the name of health or safety. See *Casey*, 505 U.S. at 884–885, 112 S.Ct. 2791 (joint opinion). Many state and local laws that are justified as safety measures rest on debatable empirical grounds. But when a party saddled with such restrictions challenges them as a violation of due process, our cases call for the restrictions to be sustained if "it might be thought that the particular legislative measure was a rational way" to serve a valid interest. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The test that petitioners advocate would give abortion providers an unjustifiable advantage over all other regulated parties, and for that reason, it was rejected in *Casey*. See 505 U.S. at 851, 112 S.Ct. 2791 (majority opinion).

Casey also rules out the balancing test adopted in *Whole Woman's Health.* *Whole Woman's Health* simply misinterpreted *Casey,* and I agree that *Whole Woman's Health* should be overruled insofar as it changed the *Casey* test. Unless *Casey* is reexamined—and Louisiana has not asked us to do that—the test it adopted should remain the governing standard.

II

Because the plurality adheres to the balancing test adopted in *Whole Woman's Health*, it considers whether the Louisiana law helps to protect the health of women seeking abortions, and it concludes that "nothing in the record indicates that the background vetting for admitting privileges adds significantly to the vetting that the State Board of Medical Examiners already provides." *Ante*, at 2131. THE CHIEF JUSTICE seems to agree, *ante*, at 2140 – 2141 (opinion concurring in judgment), although it is unclear why this issue matters under the test he favors.

***2155** In any event, contrary to the view taken by the plurality and (seemingly) by THE CHIEF JUSTICE, there is ample evidence in the record showing that admitting privileges help to protect the health of women by ensuring that physicians who perform abortions meet a higher standard of competence than is shown by the mere possession of a license to practice. In deciding whether to grant admitting privileges, hospitals typically undertake a rigorous investigative process to ensure that a doctor is responsible and competent and has the training and experience needed to perform

the procedures for which the privileges are sought. As the Fifth Circuit explained, "hospitals verify an applicant's surgical ability, training, education, experience, practice record, and criminal history. These factors are reviewed by a board of multiple physicians." *June Medical Services, L. L. C. v. Gee*, 905 F.3d 787, 805, n. 53 (2018).

The standards used by the great majority of hospitals in deciding whether to grant privileges clearly show that hospitals demand proof of a higher level of competence. The Joint Commission, a nonprofit organization that accredits healthcare institutions, has issued standards for granting admitting privileges, and all of the hospitals whose rules are relevant here (and the vast majority of Louisiana hospitals) comply with those standards. [1] These standards call for an examination of each applicant's licensure, education, training, and current competence. See Joint Commission, 2020 Hospital Accreditation Standards, pp. MS–23, 25, 26, 29. They require an examination of a doctor's health records, clinical data on performance, and peer recommendations, and they demand that a hospital make a careful assessment of the procedures a physician may perform. *Ibid*.

Dr. Robert Marier, the former director of the Louisiana Board of Medical Examiners (and the former dean of Louisiana State University Medical School), testified that the process conducted by hospitals in deciding whether to grant admitting privileges is "the primary way of determining competency." App. 818. That process, he explained, "thoroughly vet[s] the qualifications of [applicants] to ensure that [they] are competent to provide the services that are in question." *Ibid*.

June Medical's expert, Dr. Eva Pressman, agreed that "admitting privileges can serve the function of providing an evaluation mechanism for physician competency." *Id*., at 1042, 1091; Record 10864. Doe 3, one of the doctors who currently performs abortions in Louisiana, also acknowledged the credentialing value of admitting privileges, App. 247–248, as did Doe 4, another Louisiana abortion doctor, Record 14155.

Although the plurality contends that the review conducted by hospitals adds little to the vetting undertaken by the State Board of Medical Examiners (Board), that is not true. Hospitals look beyond the mere possession of a license, and they do that for very obvious reasons. If nothing else, their review process serves the hospitals' interests by diminishing the risk of awards for malpractice committed by doctors practicing on their premises. In Louisiana, hospitals that perform negligent credentialing cannot benefit from the State's medical malpractice cap. See *Billeaudeau v. Opelousas General Hospital Auth.*, 20160846, p. 21 (La. 10/19/16), 218 So.3d 513, 527. In addition, a hospital's "Medicare participation ***2156** and other certifications depend on completing the credentialing process." [2]

The review conducted by hospitals goes beyond that of the Board in another way: it is continuous. Under the Joint Commission Standards, hospitals must monitor physicians with admitting

privileges and can therefore make a running assessment of their competence. See Record 11850. The Board, on the other hand, conducts an inquiry before initially issuing a license, but the annual license renewal process entails nothing more than completing a standard form, paying the required fee, and documenting a certain number of continuing medical education credits. See 46 La. Admin. Code, pt. XLV, § 417 (2020).

Because hospitals continue to evaluate doctors after privileges are granted, they may discover information that assists the Board in carrying out its responsibilities. In the past, hospitals have forwarded such information to the Board, and such referrals have led the Board to take serious disciplinary actions. [3]

The record shows that the vetting conducted by hospitals goes far beyond what is done at Louisiana abortion clinics. Some clinics demand nothing more than possession of a license. Take the example of petitioner June Medical. Doe 3, the only person at that clinic who evaluates applicants, testified that he does not perform background checks of any kind, not even criminal records checks. App. 249–250. In the past, Doe 3 hired a radiologist and ophthalmologist to perform abortions. *Id*., at 249.

Delta Clinic in Baton Rouge and Women's Clinic in New Orleans have similarly lax practices. Leroy Brinkley, the president of both clinics, testified before a Pennsylvania grand jury that, in making hiring decisions, " 'I don't judge the license. If they have a license and the state gave the license, it's not for me to determine if they are capable.' " [4] A " 'background check,' " he said, is not within his " 'framework.' " [5]

Doe 4, who practiced at the now-defunct Causeway Clinic near New Orleans, recounted the meager vetting that occurred when he was hired at that facility. He had to produce a valid medical license and DEA license but was not required "to undergo anything similar to review by a credentials committee." Record 14156.

In light of these practices, it is no surprise that the Louisiana Department of Health has issued Statements of Deficiency against abortion facilities for failing to adopt " 'a detailed credentialing process for physicians,' " failing to investigate " 'possible restrictions' " on physicians' licenses, and failing to look into " 'evidence of prior malpractice claims/settlements.' " [6]

Louisiana adopted Act 620 in the aftermath of the Kermit Gosnell grand jury report, which expounded on the failures of regulatory oversight that allowed Gosnell's practices to continue for an extended period. See Report of Grand Jury in ***2157** No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011). The grand jury concluded that closer supervision would have uncovered Gosnell's

egregious health and safety violations. Gosnell had a medical license, but it is doubtful that any hospital would have given him admitting privileges.

In sum, contrary to the plurality's assertion, there is ample evidence in the record showing that requiring admitting privileges has health and safety benefits. There is certainly room for debate about the need for this requirement, but under our case law, this Court's task is not to ascertain whether a law "adds significantly" to the existing regulatory framework. Instead, when confronted with a genuine dispute about a law's benefits, we have afforded legislatures "wide discretion" in assessing whether a regulation serves a legitimate medical need and is medically reasonable even in the face of medical and scientific uncertainty. *Gonzales v. Carhart*, 550 U.S. 124, 163, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007); *Mazurek v. Armstrong*, 520 U.S. 968, 973, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (*per curiam*); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 458, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (O'Connor, J., dissenting) ("[L]egislatures are better suited" than courts "to make the necessary factual judgments in this area"); accord, *Barsky v. Board of Regents of Univ. of N. Y.*, 347 U.S. 442, 451, 74 S.Ct. 650, 98 L.Ed. 829 (1954) (State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). Louisiana easily satisfied this standard.

For these reasons, both the plurality and THE CHIEF JUSTICE err in concluding that the admitting-privileges requirement serves no valid purpose.

III

They also err in their assessment of Act 620's likely effect on access to abortion. They misuse the doctrine of *stare decisis* and the standard of appellate review for findings of fact.

A

Stare decisis is a major theme in the plurality opinion and that of THE CHIEF JUSTICE. Both opinions try to create the impression that this case is the same as *Whole Woman's Health* and that *stare decisis* therefore commands the same result. In truth, however, the two cases are very different. While it is certainly true that the Texas and Louisiana *statutes* are largely the same, the two cases are not. The decision in *Whole Woman's Health* was not based on the face of the Texas statute, but on an empirical question, namely, the effect of the statute on access to abortion in that State. 579 U. S., at ——, 136 S.Ct., at (slip op., at 24). The Court's answer to that question depended on numerous factors that may differ from State to State, including the demand

for abortions, the number and location of abortion clinics and physicians, the geography of the State, the distribution of the population, and the ability of physicians to obtain admitting privileges. *Id.*, at —— – ——, 136 S.Ct., at (slip op., at 24–26). There is no reason to think that a law requiring admitting privileges will necessarily have the same effect in every state. As a result, just because the Texas admitting privileges requirement was found by this Court, based on evidence in the record of that case, to have substantially reduced access to abortion in that State, it does not follow that Act 620 would have comparable effects in Louisiana. See *id.*, at —— – ——, 136 S.Ct., at (slip op., at 22–26) (reviewing Texas record). The two States are neighbors, but they are not the same. Accordingly, the record-based empirical determination in *Whole Woman's Health* is not controlling here.

***2158** The suggestion that *Whole Woman's Health* is materially identical to this case is ironic, since the two cases differ in a way that was critical to the Court's reasoning in *Whole Woman's Health, i.e.,* the difference between a pre-enforcement facial challenge and a post-enforcement challenge based on evidence of the law's effects. See *id.*, at ——, 136 S.Ct., at (slip op., at 11). Before the Texas law went into effect, abortion providers mounted an unsuccessful facial challenge, arguing that the law would drastically limit abortion access. The Fifth Circuit held that the plaintiffs had not shown that the law would create a substantial obstacle for women seeking abortions, and a final judgment was entered against them. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 590, 605 (2014). Then, after the law had been in operation for some time, many of the same plaintiffs filed a second suit and again argued that the admitting privileges requirement violated *Casey*. *Whole Woman's Health v. Cole*, 790 F.3d 563, 577, and n. 14 (CA5 2015). The State defendants sought dismissal based on the doctrine of claim preclusion, but the *Whole Woman's Health* majority rejected that argument. 579 U. S., at ——, 136 S.Ct., at (slip op., at 11).

Why? Two words: "changed circumstances." *Id.*, at ——, 136 S.Ct., at (slip op., at 13). According to the Court, the pre-enforcement facial challenge was not the same "claim" as the post-enforcement claim because the "postenforcement consequences" of the challenged Texas law were "*unknowable* before [the law] went into effect." *Id.*, at ——, 136 S.Ct., at (slip op., at 14) (emphasis added); see also *ibid.* ("[I]t was still unclear how many clinics would be affected"); *id.*, at ——, 136 S.Ct., at (slip op., at 12) (discussing "new material facts"); *id.*, at ——, 136 S.Ct., at (slip op., at 14) (recounting "later, concrete factual developments").

The present case is in the same posture as the pre-enforcement facial challenge to the Texas law, and it should therefore be obvious that this Court's decision in *Whole Woman's Health* is not controlling.

B

1

Aside from suggesting that *Whole Woman's Health* is dispositive, the plurality and THE CHIEF JUSTICE provide one other reason for concluding that Act 620, if allowed to go into effect, would create a substantial obstacle for women seeking abortions. Pointing to the District Court's finding that the Louisiana law would have a drastic effect on abortion access, *June Medical Services, LLC v. Kliebert*, 250 F.Supp.3d 27, 87 (MD La. 2017), the plurality and THE CHIEF JUSTICE note that findings of fact may be overturned only if clearly erroneous, and they see no such error here. *Ante*, at 2120 – 2121 (opinion of BREYER, J.); *ante*, at 2141 – 2142 (opinion of ROBERTS, C. J.). In taking this approach, they overlook the flawed legal standard on which the District Court's finding depends, and they ignore the gross deficiencies of the evidence in the record.

Because the Louisiana law was not allowed to go into effect for any appreciable time, it was necessary for the District Court to predict what its effects would be. Attempting to do that, the court apparently concluded that none of the doctors who currently perform abortions in the State would be replaced if the admitting privileges requirement forced them to leave abortion practice. 250 F.Supp.3d at 82. That inference is debatable, as it primarily rests on the anecdotal testimony of June Medical's administrator. See *id.*, at 81–82; App. 113–114. Neither the plurality nor THE CHIEF JUSTICE explains why it should be accepted. That alone casts doubt ***2159** on the finding to which the majority defers, but the problems with the finding do not stop there.

The finding was based on a fundamentally flawed test. In attempting to ascertain how many of the doctors who perform abortions in the State would have to leave abortion practice for lack of admitting privileges, the District Court received evidence in a variety of forms—some live testimony, but also deposition transcripts, declarations, and even letters from counsel—about the doctors' unsuccessful efforts to obtain privileges. The District Court considered whether these doctors had proceeded in "good faith"; it found that they all met that standard; and it therefore concluded that the law would leave the State with very few abortion providers.

2

Under the reasoning just described, the factual finding on which the plurality and THE CHIEF JUSTICE rely—that the Louisiana law would drastically reduce access to abortion in the State—

depends on the District Court's finding that the doctors in question exercised "good faith" in their quest for privileges, but that test is woefully deficient.

It has aptly been said that "good faith" " 'is an elusive idea, taking on different meanings and emphases as we move from one context to another.' " Black's Law Dictionary 836 (11th ed. 2019). What the District Court understood the term to mean in the present context is uncertain, but this is clear: The District Court ignored a factor of the utmost importance, the incentives of the doctors in question.

When the District Court made its assessment of the doctors' "good faith," enforcement of Act 620 had been preliminarily enjoined, and the doctors surely knew that enforcement would be permanently barred if the lawsuit was successful. Thus, the doctors had everything to lose and nothing to gain by obtaining privileges. [7] Two of the doctors—Does 1 and 2—are petitioners and cross-respondents in this Court. Two others, Does 5 and 6, were plaintiffs earlier but dropped out for unexplained reasons. See App. 1327. And Doe 3, although not a plaintiff, is the medical director of June Medical, a party to this case. *Id*., at 186, 206, 245.

If these doctors had secured privileges, that would have tended to defeat the lawsuit. Not only that, acquiring privileges would have subjected all the doctors to the previously described hospital monitoring, as well as any other obligations that a hospital imposed on doctors with privileges, such as providing unpaid care for the indigent. See *infra*, at 2163 – 2164. Thus, in light of the situation at the time when the doctors made their attempts to get privileges, they had an incentive to do as little as they thought the District Court would demand, not as much as they would if they stood to benefit from success.

Given this incentive structure, the District Court's "good faith" test was not up ***2160** to the task. Although the District Court did not define exactly what the test required, "good faith" might easily mean only that a doctor lacked the subjective intent to avoid getting privileges. See Black's Law Dictionary, at 836 (defining "good faith" to mean, among other things, "absence of intent to defraud or seek unconscionable advantage").

In light of the doctors' incentives, more should have been required. The court should have asked whether the doctors' efforts to acquire privileges were equal to the efforts they would have made if they knew that their ability to continue to perform abortions was at stake. The District Court did not do that, and because its finding on abortion access rests on the wrong legal standard, it cannot stand. A finding based on an erroneous legal test is invalid; it cannot be sustained under the "clearly erroneous" rule. See *Abbott* v. *Perez*, 585 U. S. ——, ——, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018) (slip op., at 25) (" 'An appellate cour[t has] power to correct errors of law, including those that ... infect ... a finding of fact that is predicated on a misunderstanding of the governing rule of law' " (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466

U.S. 485, 501, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984))); *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) (similar); see also 9C C. Wright & A. Miller, Federal Practice & Procedure § 2585, p. 392 (3d ed. 2008) (Wright & Miller) ("[I]t is axiomatic that the conclusions of law of the trial judge are not protected by the 'clearly erroneous' test"). [8]

3

Not only did the District Court apply the wrong test, but the evidence in the record fails to show that the doctors made anything more than perfunctory efforts to obtain privileges.

There are three abortion clinics in Louisiana: June Medical, d/b/a Hope Clinic, in Shreveport; Delta Clinic in Baton Rouge; and Women's Clinic in New Orleans. Five doctors perform abortions at those three locations: Doe 1, Doe 2, and Doe 3 at June Medical; Doe 5 at Delta Clinic and Women's Clinic; and Doe 6 at Women's Clinic. For purposes of the analysis that follows, I assume that Doe 1 could not get privileges. [9] If we also assume that none of these doctors would be replaced if they ceased to perform abortions, the impact of the challenged law on abortion access in ***2161** the State depends on the ability of four doctors to secure such privileges: Doe 2 (June Medical, Shreveport), Doe 3 (June Medical, Shreveport), Doe 5 (Delta Clinic, Baton Rouge, and Women's Clinic, New Orleans), and Doe 6 (Women's Clinic, New Orleans). As I will show, under the correct legal standard, June Medical failed to prove that Act 620 would drive these four doctors out of the abortion practice.

Doe 2. The District Court concluded that Doe 2 made a good-faith effort to obtain privileges, and the Court now affirms that holding. *Ante*, at 2126. It is painfully obvious, however, that Doe 2 did not act in the way one would expect if compliance with Act 620 had been to his benefit.

E-mails in the record reveal that Doe 2 only half-heartedly applied for privileges, did so on the advice of counsel, and calculated that an outright denial would be best for his legal challenge. See App. 1452 ("The lawyers think it is important that I at least have an application pending at a hospital"); *id*., at 1453 ("It may, however, be more important from a legal challenge standpoint against this Bill just to have an application pending *or even denied*" (emphasis added)).

Consistent with this attitude, Doe 2 declined to apply for privileges at a Shreveport-area hospital, Christus Health, where he previously had privileges while performing abortions offsite and where another doctor who performed abortions, Doe 3, maintained privileges. *Id.*, at 382. Doe 2 knew that Doe 3 had privileges at Christus Health, a hospital that grants "courtesy privileges," which allow doctors to admit patients but do not require a minimum number of admissions. See *id*., at 406; Record 12125 (bylaws).

Doe 2's stated reasons for not applying to Christus Health are not reasons that are likely to have deterred an individual with a strong personal incentive to obtain privileges. He testified that Christus is a Catholic hospital and that he did not apply there for that reason. App. 405–406. He added that he applied to other hospitals where he "knew people and might feel more comfortable," "places that [he] thought meant something" and where he would have "the highest likelihood" of obtaining privileges. *Id*., at 454. A person with a strong personal incentive to get privileges is not likely to have found these reasons sufficient to justify failing even to apply.

The District Court did not address Doe 2's failure to apply to Christus Health. 250 F.Supp.3d at 68–74. The plurality, however, argues that Christus would not have granted Doe 2 privileges because its bylaws object to abortion practice. *Ante,* at 2125 – 2126. But as noted, Christus Health had previously granted privileges to doctors who perform abortions. Not only did Doe 2 have privileges there while he was performing abortions, but Doe 3 has had privileges at Christus "off and on" for "30 years" and was reappointed to the Christus Health staff in 2012 and again in 2014. App. 272; Record 12102 (2012–2014); *id.,* at 12112 (2014–2016). Throughout this time, he performed abortions. App. 206, 210.

Attempting to justify Doe 2's decision not to (re)apply to Christus, the plurality suggests that Doe 3 (and by extension Doe 2) successfully concealed their abortion practice from Christus, and that if Doe 2 had applied for privileges, Christus would have discovered that he was performing abortions and denied his application on that ground. It is doubtful that Christus was actually in the dark, and speculative that an application would have been denied for this reason. [10] But the important point ***2162** is that a doctor with a strong personal incentive would have tried and not simply gone through the motions.

Instead of applying to Christus Health, Doe 2 made a formal application to Willis-Knighton Bossier City (WKBC) and an informal inquiry at University Hospital, but the record does not show that he pursued those requests with any zeal. At WKBC, he did not apply for courtesy privileges, which do not require a minimum number of admissions, Record 9642–9643, but instead sought an active staff position, *id.*, at 9751, and according to Doe 2, this application was doomed because he could not satisfy the minimum-admissions requirement for such a position, App. 384–390. Doe 2 later sent a three-paragraph e-mail to a WKBC e-mail address purporting to amend his 102-page application so as to seek only courtesy privileges, *id.*, at 1446, but the record does not reflect whether that e-mail was received or processed, and subsequent correspondence from WKBC does not acknowledge it, *id.*, at 1435. Doe 2 stated that he sought an active staff position "to keep [his] practice options for the future open," Record 9756, but that does not explain his lack of diligence in seeking courtesy staff privileges. Although it is true that WKBC requested inpatient records from Doe 2 for an active staff position, we do not know whether the hospital would have made the same request had Doe 2 applied for courtesy privileges. *Id.*, at 1435. [11]

Doe 2 said he made an informal inquiry about admitting privileges at University Hospital, where he has consulting privileges, but that the head of the OB/GYN Department, Dr. Groome, "essentially ***2163** said" that the hospital would not upgrade his credentials. *Id*., at 384. Doe 2 attributed this to "the political nature of what I do and the controversy of what I do." *Ibid*. But Doe 2 did not introduce evidence (or seek to elicit testimony from Dr. Groome) substantiating his account of this informal inquiry.

Doe 2's account raises obvious questions. Since he was *already* a member of the University Hospital staff, it is not apparent why the hospital would reject his request for upgraded privileges because of "the political nature" of his practice. *Id*., at 440–441. And University Hospital has long been on notice of Doe 2's abortion practice. He has been affiliated with that hospital since 1979, Record 9757, and has performed abortions since 1980, *id*., at 9759.

In sum, Doe 2 all but admitted in his e-mails that his efforts to obtain privileges were perfunctory; he declined to apply at a hospital where he previously had privileges; at the only hospital where he made a formal application, he sought a position he knew he could not get for lack of a sufficient number of admissions; and at one other hospital (where he already had consulting privileges) he did no more than make an informal inquiry. The District Court should have considered whether Doe 2's efforts were consistent with the conduct of a person who really wanted to get privileges.

Doe 5. Doe 5 is an OB/GYN who performs abortions at Women's Clinic in New Orleans and Delta Clinic in Baton Rouge. Doe 5 did not testify at the hearing in District Court, but the District Court found that he proceeded in "good faith" based on a declaration and the transcript of a deposition. 250 F.Supp.3d at 75–76.

Doe 5 obtained courtesy privileges at Touro Hospital in New Orleans, see App. 1401, and therefore all agree that Act 620 would not prevent him from practicing at Women's Clinic, *id*., at 1397. The remaining question is whether the law would bar him from performing abortions in Baton Rouge.

Doe 5 could continue to do that if one hospital in that area granted him admitting privileges, and Doe 5 testified that one, Woman's Hospital, will grant him privileges once he finds a doctor who is willing to cover him when he is not available. See *id*., at 1334. Doe 5 asked exactly one doctor to serve as his covering physician. That does not show that he "could not find a covering physician," *ante,* at 2126, if he made other inquiries.

The plurality justifies Doe 5's meager effort based on pure speculation. Because the one doctor Doe 5 asked had a transfer agreement with the Baton Rouge abortion clinic, the plurality reasons that "Doe 5 could have reasonably thought that, if this doctor wouldn't serve as his covering physician,

no one would." *Ante*, at 2126. The plurality goes on to say that "it was well within the District Court's discretion to credit that reading of the record." *Ibid*.

This argument shows how far the plurality is willing to go to strike down the Louisiana law. The plurality relies on speculation about why Doe 5 made only one inquiry and why the District Court found this one inquiry sufficient. In fact, however, Doe 5 never explained why he asked only one doctor, and he never intimated that he gave up because that doctor had a transfer agreement with the clinic. Nor did the District Court rely on that inference in finding that Doe 5 exhibited good faith. See 250 F.Supp.3d at 75–76. And in any event, even if Doe 5 had a particularly strong reason to hope that the doctor he asked would agree to cover for him, it hardly follows that other inquiries would necessarily fail.

***2164** Doe 5 applied for privileges at two other area hospitals, Lane and Baton Rouge, but he did not even call back to check on them because he thought his "best chances for privileges [were] at Woman's Hospital," App. 1334, and he noted that Lane and Baton Rouge require that their doctors treat some indigent patients "for free basically" while opening themselves up to liability, *id*., at 1335. Also, Doe 5 explained, Lane is "further away" from the Delta Clinic than the other hospitals. *Ibid*.

To sum up Doe 5's situation: The challenged law would have no effect on him if he could find a covering doctor in Baton Rouge, but he asked only one doctor. He did little to pursue applications at two other hospitals because he was not optimistic about his chances and those hospitals required a certain amount of unpaid service to the poor.

Doe 6. Doe 6 is a Board-certified OB/GYN who practices at Women's Clinic in New Orleans. There are nine qualifying New Orleans-area hospitals, and according to his affidavit, Doe 6 made an informal inquiry at one and filed a formal application at another. The District Court found that he attempted in "good faith" to obtain admitting privileges even though Doe 6 did not testify and was never subjected to adversarial questioning. The only relevant information before the court were several paragraphs in Doe 6's declaration, *id.*, at 1307–1313, and hearsay in the declaration of the Women's Clinic administrator, *id*., at 1119–1131; see also 250 F.Supp.3d at 76–77.

These questionable sources left many important questions unanswered, for example, why Doe 6 did not apply for privileges at Touro Hospital, where Doe 5, who also performs abortions at Women's Clinic, has privileges.

The plurality provides an explanation that is found nowhere in the record, *i.e*., that Doe 6 could not get privileges at Touro because, unlike Doe 5, who performs both surgical and medication abortions, Doe 6 performs only medication abortions. *Ante*, at 2127 – 2128. Not only is this pure speculation, but it is not evident why this difference might matter. The plurality notes that Doe 6's

medication abortion patients have never been admitted to a hospital, but the plurality also argues that very few surgical abortion patients are admitted. *Ante*, at 2127 – 2128, 2131. If Doe 6 had testified or been deposed, he could have been asked about his decision not to apply at Touro, but that did not occur.

Aside from Touro, there are eight other hospitals in the New Orleans area, but Doe 6 apparently made no attempt to get privileges at six of these, and nothing in the scant record explains why. He stated that he formally applied at East Jefferson Hospital and made an informal inquiry at Tulane Hospital, but much about these efforts is unknown. No representative from Tulane or East Jefferson testified or was deposed, and no documents relating to either application were offered.

With respect to Doe 6's informal inquiry at Tulane, all that the District Court had before it was a single paragraph in Doe 6's declaration in which he stated that he spoke to an unnamed individual and was told he should not bother to apply because he did not have the requisite number of admissions per year. App. 1310. Nothing in the record reveals the type of privileges about which Doe 6 inquired.

Doe 6 furnished even less information about his formal application to East Jefferson hospital—a hospital which offers courtesy privileges, and does not impose an admissions requirement for those privileges. Record 10679. In his declaration, which he signed in September 2014, Doe 6 wrote that he had applied but had not ***2165** received a response. App. 1311. A few weeks later, June Medical's counsel informed the District Court by letter that Doe 6 had complied with East Jefferson's request for additional information, *id*., at 54, but the record says nothing about any later developments. Presumably, East Jefferson did not grant privileges, but the record does not disclose why. Did Doe 6 provide all the information that the hospital requested and do everything else required by the application process? The record is silent, and the District Court was incurious.

Doe 3. Doe 3, who performs abortions at the June Medical clinic in Shreveport, would not be directly affected by Act 620 because he maintains privileges at two area hospitals, Christus Health and WKBC, but he stated that he would stop performing abortions if, as a result of that law, he was left as the only abortion doctor in the northern part of the State. *Id.,* at 236. Thus, if Doe 1 or Doe 2 got privileges and continued to perform abortions, Doe 3, according to his testimony, would remain as well. [12]

Putting all this together, it is apparent that the record does not come close to showing that Doe 2, Doe 5, and Doe 6 made the sort of effort that one would expect if their ability to continue performing abortions had depended on success. These doctors had an incentive to do the bare minimum that they thought the judge would demand—and as it turned out, the judge did not demand much, not even an appearance in his courtroom. In short, the record does not show that Act 620 would drive any of these doctors out of abortion practice, and therefore the Act would not

lead Doe 3 to leave either. It follows that the District Court's finding on Act 620's likely effects cannot stand.

C

The Court should remand this case for a new trial under the correct legal standards. The District Court should apply *Casey*'s "substantial obstacle" test, not the *Whole Woman's Health* balancing test. And it should require those challenging Act 620 to demonstrate that the doctors who lack admitting privileges attempted to obtain them with the same zeal they would have exhibited if the Act were in effect and they stood to lose by failing in those efforts.

IV

On remand, the District Court should not permit June Medical to assert the rights of women wishing to obtain an abortion. The court should require the joinder of a plaintiff whose own rights are at stake. Our precedents rarely permit a plaintiff to assert the rights of a third party, and June Medical cannot satisfy our established test for third-party standing. Indeed, what June Medical seeks is something we have never allowed. It wants to rely on the rights of third parties whose interests conflict with its own.

A

The plurality holds that Louisiana waived any objection to June Medical's third-party standing, *ante,* at 2117 – 2118, but that is a misreading of the record. The plurality relies on a passing statement in a brief filed by the State in District Court in ***2166** connection with the plaintiffs' request for a temporary restraining order, but the statement is simply an accurate statement of circuit precedent on the standing of abortion providers. See App. 44. It does not constitute a waiver.

It is true that Louisiana did not affirmatively make the third-party standing argument until it filed its cross-petition for certiorari, but "[w]e may make exceptions to our general approach to claims not raised below." *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 14, 129 S.Ct. 2277, 174 L.Ed.2d 1 (2009). A party's failure to raise an issue does not deprive us of the power to take it up, so long as the court below has passed on the question. See *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) ("[E]ven if this were a claim not raised by petitioner below, we would ordinarily feel free to address it since it

was addressed by the court below" (emphasis deleted)); S. Shapiro et al., Supreme Court Practice § 6–26(b), p. 6–104 (11th ed. 2019) (collecting cases).

In this case, no one disputes that the Fifth Circuit passed on the issue of third-party standing in Louisiana's appeal from the District Court's entry of a preliminary injunction. *June Medical Services, L. L. C. v. Gee*, 814 F.3d 319, 322–323 (2016). And when we granted the State's cross-petition, we took up this question and received briefing and argument on it. 589 U. S. —— (2019).

We have a strong reason to decide the question of third-party standing because it implicates the integrity of future proceedings that should occur in this case. This case should be remanded for a new trial, and we should not allow that to occur without a proper plaintiff. Nothing compels us to forbear from addressing this issue. See *Carlson v. Green*, 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980); Shapiro, Supreme Court Practice § 6.26(h), at 6–111.

B

This case features a blatant conflict of interest between an abortion provider and its patients. Like any other regulated entity, an abortion provider has a financial interest in avoiding burdensome regulations such as Act 620's admitting privileges requirement. Applying for privileges takes time and energy, and maintaining privileges may impose additional burdens. See App. 1335. Women seeking abortions, on the other hand, have an interest in the preservation of regulations that protect their health. The conflict inherent in such a situation is glaring.

Some may not see the conflict in this case because they are convinced that the admitting privileges requirement does nothing to promote safety and is really just a ploy. But an abortion provider's ability to assert the rights of women when it challenges ostensible safety regulations should not turn on the merits of its claim.

The problem with the rule that the majority embraces is highlighted if we consider challenges to other safety regulations. Suppose, for example, that a clinic in a State that allows certified non-physicians to perform abortions claims that the State's certification requirements are too onerous and that they imperil the clinic's continued operation. Should the clinic be able to assert the rights of women in attacking this regulation, which the state lawmakers thought was important to protect women's health?

When an abortion regulation is enacted for the asserted purpose of protecting the health of women, an abortion provider seeking to strike down that law should not be able to rely on the constitutional rights ***2167** of women. Like any other party unhappy with burdensome regulation, the provider should be limited to its own rights.

C

This rule is supported by precedent and follows from general principles regarding conflicts of interest. We have already held that third-party standing is not appropriate where there is a potential conflict of interest between the plaintiff and the third party. In *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 9, 15, and n. 7, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004), a potential conflict of interest between the plaintiff and his daughter arose on appeal. The father had asserted that his daughter had a constitutional right not to hear others recite the words " 'under God' " when the pledge of allegiance was recited at her public school, but the child's mother maintained that her daughter had "no objection either to reciting or hearing" the full pledge. *Id.*, at 5, 9, 124 S.Ct. 2301. The Court held that the father lacked prudential standing, because "the interests of this parent and this child are not parallel and, indeed, are potentially in conflict." *Id.*, at 15, 124 S.Ct. 2301. The lower court's judgment (based, as it was, on a presentation by a conflicted party) was therefore reversed.

Newdow recognized the seriousness of conflicts of interest in the specific context of third-party claims, but the law is always sensitive to potential conflicts when a party sues in a representative capacity. Parties naturally "tailor their own presentation to the interest that each of them has," and a conflict therefore creates "a risk that the party will not provide adequate representation of the interest of the absentee." See 7C Wright & Miller § 1909. Thus, in class-action suits, Federal Rule of Civil Procedure 23(a)(4) demands that the named plaintiff possess "the same interest and suffer the same injury" as class members. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (internal quotation marks omitted). That requirement, we have said, "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Similarly, under Federal Rule of Civil Procedure 17(c), a party representing a minor or incompetent person may be replaced if the representative has conflicting interests. See *Sam M. v. Carcieri*, 608 F.3d 77, 86 (CA1 2010); 6A Wright & Miller § 1570. And of course, an attorney cannot represent a client if their interests conflict. [13]

D

The conflict of interest inherent in a case like this is reason enough to reject third-party standing, and our standard rules on third-party standing provide a second, independent reason. As a general rule, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief

on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). We have recognized a "limited" exception to this rule, but in order to qualify, a litigant must demonstrate (1) closeness to the third party and (2) a hindrance to the third party's ability to bring suit. *Kowalski v. Tesmer*, 543 U.S. 125, 129–130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004); see also *Powers v. Ohio*, 499 U.S. 400, 410–411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

The record shows that abortion providers cannot satisfy either prong of this test. ***2168** First, a woman who obtains an abortion typically does not develop a close relationship with the doctor who performs the procedure. On the contrary, their relationship is generally brief and very limited. In Louisiana, a woman may make her first visit to an abortion clinic the day before the procedure, and if she goes to June Medical, she is likely to have a short meeting with a counselor, not the doctor who will actually perform the procedure. See App. 784–786. She will typically meet the abortion doctor for the first time just before the procedure, and if Doe 1's description is representative, their relationship consists of the doctor's telling the woman what he will do, offering to answer questions, informing her of his progress as the abortion is performed, and asking her to remain calm. *Id.*, at 688. Doe 4 testified that the surgical procedure itself takes "two or three minutes." Record 14144. Doe 3 testified that he can perform six abortions an hour and once performed 64 abortions in a 2-day period. App. 207, 243.

In the case of medication abortions, patients are required to schedule a follow-up appointment three weeks after the procedure, see *id.*, at 129–131, 690, but surgical abortions, which constitute the majority of the procedures at June Medical and across the State, do not require any follow-up, *id.*, at 691, and the great majority of women never return to the clinic, *id.*, at 131; accord, *id.*, at 1342 (Doe 5).

This description of doctor-patient interactions at June Medical is similar to those recounted in testimony heard by the legislature. See Record 11263 ("there was no doctor/patient relationship"); *id.*, at 11226 ("I can tell you, women I've counseled, many times they don't know who the abortion provider is"). *Amici* who have had abortions recount similarly distant relationships with their abortion doctors. [14] For these reasons, the first prong of the third-party standing rule cannot be met.

Nor can the second, which requires that there be a hindrance to the ability of the third party to bring suit. See *Kowalski*, 543 U.S. at 130, 125 S.Ct. 564. The plurality opinion in *Singleton v. Wulff*, 428 U.S. 106, 117, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), found that women seeking abortions were hindered from bringing suit, but the reasoning in that opinion is hard to defend. The opinion identified two purported obstacles to suits by women wishing to obtain abortions—the women's desire to protect their privacy and the prospect of mootness. *Ibid.* But as Justice

Powell said at the time, these "alleged 'obstacles' ... are chimerical." *Id.*, at 126, 96 S.Ct. 2868 (opinion concurring in part and dissenting in part).

First, a woman who challenges an abortion restriction can sue under a pseudonym, and many have done so. *Ibid.* ("Our docket regularly contains cases in which women, using pseudonyms, challenge statutes that allegedly infringe their right to exercise the abortion decision"). Other precautions may be taken during the course of litigation to avoid revealing their identities. See App. 196. [15] And there is little reason ***2169** to think that a woman who challenges an abortion restriction will have to pay for counsel. See Brief for Respondent/Cross-Petitioner 40–41.

Second, if a woman seeking an abortion brings suit, her claim will survive the end of her pregnancy under the capable-of-repetition-yet-evading-review exception to mootness. See *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) ("Pregnancy provides a classic justification for a conclusion of nonmootness"). To be sure, when the pregnancy terminates, an individual plaintiff 's immediate interest in prosecuting the case may diminish. But this is generally true whenever the capable-of-repetition-yet-evading-review exception applies. See 13C Wright & Miller § 3533.8 (collecting examples).

The *Singleton* plurality opinion is the only opinion in which any Members of this Court have ever attempted to justify third-party standing for abortion providers, and judged on its own merits, the opinion is thoroughly unconvincing.

E

The Court does not address the conflict of interest inherent in this challenge, or plaintiffs' failure to satisfy the two prongs of our third-party standing doctrine. See *Kowalski*, 543 U.S. at 130, 125 S.Ct. 564. Instead, the plurality says that it "is ... common" in third-party standing case law for "plaintiffs [to] challeng[e] a law ostensibly enacted to protect [a third party] whose rights they are asserting." *Ante*, at 2119. In support of this strange proposition, the plurality cites two of our prior decisions, but neither decision acknowledged or addressed any potential conflict of interest, and both cases involved circumstances very different from those present here. Both cases also featured facts assuring that third-party interests were fairly represented.

In the first case, *Craig v. Boren*, 429 U. S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), the sole appellant with a live claim at the time of decision was a beer vendor who challenged a law that allowed females to purchase 3.2% beer at the age of 18 but barred males from making such purchases until they turned 21. *Id.*, at 193, 97 S.Ct. 451. The Court's lead explanation for its

refusal to dismiss had nothing to do with the merits of the vendor's third-party standing claim. The Court noted that the other appellant, Curtis Craig, had been under the age of 21 during the proceedings below, that the appellees had not raised a standing objection below, and that they had not pressed an objection in this Court. *Id.*, at 192–194, 97 S.Ct. 451.

Only after this discussion did the Court say anything about the merits of the third-party claim, and even then, the Court said nothing about a conflict of interest between the vendor and underage males. The plurality now claims there was a potential conflict: Young men under the age of 21 had an interest in being barred from buying beer in order to protect themselves from their own reckless conduct. Suffice it to say that there is no indication that this ***2170** supposed conflict occurred to anybody when *Craig* was before this Court.

The plurality's second case, *Department of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990), is even weaker. A state bar ethics committee filed a disciplinary proceeding in state court against a lawyer who had entered into an attorney-fee arrangement that was prohibited by a provision of the Black Lung Benefits Act. When the State Supreme Court ruled in favor of the lawyer on the ground that the provision in question violated Black Lung claimants' constitutional right to counsel, both the bar ethics committee and the Department of Labor, which had intervened in state court, successfully petitioned for review in this Court. We then held that the attorney could defend the decision below based on the rights of his client.

Triplett is inapposite here for at least two reasons. First, the lawyer in that case did not initiate the litigation. Second, because the case arose in state court, his right to invoke his client's rights in that forum was a question of state law. Had we prevented him from asserting those rights in this Court, he would have been unable to defend himself against the petitioners' arguments. And on top of all this, *Triplett,* as we noted in *Kowalski*, "involved the representation of known claimants," and that "existing attorney-client relationship [was] quite different from the hypothetical ... relationship" between the abortion providers and clients in the present case. 543 U.S. at 131, 125 S.Ct. 564. That *Craig* and *Triplett* are the best authorities the plurality can find is telling proof of the weakness of its position.

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As THE CHIEF JUSTICE points out, *stare decisis* generally counsels adherence to precedent, and in deciding whether to overrule a prior decision, we consider factors beyond the strength of the precedent's reasoning. *Ante*, at 2112 – 2114. But here, such factors weigh in favor of overruling.

Reexamination of a precedent may be appropriate when it is an "outlier" and its reasoning cannot be reconciled with other established precedents, see *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U. S. ——, ——, 139 S.Ct. 1485, 203 L.Ed.2d 768 (2019) (slip op., at 17); *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ——, ——, 138 S.Ct. 2448, 201 L.Ed.2d 924 (2018) (slip op., at 43); *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), and that is true of the rule allowing abortion providers to assert their patients' rights. The parties have not brought to our attention any other situation in which a party is allowed to invoke the right of a third party with blatantly adverse interests. The rule that the majority applies here is an abortion-only rule.

THE CHIEF JUSTICE properly notes that subsequent legal developments may support overruling a precedent, *ante*, at 2112 – 2114, 109 S.Ct. 1917, and that factor too is present here. Both our general standing jurisprudence and our treatment of third-party standing have changed since *Singleton*. We have stressed the importance of insisting that a plaintiff assert an injury that is particular to its own situation. See, *e.g.*, *Spokeo, Inc.* v. *Robins*, 578 U. S. ——, ——, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (slip op., at 7); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Moreover, in *Kowalski*, 543 U. S. 125, 125 S.Ct. 564, 160 L.Ed.2d 519, we refined our ***2171** rule for third-party standing, and in *Newdow*, 542 U. S. 1, 124 S.Ct. 2301, 159 L.Ed.2d 98, we made it clear that a plaintiff cannot sue on behalf of a third party if the parties' interests may conflict.

The presence or absence of reliance is often a critical factor in applying the doctrine of stare decisis, see, *e.g.*, *Franchise Tax Bd.*, 587 U. S., at ——, 139 S.Ct., at (slip op., at 17); *Janus*, 585 U. S., at ——, 138 S.Ct., at (slip op., at 44); *South Dakota* v. *Wayfair, Inc.*, 585 U. S. ——, —— (2018) (slip op., at 20); *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 206–207, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991), but neither the plurality nor THE CHIEF JUSTICE claims that any reliance interests are at stake here. Women wishing to obtain abortions have not taken any action in reliance on the ability of abortion providers to sue on their behalf, and eliminating third-party standing for providers would not interfere with the ability of women to sue. Nor does it appear that abortion providers have done anything in reliance on the special third-party standing rule they have enjoyed. If that rule were abrogated, they could still ask to intervene or appear as an *amicus curiae* in a suit brought by a woman, but it is deeply offensive to our rules of standing to permit them to sue in the name of their patients when they challenge laws enacted to protect their patients' safety.

On remand, the District Court should permit the joinder of a plaintiff with standing and should not proceed until such a plaintiff appears.

* * *

The decision in this case, like that in *Whole Woman's Health*, twists the law, and I therefore respectfully dissent.

Justice GORSUCH, dissenting.

The judicial power is constrained by an array of rules. Rules about the deference due the legislative process, the standing of the parties before us, the use of facial challenges to invalidate democratically enacted statutes, and the award of prospective relief. Still more rules seek to ensure that any legal tests judges may devise are capable of neutral and principled administration. Individually, these rules may seem prosaic. But, collectively, they help keep us in our constitutionally assigned lane, sure that we are in the business of saying what the law is, not what we wish it to be.

Today's decision doesn't just overlook one of these rules. It overlooks one after another. And it does so in a case touching on one of the most controversial topics in contemporary politics and law, exactly the context where this Court should be leaning most heavily on the rules of the judicial process. In truth, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), is not even at issue here. The real question we face concerns our willingness to follow the traditional constraints of the judicial process when a case touching on abortion enters the courtroom.

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When confronting a constitutional challenge to a law, this Court ordinarily reviews the legislature's factual findings under a "deferential" if not "[u]ncritical" standard. *Gonzales v. Carhart*, 550 U.S. 124, 165–166, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007). When facing such a challenge, too, this Court usually accepts that "the public interest has been declared in terms well-nigh conclusive" by the legislature's adoption of the law—so we may review the law only for its constitutionality, not its wisdom. *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954). Today, however, the plurality declares that the law before us holds no benefits for the public and bears too many social costs. All while sharing virtually nothing about the ***2172** facts that led the legislature to conclude otherwise. The law might as well have fallen from the sky.

Of course, that's hardly the case. In Act 620, Louisiana's legislature found that requiring abortion providers to hold admitting privileges at a hospital within 30 miles of the clinic where they

perform abortions would serve the public interest by protecting women's health and safety. Those in today's majority never bother to say so, but it turns out that Act 620's admitting privileges requirement for abortion providers tracks longstanding state laws governing physicians who perform relatively low-risk procedures like colonoscopies, Lasik eye surgeries, and steroid injections at ambulatory surgical centers. In fact, the Louisiana legislature passed Act 620 only after extensive hearings at which experts detailed how the Act would promote safer abortion treatment—by providing "a more thorough evaluation mechanism of physician competency," promoting "continuity of care" following abortion, enhancing inter-physician communication, and preventing patient abandonment.

Testifying physicians explained, for example, that abortions carry inherent risks including uterine perforation, hemorrhage, cervical laceration, infection, retained fetal body parts, and missed ectopic pregnancy. Unsurprisingly, those risks are minimized when the physician providing the abortion is competent. Yet, unlike hospitals which undertake rigorous credentialing processes, Louisiana's abortion clinics historically have done little to ensure provider competence. Clinics have failed to perform background checks or to inquire into the training of doctors they brought on board. Clinics have even hired physicians whose specialties were unrelated to abortion—including a radiologist and an ophthalmologist. Requiring hospital admitting privileges, witnesses testified, would help ensure that clinics hire competent professionals and provide a mechanism for ongoing peer review of physician proficiency. Loss of admitting privileges, as well, might signal a problem meriting further investigation by state officials. At least one Louisiana abortion provider's loss of admitting privileges following a patient's death alerted the state licensing board to questions about his competence, and ultimately resulted in restrictions on his practice.

The legislature also heard testimony that Louisiana's clinics and the physicians who work in them have racked up dozens of citations for safety and ethical violations in recent years. Violations have included failing to use sterile equipment, maintaining unsanitary conditions, failing to monitor patients' vital signs, permitting improper administration of medications by unauthorized persons, and neglecting to obtain informed consent from patients. Some clinics have failed to maintain supplies of emergency medications and medical equipment for treating surgical complications. One clinic used single-use hoses and tubes on multiple patients, and the solution needed to sterilize instruments was changed so infrequently that it often had pieces of tissue floating in it. Hospital credentialing processes, witnesses suggested, could help prevent such violations. In the course of the credentialing process, physicians' prior safety lapses, including criminal violations and medical malpractice suits, would be revealed and investigated, and incompetent doctors might be weeded out.

The legislature heard, too, from affected women and emergency room physicians about clinic doctors' record of abandoning their patients. One woman testified that, while she was hemorrhaging, her abortion provider told her, " 'You're on your own. Get out.' " Eventually, the

woman went to ***2173** a hospital where an emergency room physician removed fetal body parts that the abortion provider had left in her body. Another patient who complained of severe pain following her abortion was told simply to go home and lie down. When she decided for herself to go to the emergency room, physicians discovered a tear in her uterus and a large hematoma containing a fetal head. The woman required an emergency hysterectomy. In another case, a clinic physician allowed a patient to bleed for three hours, yet a clinic employee testified that the physician would not let her call 911 because of possible media involvement. In the end, the employee called anyway and emergency room personnel discovered that the woman had a perforated uterus and a needed a hysterectomy. A different physician explained that she routinely treats abortion complications in the emergency room when the physician who performed the abortion lacks admitting privileges. In her experience, that situation "puts a woman's health at an unnecessary, unacceptable risk that results from a delay of care ... and a lack of continuity of care." Admitting privileges would mitigate these risks, she testified, because "the physician who performed the procedure would be the one best equipped to evaluate and treat the patient."

Nor did the legislature neglect to consider the law's potential burdens. As witnesses explained, the admitting privileges requirement in Act 620 for abortion clinic providers would parallel existing requirements for many physicians who work at ambulatory surgical centers. And there is no indication this parallel admitting privileges requirement has led to the closing of any surgical centers or otherwise presented obstacles to quality care in Louisiana. Further, legislators learned that at least one Louisiana abortion provider already had qualifying admitting privileges, suggesting other competent abortion providers would be able to comply with the new regulation as well.

Since trial, the State continues to accrue evidence supporting Act 620, and the State has sought to lodge that evidence with this Court. In particular, the State has learned of additional safety violations at Louisiana clinics, including evidence of an abortion provider deviating from the standard of care in a way that can result in the live births of nonviable fetuses. The State has also proffered new evidence of potential criminal conduct by Louisiana abortion providers, including the failure to report the forcible rape of a minor and performing an abortion on a minor without parental consent or judicial bypass.

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After overlooking so many facts and the deference owed to the legislative process, today's decision misapplies many of the rules that normally constrain the judicial process. Start with the question who can sue. To establish standing in federal court, a plaintiff typically must assert an injury to her own legally protected interests—not the rights of someone else. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). This rule ensures that the judiciary stays focused on the "factual situation before it," *New York v. Ferber*, 458 U.S. 747, 768, 102 S.Ct. 3348, 73

L.Ed.2d 1113 (1982), while "questions of wide public significance" remain with "governmental institutions ... more competent to address" them, *Warth*, 422 U.S. at 500, 95 S.Ct. 2197.

No one even attempts to suggest this usual prerequisite is satisfied here. The plaintiffs before us are abortion providers. They do not claim a constitutional right to perform that procedure, and no one on the Court contends they hold such a right. Instead, the abortion providers before us seek only to assert the constitutional ***2174** rights of an undefined, unnamed, indeed unknown, group of women who they hope will be their patients in the future.

In narrow circumstances, to be sure, this Court has allowed cases to proceed based on "third-party standing." But to qualify, the plaintiff must demonstrate both that he has a " 'close' relationship" with the person whose rights he wishes to assert *and* that some " 'hindrance' " hampers the right-holder's "ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004). Think of parents and children, guardians and wards. In these special cases, the logic goes, the plaintiff's interests are so aligned with those of a particular right-holder that the litigation will proceed in much the same way as if the right-holder herself were present.

Nothing like that exists here. In the first place, the plaintiff abortion providers identify no reason to think affected women are unable to assert their own rights if they wish. Instead, the plaintiffs merely gesture to a 1976 plurality opinion suggesting that women seeking abortions "generally" face a hindrance in asserting their own rights. *Singleton v. Wulff*, 428 U.S. 106, 118, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). But whatever the supposition of a 1976 plurality, in the years since interested women have challenged abortion regulations on their own behalf in case after case. See, *e.g.*, *McCormack v. Herzog*, 788 F.3d 1017 (CA9 2015); *Jane L. v. Bangerter*, 102 F.3d 1112 (CA10 1996); *Margaret S. v. Edwards*, 794 F.2d 994 (CA5 1986)*Margaret S. v. Edwards*, 794 F.2d 994 (CA5 1986); see also *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, ——, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016) (THOMAS, J., dissenting) (slip op., at 4) (collecting additional examples). And no one suggests this suit differs from those cases in any meaningful way. The truth is transparent: The plaintiffs hardly try to carry their burden of showing a hindrance because they can't.

Separately and additionally, the abortion providers cannot claim a "close relationship" with the women whose rights they assert. Normally, the fact that the plaintiffs do not even know who those women are would be enough to preclude third-party standing. This Court has held, for example, that a future "*hypothetical* attorney-client relationship" (as opposed to an "*existing*" one) cannot confer third-party standing. *Kowalski*, 543 U.S. at 131, 125 S.Ct. 564. Likewise, this Court has held that a pediatrician lacks standing to *defend* a State's abortion laws on the theory that fetuses are his future potential patients. *Diamond v. Charles*, 476 U.S. 54, 66, 106 S.Ct. 1697, 90 L.Ed.2d

48 (1986). If standing isn't present in cases like those, it is hard to see how it might be present in this one.

Nor is that the end of the plaintiffs' standing problems. Even when a plaintiff can identify an actual and close relationship, this Court will normally refuse third-party standing if the plaintiff has a potential conflict of interest with the person whose rights are at issue. See *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 15, 17–18, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). And it's pretty hard to ignore the potential for conflict here. After all, Louisiana's law expressly aims to protect women from the unsafe conditions maintained by at least some abortion providers who, like the plaintiffs, are either unwilling or unable to obtain admitting privileges. Cf. *ante,* at 2166 – 2167 (ALITO, J., dissenting).

Seeking to set all these difficulties aside, today's decision contends that Louisiana has waived its prudential standing arguments. But in doing so, today's decision mistakes three more legal principles. First, what the plurality characterizes as a waiver ***2175** arises from the State's admission that applicable circuit law allowed the plaintiffs standing. At worst, that reflects a forfeiture of, or a failure to pursue, a possible argument against standing, not an affirmative waiver of the argument, or an intentional relinquishment of any interest in the issue. Cf. *ante,* at 2165 – 2166 (ALITO, J., dissenting). Second, this Court typically relies on a forfeiture or even a waiver only if the issue was " 'not pressed or passed upon' " in the lower courts. *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992). That rule's disjunctive phrasing is no accident—it "permit[s] review of an issue not pressed so long as it has been passed upon" below. *Ibid.* Here, the Fifth Circuit *did* pass upon the standing question—so forfeiture or waiver presents no impediment to our review. See *June Medical Services, L.L.C. v. Gee*, 814 F.3d 319, 322–323 (2016). Finally, this Court has held that even truly forfeited or waived arguments may be entertained when structural concerns or third-party rights are at issue. *Freytag v. Commissioner*, 501 U.S. 868, 878–880, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). Both conditions are present here.

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Next consider our rules about facial challenges. Generally, courts decide the constitutionality of statutes as applied to specific people in specific situations and disfavor facial challenges seeking to forestall a law's application in every circumstance. The reasons for this rule are many. Not least, when a court focuses on the parties before it, it is able to assess the law's application within a real factual context, rather than left to imagine "every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Barrows v. Jackson*, 346 U.S. 249, 256, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). Importantly, too, as-applied challenges reduce the risk that a court will "short circuit the democratic process" by interfering with legislation any more

than necessary to remedy a complaining party's injury. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008).

As a result, the path for a litigant pursuing a facial challenge is deliberately difficult. Typically, a plaintiff seeking to render a law unenforceable in all of its applications must show that the law cannot be constitutionally applied against *anyone* in *any* situation. *United States v. Stevens*, 559 U.S. 460, 472–473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). This Court has carved out an exception to this high bar for overbreadth challenges under the First Amendment. Some suggest this exception is ill-advised. *United States* v. *Sineneng-Smith*, 590 U. S. ——, —— – ——, 140 S.Ct. 1575, —— L.Ed.2d —— (2020) (THOMAS, J., concurring) (slip op., at 5–6). But even in First Amendment overbreadth challenges, a plaintiff still must show that the law in question has " 'a substantial number of ... applications [that] are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' " *Stevens*, 559 U.S. at 473, 130 S.Ct. 1577 (quoting *Washington State Grange*, 552 U.S. at 449, n. 6, 128 S.Ct. 1184); see also *Stevens*, 559 U.S. at 481–482, 130 S.Ct. 1577 (holding law unconstitutional under First Amendment where "impermissible applications ... far outnumber[ed] any permissible ones").

Today, it seems any of these standards would demand too much. Instead of asking whether the law has a "substantial number of unconstitutional applications" compared to its "legitimate sweep," the plurality asks whether the law will impose a " 'substantial obstacle' " for a " 'large fraction' " of " 'those women for whom the provision is ***2176** an actual rather than an irrelevant restriction.' " *Ante,* at 2132. Concededly, the two tests sound similar—after all, who could say whether a "substantial number" is more or less than a "large fraction"? But notice the switch at the end, where the plurality limits our focus to women for whom the law is an "actual" restriction. Because of that limitation, it doesn't matter how many women continue to have convenient access to abortions: Any woman not burdened by the challenged law is deemed "irrelevant" to the analysis. So instead of asking how the law's unconstitutional applications compare to its legitimate sweep, the plurality winds up asking only whether the law burdens a very large fraction of the people that it burdens. The words might sound familiar, but this circular test is unlike anything we apply to facial challenges anywhere else.

Abandoning our usual caution with facial challenges leads, predictably, to overbroad conclusions. Suppose that for a substantial number of women Louisiana's law imposes no burden at all. These women might live in an area well-served by well-qualified abortion providers who can easily obtain admitting privileges. No one could dispute the law is constitutional as applied to these women and providers. But suppose the law makes it difficult to obtain an abortion on the other side of the State, where qualified providers are fewer and farther between. Under the standard applied today, it seems the entire law would fall statewide, notwithstanding its undeniable constitutionality in many applications.

Nor is this possibility farfetched. Today's decision declares the admitting privileges requirement unconstitutional even as applied to Does 3 and 5, each of whom holds admitting privileges. Not a single woman would be burdened by requiring these doctors to maintain the privileges they already have. Yet the State may not enforce the law even against them. In effect, the standard for facial challenges has been flipped on its head: Rather than requiring that a law be unconstitutional in all its applications to fall, today's decision requires that Louisiana's law be constitutional in all its applications to stand.

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Even when it comes to assessing the law's effects on the subset of women deemed "relevant," this case proves unusual. Normally, to obtain a prospective injunction like the one approved today, a plaintiff must show that irreparable injury is not just possible, but likely. *O'Shea* v. *Littleton*, 414 U.S. 488, 501–502, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Yet, nothing like that standard can be found at work today.

The plaintiffs allege that statewide enforcement of Act 620 would irreparably injure Louisiana women by making it difficult for them to obtain abortions. To justify injunctive relief on that theory, however, it can't be enough to show that the law would induce any particular doctor or clinic to stop providing abortions. Instead, the plaintiffs would have to show that a sufficient number of clinics would close (without enough new clinics opening) so that supply would no longer meet demand for abortion in the State. And when assessing claims like *that*, we usually proceed with caution, aware of the "the difficulties and uncertainties involved in determining how [a] relevant market" would behave in response to changed circumstances. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 743, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). At a minimum, we expect one change in a marketplace—such as the introduction of a new regulation—will induce other responsive changes. ***2177** *General Motors Corp. v. Tracy*, 519 U.S. 278, 307–309, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997). When "the claim is one that simply makes no economic sense," too, the plaintiffs "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Rather than follow these rules, today's decision proceeds to accept one speculative proposition after another to arrive at what can only be called a worst case scenario. Take the question whether existing providers will be able to continue their existing practices. On its way to predicting dire results, the plurality uncritically accepts that, if Act 620 went into effect, Doe 5 would be unable to obtain admitting privileges in Baton Rouge. The plurality does so even though it is undisputed

that the sole remaining step for him to obtain privileges is to find a doctor willing to cover for him —and that Doe 5 gave up on that effort after asking only one doctor. Similarly, the plurality takes it as given that Doe 2 would be denied admitting privileges even though he dropped a pending application when the hospital simply sent him a request for additional information. Maybe these physicians didn't feel it was worth putting in much effort to obtain admitting privileges given their chances of prevailing in this lawsuit. But it "taxes the credulity of the credulous" to think they would have treated the process so lightly if their livelihood depended on securing admitting privileges. *Maryland v. King*, 569 U.S. 435, 466, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013) (Scalia, J., dissenting). Cf. *ante,* at 2158 – 2160 (ALITO, J., dissenting).

That example only begins to illustrate the remarkably static view of the market on display here. Today's decision also appears to assume that, if Louisiana's law took effect, not a single hospital would amend its rules to permit abortion providers easier access to admitting privileges; no clinic would choose to relocate closer to a hospital that offers admitting privileges rather than permanently close its doors; the prospect of significant unmet demand would not prompt a single Louisiana doctor with established admitting privileges to begin performing abortions; and unmet demand would not induce even one out-of-state abortion provider to relocate to Louisiana.

All these assumptions are open to question. Hospitals can (and do) change their policies in response to regulations. Clinic operators have opened, closed, and relocated clinics numerous times. There are hundreds of OB/GYNs with active admitting privileges in Louisiana who could lawfully perform abortions tomorrow. Millions of Americans move between States every year to pursue their profession. Yet with conditions ripe for market entry and expansion, today's decision foresees nothing but clinic closures and unmet demand.

Not only questionable, the plurality's assumptions are already contradicted by emerging evidence. For example, a major hospital reacted to the law by developing a new type of admitting privileges expressly for an abortion provider seeking to comply with Act 620. Whether this type of privileges satisfies the statute is yet unknown—so, again assuming the worst, today's decision simply ignores the possibility. If nothing else, this development belies the prediction that hospitals statewide would stand idly by as thousands upon thousands of requests for abortions go unfulfilled.

What's more, as this suit was in progress, the State discovered two additional Louisiana abortion providers not reflected in the district court's opinion. No one disputes the accuracy of the State's information about these two providers. Nor could anyone deny the importance of this information, ***2178** when so much of today's decision seems to turn on the exact quantity and distribution of a relatively small number of abortion providers. Normally, this Court might hesitate to deliver a fact-bound decision premised on facts we know to be incorrect. But today's decision, assuming the worst once more, simply proceeds as if these providers didn't exist.

If there is a silver lining, though, it may be here. This Court generally recognizes that facts can change over time—and that, when they do, legal conclusions based on them may have to change as well. Even so-called "permanent injunctions" are actually provisional—open to modification "to prevent the possibility that [they] may operate injuriously in the future." *Glenn v. Field Packing Co.*, 290 U.S. 177, 179, 54 S.Ct. 138, 78 L.Ed. 252 (1933) (*per curiam*). After all, when the facts change, the law cannot pretend nothing has happened. For that reason, we have instructed lower courts to reconsider injunctions "when the party seeking relief ... can show a significant change either in factual conditions or in law." *Agostini v. Felton*, 521 U.S. 203, 215, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (internal quotation marks omitted). And, given the fact-intensive nature of today's analysis, the relief directed might well need to be reconsidered below if, for example, hospitals start offering qualifying admitting privileges to abortion providers, a handful of abortion providers relocate from other States, or even a tiny fraction of Louisiana's existing OB/GYNs decide to begin performing abortions. Given the post-trial developments Louisiana has already identified but no court has yet considered, there's every reason to think the factual context here is prone to significant changes.

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Another background rule, another exception. When it comes to the factual record, litigants normally start the case on a clean slate. While a previous case's legal rules can create precedent binding in the current dispute, earlier "fact-bound" decisions typically "provide only minimal help when other courts consider" later cases with different factual "circumstances." *Buford v. United States*, 532 U.S. 59, 65–66, 121 S.Ct. 1276, 149 L.Ed.2d 197 (2001). We've long recognized that this arrangement is required by due process—because while the law binds everyone equally, parties are normally entitled to the chance to present evidence about their own unique factual circumstances. See *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971).

No hint of these rules can be found in today's decision. From beginning to end, the plurality treats *Whole Woman's Health*'s fact-laden predictions about how a Texas law would impact the availability of abortion in that State in 2016 as if they obviously and necessarily applied to Louisiana in 2020. Most notably, the plurality cites *Whole Woman's Health* for the proposition that admitting privileges requirements offer no benefit when it comes to patient safety or otherwise. But *Whole Woman's Health* found an absence of benefit based only on the particular factual record before it. Nothing in the decision suggested that its conclusions about the costs and benefits of the Texas statute were universal principles of law, medicine, or economics true in all places and at all times. See, *e.g.*, 579 U. S., at ——– – ———, ———, ——– – ———, 136 S.Ct., at (slip op., at 22–23, 26, 31–32). Yet that is exactly how the plurality treats those conclusions—all while

leaving unmentioned the facts Louisiana amassed in an effort to show that its law promises patient benefits in this place at this time.

***2179** Not only does today's decision treat factual questions as if they were legal ones, it treats legal questions as if they were facts. We have previously explained that it would "be inconsistent with the idea of a unitary system of law" for the Supreme Court to defer to lower court legal holdings. *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Yet, the plurality today reviews for clear error not only the district court's findings about how the law will affect abortion access, but also the lower court's judgment that the law's effects impose a "substantial obstacle." The plurality defers not only to the district court's findings about the extent of the law's benefits, but also to the lower court's judgment that the benefits are so limited that the law's burden on abortion access is "undue." By declining to apply our normal *de novo* standard of review to questions of law like these, today's decision proceeds on the remarkable premise that, even if the district court was wrong on the law, a duly enacted statute must fall because the lower court wasn't *clearly* wrong.

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After so much else, one might at least hope that the legal test lower courts are tasked with applying in this area turns out to be replicable and predictable. After all, "[l]iving under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.' " *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (quotation modified). The existence of an administrable legal test even lies at the heart of what makes a case justiciable—as we have put it, federal courts may not entertain a question unless there are " 'judicially discoverable and manageable standards for resolving it.' " *Rucho* v. *Common Cause*, 588 U. S. ——, ——, 139 S.Ct. 2484, 204 L.Ed.2d 931 (2019) (slip op., at 11). Nor does the need for clear rules dissipate as the stakes grow. If anything, the judicial responsibility to avoid standardless decisionmaking is at its apex in " 'the most heated partisan issues.' " *Id.*, at ——, 139 S.Ct., at (slip op., at 15).

Consider, for example, our precedents involving the First Amendment's right to free speech. In an effort to keep judges from straying into the political fray, this Court has provided a detailed roadmap: A court must determine whether protected speech is at issue, whether the restriction is content based or content neutral, whether the State's asserted interest is compelling or substantial, and whether the State might rely on less restrictive alternatives to achieve the same goals. At no point may a judge simply " 'balanc[e]' the governmental interests ... against the First Amendment rights" at stake because, as we have recognized, it would be "inappropriate" for any court "to label one as being more important or more substantial than the other." *United States v. Robel*, 389 U.S. 258, 268, n. 20, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967). Any such raw balancing of competing

social interests must be left to the legislature—"our inquiry is more circumscribed." *Ibid.* Nor is this idea unique to the First Amendment context. This Court has consistently rejected the idea that courts may decide constitutional issues by relying on "abstract opinions ... of the justice of the decision" or "of the merits of the legislation" at issue. *Davidson v. New Orleans*, 96 U.S. 97, 104, 24 L.Ed. 616 (1878).

By contrast, and as today's concurrence recognizes, the legal standard the plurality applies when it comes to admitting privileges for abortion clinics turns out to be exactly the sort of all-things-considered balancing of benefits and burdens this Court has long rejected. Really, it's little ***2180** more than the judicial version of a hunter's stew: Throw in anything that looks interesting, stir, and season to taste. In another context, this Court has described the sort of decisionmaking on display today as "*inherently*, and therefore *permanently*, unpredictable." *Crawford v. Washington*, 541 U.S. 36, 68, n. 10, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Under its terms, "[w]hether a [burden] is deemed [undue] depends heavily on which factors the judge considers and how much weight he accords each of them." *Id.*, at 63, 124 S.Ct. 1354.

What was true there turns out to be no less true here. The plurality sides with the district court in concluding that the time and cost some women might have to endure to obtain an abortion outweighs the benefits of Act 620. Perhaps the plurality sees that answer as obvious, given its apparent conclusion that the Act would offer the public no benefits of any kind. But for its test to provide any helpful guidance, it must be capable of resolving cases the plurality can't so easily dismiss. Suppose, for example, a factfinder credited the State's evidence of medical benefit, finding that a small number of women would obtain safer medical care if the law went into effect. But suppose the same factfinder *also* credited a plaintiff's evidence of burden, finding that a large number of women would have to endure longer wait times and farther drives, and that a very small number of women would be unable to obtain an abortion at all. How is a judge supposed to balance, say, a few women's emergency hysterectomies against many women spending extra hours travelling to a clinic? The plurality's test offers no guidance. Nor can it. The benefits and burdens are incommensurable, and they do not teach such things in law school.

When judges take it upon themselves to assess the raw costs and benefits of a new law or regulation, it can come as no surprise that "[s]ome courts wind up attaching the same significance to opposite facts," and even attaching the opposite significance to the same facts. *Ibid.* It can come as no surprise, either, that judges retreat to their underlying assumptions or moral intuitions when deciding whether a burden is undue. For what else is left?

Some judges have thrown up their hands at the task put to them by the Court in this area. If everything comes down to balancing costs against benefits, they have observed, "the only institution that can give an authoritative answer" is this Court, because the question isn't one of law

at all and the only "balance" that matters is the one this Court strikes. *Planned Parenthood of Ind. & Ky. v. Box*, 949 F.3d 997, 999 (CA7 2019) (Easterbrook, J., concurring in denial of rehearing en banc). The lament is understandable. Missing here is exactly what judges usually depend on when asked to make tough calls: an administrable legal rule to follow, a neutral principle, something outside themselves to guide their decision.

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Setting aside the other departures from the judicial process on display today, the concurrence suggests it can remedy at least this one. We don't need to resort to a raw balancing test to resolve today's dispute. A deeper respect for *stare decisis* and existing precedents, the concurrence assures us, supplies the key to a safe way out. Unfortunately, however, the reality proves more complicated.

Start with the concurrence's discussion of *Whole Woman's Health*. Immediately after paying homage to *stare decisis*, the concurrence *refuses* to follow the all-things-considered balancing test that decision employed when striking down Texas's admitting privileges law. In the process, the concurrence rightly recounts many of the problems with raw balancing tests. But ***2181** then, switching directions again, the concurrence insists we are bound by an *alternative* holding in *Whole Woman's Health*. According to the concurrence, this alternative holding declared that the Texas law imposed an impermissible "substantial obstacle" to abortion access in light *only* of the burdens the law imposed—"independent of [any] discussion of [the law's] benefits." *Ante,* at 2138 – 2139 (ROBERTS, C. J., concurring in judgment). And, the concurrence concludes, because the facts of this suit look like those in *Whole Woman's Health*, we must find an impermissible substantial obstacle here too.

But in this footwork lie at least two missteps. For one, the facts of this suit cannot be so neatly reduced to *Whole Woman's Health* redux. See *ante,* at 2153 – 2155; *ante,* at 2157 – 2158, 2160 – 2166 (ALITO, J. dissenting). For another, *Whole Woman's Health* nowhere issued the alternative holding on which the concurrence pins its argument. At no point did the Court hold that the burdens imposed by the Texas law alone—divorced from any consideration of the law's benefits—could suffice to establish a substantial obstacle. To the contrary, *Whole Woman's Health* insisted that the substantial obstacle test "*requires* that courts consider the burdens a law imposes on abortion access together with the benefits th[e] la[w] confer[s]." 578 U. S., at ——— – ———, 136 S.Ct., at (emphasis added) (slip op., at 19–20). And whatever else respect for *stare decisis* might suggest, it cannot demand allegiance to a nonexistent ruling inconsistent with the approach actually taken by the Court.

The concurrence's fallback argument doesn't solve the problem either. So what if *Whole Woman's Health* rejected the benefits-free version of the "substantial obstacle" test the concurrence

endorses? The concurrence assures us that *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), specified this form of the test, so we must (or at least may) do the same, whatever *Whole Woman's Health* says.

But here again, the concurrence rests on at least one mistaken premise. In the context of laws implicating only the State's interest in fetal life previability, the *Casey* plurality did describe its "undue burden" test as asking whether the law in question poses a substantial obstacle to abortion access. 505 U.S. at 878, 112 S.Ct. 2791. But when a State enacts a law "to further the health or safety of a woman seeking an abortion," the *Casey* plurality added a key qualification: Only "*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Ibid.* (emphasis added). That qualification is clearly applicable here, yet the concurrence nowhere addresses it, applying instead a new test of its own creation. In the context of medical regulations, too, the concurrence's new test might even prove stricter than strict scrutiny. After all, it's possible for a regulation to survive strict scrutiny if it is narrowly tailored to advance a compelling state interest. And no one doubts that women's health can be such an interest. Yet, under the concurrence's test it seems possible that even the most compelling and narrowly tailored medical regulation would have to fail if it placed a substantial obstacle in the way of abortion access. Such a result would appear to create yet another discontinuity with *Casey*, which expressly disavowed any test as strict as strict scrutiny. *Id.*, at 871, 112 S.Ct. 2791.

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To arrive at today's result, rules must be brushed aside and shortcuts taken. While the concurrence parts ways with the plurality at the last turn, the road both travel leads us to a strangely open space, unconstrained ***2182** by many of the neutral principles that normally govern the judicial process. The temptation to proceed this direction, closer with each step toward an unobstructed exercise of will, may be always with us, a danger inherent in judicial review. But it is an impulse this Court normally strives mightily to resist. Today, in a highly politicized and contentious arena, we prove unwilling, or perhaps unable, to resist that temptation. Either way, respectfully, it is a sign we have lost our way.

Justice KAVANAUGH, dissenting.

I join Parts I, II, and III of Justice ALITO's dissent. A threshold question in this case concerns the proper standard for evaluating state abortion laws. The Louisiana law at issue here requires doctors who perform abortions to have admitting privileges at a hospital within 30 miles of the abortion clinic. The State asks us to assess the law by applying the undue burden standard of *Planned*

Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). [1] The plaintiffs ask us to apply the cost-benefit standard of *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016).

Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard. *Ante*, at 2134 – 2139 (ROBERTS, C. J., concurring in judgment); *ante*, at 2149 – 2153 (THOMAS, J., dissenting); *ante*, at 2154 – 2155 (ALITO, J., joined by THOMAS, GORSUCH, and KAVANAUGH, JJ., dissenting); *ante*, at 2178 – 2180 (GORSUCH, J., dissenting). A different five Members of the Court conclude that Louisiana's admitting-privileges law is unconstitutional because it "would restrict women's access to abortion to the same degree as" the Texas law in *Whole Woman's Health*. *Ante*, at 2139 – 2140 (opinion of ROBERTS, C. J.); see also *ante*, at 2120 – 2133 (opinion of BREYER, J., joined by GINSBURG, SOTOMAYOR, and KAGAN, JJ.).

I agree with the first of those two conclusions. But I respectfully dissent from the second because, in my view, additional factfinding is necessary to properly evaluate Louisiana's law. As Justice ALITO thoroughly and carefully explains, the factual record at this stage of plaintiffs' facial, pre-enforcement challenge does not adequately demonstrate that the three relevant doctors (Does 2, 5, and 6) cannot obtain admitting privileges or, therefore, that any of the three Louisiana abortion clinics would close as a result of the admitting-privileges law. I expressed the same concern about the incomplete factual record more than a year ago during the stay proceedings, and the factual record has not changed since then. See *June Medical Services, L.L.C.* v. *Gee*, 586 U. S. ——, 139 S.Ct. 663, 203 L.Ed.2d 143 (2019) (opinion dissenting from grant of application for stay). In short, I agree with Justice ALITO that the Court should remand the case for a new trial and additional factfinding under the appropriate legal standards. [2]

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Although parts of *Casey*'s joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), as the narrowest position supporting the judgment.

2 Justice GORSUCH correctly notes that *Casey* "expressly disavowed any test as strict as strict scrutiny." *Post,* at 2181 (dissenting opinion). But he certainly is wrong to suggest that my position is in any way inconsistent with that disavowal. Applying strict scrutiny would require "*any* regulation touching upon the abortion decision" to be the least restrictive means to further a compelling state interest. *Casey*, 505 U.S. at 871, 112 S.Ct. 2791 (plurality opinion) (emphasis added). *Casey* however recognized that such a test would give "too little acknowledgement and implementation" to the State's "legitimate interests in the health of the woman and in protecting the potential life within her." *Ibid.* Under *Casey*, abortion regulations are valid so long as they do not pose a substantial obstacle and meet the threshold requirement of being "reasonably related" to a "legitimate purpose." *Id.*, at 878, 112 S.Ct. 2791; *id.*, at 882, 112 S.Ct. 2791 (joint opinion).

3 Justice GORSUCH considers this is a "nonexistent ruling" nowhere to be found in *Whole Woman's Health*. *Post*, at 2181 (dissenting opinion). I disagree. *Whole Woman's Health* first surveyed the benefits of Texas's admitting privileges requirement. 579 U. S., at —— – ——, 136 S.Ct. (slip op., at 23–24). The Court then transitioned to examining the law's burdens: "*At the same time*, the record evidence indicates that the admitting-privileges requirement places a substantial obstacle in the path of a woman's choice." *Id.*, at ——, 136 S.Ct. (slip op., at 24) (internal quotation marks omitted; emphasis added). And the Court made clear that a law which has the purpose or effect of placing "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" imposes an "undue burden" and therefore violates the Constitution. *Id.*, at ——, 136 S.Ct. (slip op., at 1) (internal quotation marks omitted; emphasis deleted). Thus the discussion of benefits in *Whole Woman's Health* was not necessary to its holding.

4 For the reasons the plurality explains, *ante,* at 2117 – 2120, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients.

5 Justice ALITO misunderstands my discussion of credentials as focusing on the law's lack of benefits. See *post*, at 2154 – 2155 (dissenting opinion). But my analysis, like *Casey*, is limited to the law's effect on the availability of abortion.

6 I agree with Justice ALITO that the validity of admitting privileges laws "depend[s] on numerous factors that may differ from State to State." *Post*, at 2157 (dissenting opinion). And I agree with Justice GORSUCH that "[w]hen it comes to the factual record, litigants normally start the case on a clean slate." *Post,* at 2178 (dissenting opinion). Appreciating that others may in good faith disagree, however, I cannot view the record here as in any

pertinent respect sufficiently different from that in *Whole Woman's Health* to warrant a different outcome.

1 In practice, this doctrine's application has been unconvincing and unpredictable, which has long caused me to question its legitimacy. See, *e.g.*, *United States* v. *Sineneng-Smith*, 590 U. S. ——, —— – ——, 140 S.Ct. 1575, —— L.Ed.2d —— (2020) (THOMAS, J., concurring) (slip op., at 6–9); *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, —— – ——, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016) (THOMAS, J., dissenting) (slip op., at 2–5); *Kowalski*, 543 U.S. at 135, 125 S.Ct. 564 (THOMAS, J., concurring). For example, the Court has held that attorneys cannot bring suit to vindicate the Sixth Amendment rights of their potential clients due to the lack of a current close relationship, *id.*, at 130–131, 125 S.Ct. 564, but the Court permits defendants to seek relief based on the Fourteenth Amendment equal protection rights of potential jurors whom they have never met, *Powers*, 499 U.S. at 410–416, 111 S.Ct. 1364; *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 129, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). And today, the plurality reaffirms our precedent allowing beer vendors to assert the Fourteenth Amendment rights of their potential customers. *Ante*, at 2118 – 2119, 114 S.Ct. 1419 (citing *Craig v. Boren*, 429 U.S. 190, 192, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)). But it is fair to wonder whether gun vendors could expect to receive the same privilege if they seek to vindicate the Second Amendment rights of their customers. Given this Court's ad hoc approach to third-party standing and its tendency to treat the Second Amendment as a second-class right, their time would be better spent waiting for Godot.

2 Common-law courts' recognition of prochain ami or "next friend" standing is not inconsistent with this point. In those cases, the third party was "no party to the suit in the technical sense" but rather served as "an officer of the court" and was legally "appointed by [the court] to look after the interests of [the party lacking legal capacity]," who remained the real party in interest on "whom the judgment in the action [was] consequently binding." *Blumenthal v. Craig*, 81 F. 320, 321–322 (CA3 1897) (internal quotation marks omitted). In contrast, the real parties in interest here—women seeking abortions in Louisiana—cannot be bound by a judgment against abortionists and abortion clinics.

3 Although the Court concluded that the abortionists had standing to challenge the constitutionality of abortion regulations in *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), it did so only in dicta, *id.*, at 188–189, 93 S.Ct. 739. The abortionists' coplaintiffs were pregnant women whom the Court determined had standing to assert their own rights, and thus whether the abortionists had standing was "a matter of no great consequence." *Id.*, at 188, 93 S.Ct. 739. Even so, the Court only cursorily considered the question whether the threat of prosecution faced by the abortionists was a sufficiently direct injury under the Court's then-existing standing doctrine, *id.*, at 188–189, 93 S.Ct. 739, which was considerably more lenient than our current understanding. The Court did

not engage in any meaningful Article III analysis or refer to this Court's third-party standing doctrine. *Ibid.*; see also *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 440, n. 30, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (concluding without any analysis that an abortionist had standing to raise a claim on behalf of his minor patients). And notably, the abortionists in that case had brought suit to vindicate their own constitutional rights to "practic[e] their ... professio[n]." *Doe, supra*, at 186, 93 S.Ct. 739; see also *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 62, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (concluding, without any analysis of Article III or the third-party standing doctrine, that abortionists had standing in a suit alleging violations of both their own constitutional rights and those of their clients).

4 Three Justices of this Court have recently taken the position that this rule from *Marks*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260, does not necessarily apply in all 4–1–4 cases, and that such decisions can sometimes produce "no controlling opinion at all." *Ramos v. Louisiana*, 590 U. S. ——, ——, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020) (principal opinion) (slip op., at 18). But even under their view, Justice Blackmun's plurality in *Singleton* would not be considered binding precedent.

5 Notably, plaintiffs point to no evidence in the record of women who seek abortions in Louisiana actually opposing this law on the ground that it violates their constitutional rights.

6 Although plaintiffs initially argued that Louisiana's law also violated their procedural due process rights by requiring them to obtain admitting privileges in an unreasonably short time, App. 24, 28, they have since abandoned that claim. And even if they had asserted violations of their own rights before this Court, those legal injuries would be insufficient to establish standing for a distinct claim based on their clients' putative rights. See *supra,* at 2142.

7 See, *e.g.,* Ala. Rev. Code § 3605 (1867); Terr. of Ariz., Howell Code, ch. 10, § 45 (1865); Ark. Rev. Stat., ch. 44, div. III, Art. II, § 6 (1838); 1861 Cal. Stat., ch. 521, § 45, p. 588; Colo. (Terr.) Rev. Stat. § 42 (1868); Conn. Gen. Stat., Tit. 12, §§ 22–24 (1861); Fla. Acts 1st Sess., ch. 1637, subch. III, §§ 10, 11, ch. 8, §§ 9, 10 (1868); Terr. of Idaho Laws, Crimes and Punishments § 42 (1864); Ill. Stat., ch. 30, § 47 (1868); Ind. Laws ch. LXXXI, § 2§ 2 (1859); Iowa Rev. Gen. Stat., ch. 165, § 4221 (1860); Kan. Gen. Stat., ch. 31, §§ 14, 15, 44 (1868); La. Rev. Stat., Crimes and Offenses § 24 (1856); Me. Rev. Stat., Tit. XI, ch. 124, § 8 (1857); 1868 Md. Laws ch. 179, § 2, p. 315; Mass. Gen. Stat., ch. 165, § 9 (1860); Mich. Rev. Stat., Tit. XXX, ch. 153, §§ 32, 33, 34 (1846); Terr. of Minn. Rev. Stat., ch. 100, §§ 10, 11 (1851); Miss. Rev. Code, ch. LXIV, Arts. 172, 173 (1857); Mo. Rev. Stat., Art. II, §§ 9, 10, 36 (1835); Terr. of Mont. Laws, Criminal Practice Acts § 41 (1864); Terr. of Neb. Rev. Stat., Crim. Code § 42 (1866); Terr. of Nev. Laws ch. 28, § 42 (1861); 1848 N. H. Laws ch. 743, §§ 1, 2, p. 708; 1849 N. J. Laws, pp. 266–267; 1854 Terr. of N. M. Laws ch. 3, §§ 10, 11, p. 88; 1846 N. Y. Laws ch. 22, § 1, p. 19; 1867 Ohio Laws § 2, pp. 135–136; Ore. Gen. Laws, Crim. Code, ch. XLIII, § 509 (1845–1864); 1860 Pa. Laws no. 374, §§ 87, 88, 89, pp. 404–405; Tex. Gen. Stat. Dig., Penal Code, ch. VII, Arts. 531–536 (1859); 1867 Vt. Acts &

Resolves no. 57, §§ 1, 3, pp. 64–66; 1848 Va. Acts, Tit. II, ch. 3, § 9, p. 96; Terr. of Wash. Stat., ch. II, §§ 37, 38 (1854); Wis. Rev. Stat., ch. 164, §§ 10, 11, ch. 169, §§ 58, 59 (1858).

8 I agree with Justice ALITO's application of our precedents except in Part IV–F of his opinion, but I would not remand for further proceedings. Because plaintiffs lack standing under Article III, I would instead remand with instructions to dismiss for lack of jurisdiction. Alternatively, if I were to reach the merits because a majority of the Court concludes we have jurisdiction, I would affirm, as plaintiffs have failed to carry their burden of demonstrating that Act 620 is unconstitutional, even under our precedents.

1 Quality Check, Find a Gold Seal Health Care Organization (2020), https://www.qualitycheck.org/search/?keyword=louisiana#keyword=louisiana&accreditationprogram=Hospital (listing "[o]rganizations that have achieved The Gold Seal of Approval from the Joint Commission").

2 Ryan, Negligent Credentialing: A Cause of Action for Hospital Peer Review Decisions, 59 How. L. J. 413, 419 (2016); see also Eskine, Square Pegs and Round Holes: Antitrust Law and the Privileging Decision, 44 U. Kan. L. Rev. 399, 401 (1996) ("[H]ospitals have strong incentives to award staff privileges only to those physicians who have proven to be capable and knowledgeable physicians").

3 Brief for 207 Members of Congress as *Amici Curiae* 18–19 (lifetime ban from obstetric surgery in Louisiana); *id*., at 19–20 (one-year probation of medical license).

4 Brief for Louisiana State Legislators as *Amici Curiae* 8–9; App. to *id*., at 67a.

5 *Ibid.*

6 *Id*., at 9.

7 Petitioners maintain that an unsuccessful admitting privileges application is a "stain" on a doctor's medical record, because the rejection could appear in a federal database and would need to be disclosed on future applications for admitting privileges. Brief for Petitioners in No. 181323, p. 41, n. 7. As the record in this case shows, there is reason to doubt that the prospect of rejection provides a sufficient incentive for doctors to pursue privileges vigorously. See *infra*, at 2160 – 2165. Perhaps that is because only rejections for lack of "professional competence or professional conduct" need to be disclosed to the relevant federal database. 45 C.F.R. §§ 60.12, 60.3 (2019). Petitioners also have not explained how a non-competence-based rejection would have any bearing on future applications for privileges.

8 The plurality claims that my criticism of the District Court's "good faith" standard "is not a legal argument," and instead reflects a view of the facts—namely that the Does acted in "bad faith." *Ante*, at 2124 – 2125. But the District Court used "good faith" as the legal standard to assess whether Act 620 would cause the Does to stop performing abortions. Neither the District Court nor the plurality has defined "good faith." Unless that term reflects what the doctors would have done if the incentives had been reversed—and the plurality does not argue that it does—there is a legal issue.

9 The Fifth Circuit concluded that it would be "nearly impossible" for Doe 1 to get privileges, *June Medical Services L. L. C. v. Gee*, 905 F.3d 787, 812 (2018), and for this reason, the plurality does not linger on Doe 1. *Ante*, at 2124. Under the correct legal standard, however, it is not at all clear that Doe 1 made the effort required, at least with respect to Christus Health in Shreveport. He applied there for courtesy privileges, received letters instructing him to pick up a badge, and when he called to clarify the meaning of letters sent to him, an unnamed doctor supposedly told him that he should apply for "some kind of a nonstaff caregiver type" position, App. 725, and he then ceased all efforts to get courtesy staff privileges at Christus, *id*., at 728. A person with a strong personal incentive to obtain courtesy privileges would not necessarily have taken this somewhat cryptic advice as a definite rejection of his application.

10 The suggestion that Doe 2's abortion practice could have eluded Christus (and therefore that it would be an impediment to obtaining privileges again) blinks reality. There is no evidence that the hospital was unaware of Doe 2's abortion practice when he was on staff. Nor is there reason to believe that Christus would not have reviewed Doe 2's professional practice history, Record 12190–12191, or demanded disclosure of past malpractice claims at the time he held privileges there, *id*., at 12194; App. 374 (medical malpractice claim against Doe 2 arising from practice at June Medical); see also *supra*, at 2154 – 2156 (reviewing hospital credentialing).

The notion that Doe 3's abortion practice has escaped attention for 30 years is even harder to believe. Christus has reappointed Doe 3 in recent years based on a biennial process that assesses "[p]erformance and conduct in each hospital and/or other healthcare organizatio[n]" outside of Christus. Record 12136; see also *ibid*. (requiring staff members to submit "reapplication form [with] complete information to update his/her file on items listed in his/her original application"). Doe 3 spends "Thursday afternoon" and "all day on Saturday" at the abortion clinic, App. 206, and therefore presumably is unavailable for his on-call duties at Christus at those times, Record 12123. Doe 3 is affiliated with the National Abortion Federation and has attended "many" of their national conferences to obtain continuing medical education credits. App. 203. And Doe 3 indicated that all eight OB/GYNs in Bossier City learned of his abortion practice when discussing a possible on-call rotation system. See *id.*, at 200–202. If those facts did not tip off the hospital, perhaps Christus learned about Doe 3's abortion practice when one of his patients was transferred directly from June Medical to Christus, bleeding and in need of a hysterectomy, *id.*, at 217–218, or when Doe 1's privileges application named Doe 3 as a peer reference, Record 13025. Whatever the Christus bylaws say, abortion practice does not appear to have presented an obstacle to a successful association with the hospital.

11 Each year, a physician with courtesy staff privileges at WKBC may have as many as 49 "patient contacts," which are defined as "any admission and management, consultation, procedure, response to emergency call, and newborns." Record 9628, 9642 (capitalization omitted). And contrary to the plurality's suggestion, the fact that WKBC imposes the same "[f]actors for [e]valuation" for courtesy and active staff-applicants says little, since

those factors do not set out any quantum of patient records, and require only "relevant ... experience" for the position sought. *Id.,* at 9669.

12 The plurality suggests that, if Doe 3 were to leave abortion practice, it would be attributable to Act 620. But even the most ardent opponents of Act 620 did not contemplate that the law would prompt abortion doctors who *satisfied* the law's requirements to quit. Record 11231–11234, 11291. And if this outcome was not foreseeable at the time of enactment, it is hard to see how the District Court could blame Act 620 for causing Doe 3 to leave abortion practice. Cf. Restatement (Second) of Torts § 440, §442A (1964).

13 See, *e.g.*, ABA Model Rules of Professional Conduct 1.7–1.9, 1.18 (2016).

14 See Brief for 2,624 Women Injured by Abortion et al. as *Amici Curiae* 14–22 (firsthand accounts of abortion procedures in Louisiana); Brief for Priests for Life et al. as *Amici Curiae* 7–8, and App. (accounts from Louisiana and other States).

15 Four cases to reach this Court have featured exclusively women plaintiffs. See *Beal v. Doe*, 432 U.S. 438, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977); *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977); *Poelker v. Doe*, 432 U.S. 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977) (*per curiam*); *H. L. v. Matheson*, 450 U. S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981). But there are a number of cases in which women have been co-plaintiffs along with abortion clinics or providers. See *Leavitt v. Jane L.*, 518 U.S. 137, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (*per curiam*); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990); *Williams v. Zbaraz*, 448 U. S. 358, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980); *Harris v. McRae*, 448 U. S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). More recently, abortion patients have litigated in the lower courts using their names, those of legal guardians, or pseudonyms. Brief for Respondent/Cross-Petitioner 39; see also Brief for State of Arkansas et al. as *Amici Curiae* 3, and n. 1.

1 The State has not asked the Court to depart from the *Casey* standard.

2 In my view, the District Court on remand should also address the State's new argument (raised for the first time in this Court) that these doctors and clinics lack third-party standing.

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SCOTUS NEWS

Justices will hear free-speech claim from website designer who opposes same-sex marriage

By **Amy Howe**
on Feb 22, 2022 at 4:11 pm

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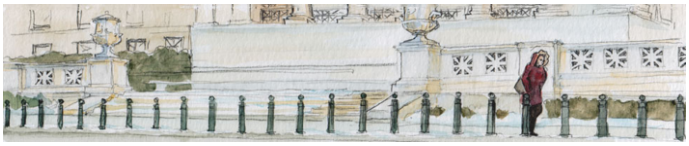

Nearly four years after the Supreme Court **declined to decide** whether compelling a Colorado baker to bake a cake for same-sex couples would violate his right to freedom of speech, the justices agreed to

intersection between LGBTQ rights and religious beliefs.

The case that the court agreed on Tuesday to hear was filed by Lorie Smith, who owns a graphic design firm and wants to expand

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her business to include wedding websites. Because she opposes same-sex marriage on religious grounds, Smith does not want to design websites for same-sex weddings, and she wants to post a message on her own website to explain that. But a Colorado law prohibits businesses that are open to the public from discriminating against gay people or announcing their intent to do so.

Smith went to federal court, seeking a ruling that Colorado could not enforce its anti-discrimination law against her. The U.S. Court of Appeals for the 10th Circuit agreed that Smith's "creation of wedding websites is pure speech," and that Colorado law compels Smith to create speech that she would otherwise refuse. But the anti-discrimination law does not violate the Constitution in this case, the court of appeals **concluded**, because the law is narrowly tailored to the state's interest in ensuring that LGBTQ customers have access to the unique services that Smith provides. Same-sex couples might be able to have their wedding websites designed by someone else, the court of appeals explained, but those customers "will never be able to obtain wedding-related services of the same quality and nature as those that" Smith offers.

After considering the case at four consecutive conferences, the justices agreed to take up Smith's claim under the free speech clause of the First Amendment. They declined to review two other questions that Smith raised in her petition for review: whether requiring Smith to create custom websites for same-sex

create custom websites for same-sex couples violates the First Amendment's free exercise clause, and whether the Supreme Court should overrule its 1990 decision in ***Employment Division v. Smith***, which held that government actions usually do not violate the free exercise clause as long as they are neutral and apply to everyone. The case nonetheless promises to be a major ruling because it may clarify when business owners who are engaged in expressive activities are entitled to religious-based exemptions from laws protecting civil rights.

Unlike ***Biden v. Texas***, the case that the justices **agreed to fast-track** on Friday, involving the Biden administration's efforts to end the Trump-era program known as the "remain in Mexico" policy, the justices did not set *303 Creative* for argument during their April argument session or otherwise give any sign that they planned to expedite the briefing. The case will therefore presumably be argued during the 2022-23 argument session, joining **the pair of cases involving the role of race in university admissions** and **the challenge to Alabama's redistricting plan** in what already promises to be another blockbuster term.

*This article was **originally published at Howe on the Court**.*

Posted in **Merits Cases**

Cases: **303 Creative LLC v. Elenis**

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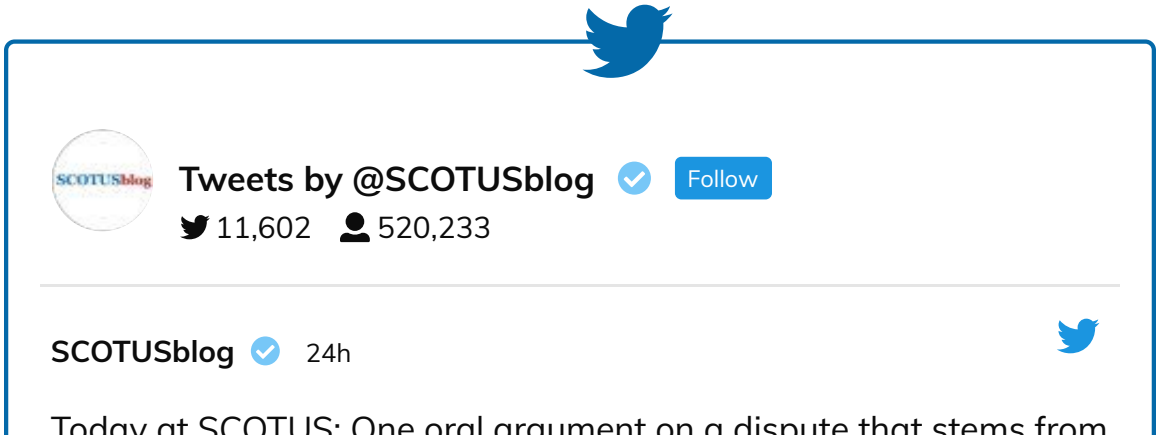

today at SCOTUS. One oral argument on a dispute that stems from the Trump-era immigration policy known as the "public charge" rule. The Biden administration refused to defend the rule in court, and some red states want to intervene in hopes of reviving it.

Justices will hear dispute from GOP-led states over Biden's refusal to defend legality of Trump-era immigration rule - SCOTUSblog

Kachalsky v. County of Westchester

United States Court of Appeals for the Second Circuit

August 22, 2012, Argued; November 27, 2012, Decided

Docket Nos. 11-3642 (Lead), 11-3962 (XAP)

Reporter

701 F.3d 81 *; 2012 U.S. App. LEXIS 24363 **

ALAN KACHALSKY, CHRISTINA NIKOLOV, JOHNNIE NANCE, ANNA MARCUCCI-NANCE, ERIC DETMER, SECOND AMENDMENT FOUNDATION, INC., Plaintiffs-Appellants-Cross-Appellees, -v.- COUNTY OF WESTCHESTER, Defendant-Appellee-Cross-Appellant, SUSAN CACACE, JEFFREY A. COHEN, ALBERT LORENZOR, ROBERT K. HOLDMAN, Defendants-Appellees.

Subsequent History: US Supreme Court certiorari denied by Kachalsky v. Cacace, 2013 U.S. LEXIS 3132 (U.S., Apr. 15, 2013)

Prior History: [**1] Plaintiffs-Appellants appeal from a September 2, 2011 Opinion and Order of the United States District Court for the Southern District of New York (Seibel, J.), granting Defendants-Appellees summary judgment. Plaintiffs seek declaratory and injunctive relief under 42 U.S.C. § 1983, barring New York State handgun licensing officials from requiring that applicants prove "proper cause" to obtain licenses to carry handguns for self-defense pursuant to New York Penal Law section 400.00(2)(f). They argue that application of section 400.00(2)(f) violates the Second and Fourteenth Amendments to the Constitution. Because the proper cause requirement is substantially related to New York's compelling interests in public safety and crime prevention, we affirm.

Kachalsky v. Cacace, 817 F. Supp. 2d 235, 2011 U.S. Dist. LEXIS 99837 (S.D.N.Y., 2011)

Disposition: AFFIRMED.

Counsel: ALAN GURA, Gura & Possessky, PLLC, Alexandria, VA, for Plaintiffs-Appellants-Cross-Appellees.

THOMAS G. GARDINER, Sr. Assistant County Attorney (James Castro-Blanco, Chief Deputy County Attorney, on the brief), for Robert F. Meehan, County Attorney for the County of Westchester, Westchester, NY, for Defendant-Appellee-Cross-Appellant.

SIMON HELLER, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Richard Dearing, [**2] Deputy Solicitor General, on the brief), for Eric T. Schneiderman, Attorney General of the State of New York, New York, NY, for Defendants-Appellees.

Judges: Before: KATZMANN, WESLEY, LYNCH, Circuit Judges.

Opinion by: WESLEY

Opinion

[*83] WESLEY, *Circuit Judge*:

This appeal presents a single issue: Does New York's handgun licensing scheme violate the Second Amendment by requiring an applicant to demonstrate "proper cause" to obtain a license to carry a concealed handgun in public?

Plaintiffs Alan Kachalsky, Christina Nikolov, Johnnie Nance, Anna Marcucci-Nance, and Eric Detmer (together, the "Plaintiffs") all seek to carry handguns outside the home for self-defense. Each applied for and was denied a full-carry concealed-handgun license by one of the defendant licensing officers (the "State Defendants"[1] [*84] for failing to establish "proper cause"—a special need for self-protection—pursuant to New York Penal Law section 400.00(2)(f). Plaintiffs, along with the Second Amendment Foundation ("SAF"), thereafter filed this action to contest New York's proper cause requirement. They contend that the proper cause provision, on its face or as applied to them, violates the Second Amendment as interpreted by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

The State Defendants moved for summary judgment. The district court granted that motion and granted Defendant County of Westchester summary judgment *sua sponte*. *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 273-74 (S.D.N.Y. 2011). The district court found that SAF lacked standing to sue on its own behalf or on behalf of its members. *Id.* at 251. Addressing the merits, the district court concluded that the concealed carrying of handguns in public is "outside the core Second Amendment concern articulated in *Heller*: self-defense in the home." *Id.* at 264. In the alternative, the district court determined that the proper cause requirement would survive constitutional scrutiny even if it implicated the Second Amendment. *Id.* at 266-72. For the reasons that follow, we affirm.[2]

I

A

New York's efforts in regulating the possession and use of firearms predate the Constitution. By 1785, New York had enacted laws regulating when and where firearms could be used, as well as restricting the storage of gun powder. *See, e.g.*, Act of Apr. 22, 1785, ch. 81, 1785 Laws of N.Y. 152; Act of Apr. 13, 1784, ch. 28, 1784 Laws of N.Y. 627. Like most other states, during the nineteenth century, New York heavily regulated the carrying of

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[1] The [**3] State Defendants include Susan Cacace, Jeffrey A. Cohen, Albert Lorenzo, and Robert K. Holdman.

[2] Because we affirm the dismissal of Plaintiffs' suit, we do not address whether SAF has standing. Where, as here, at least one plaintiff has standing, jurisdiction is secure and we can adjudicate the case whether the additional plaintiff has standing or not. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). [**4] We also do not address Defendant County of Westchester's contention that it is not a proper party to this case.

concealable firearms. In 1881, New York prohibited the concealed carrying of "any kind of fire-arms." 1881 Laws of N.Y., ch. 676, at 412. In 1884, New York instituted a statewide licensing requirement for minors carrying weapons in public, *see* 1884 Laws of N.Y., ch. 46, § 8, at 47, and soon after the turn of the century, it expanded its licensing requirements to include all persons carrying concealable pistols, *see* 1905 Laws of N.Y., ch. 92, § 2, at 129-30.

Due to a rise in violent crime associated with concealable firearms in the early twentieth century, New York enacted the Sullivan Law in 1911, which made it unlawful for any person to [**5] possess, without a license, "any pistol, revolver or other firearm of a size which may be concealed upon the person." *See* 1911 Laws of N.Y., ch. 195, § 1, at 443 (codifying N.Y. Penal Law § 1897, ¶ 3); *see also* N.Y. Legislative Service, *Dangerous Weapons—"Sullivan Bill,"* 1911 Ch. 195 (1911). A study of homicides and suicides completed shortly before the law's enactment explained: "The increase of homicide by shooting indicates . . . the urgent necessity of the proper authorities taking some measures for the regulation of the indiscriminate sale and carrying of firearms." *Revolver Killings [*85] Fast Increasing*, N.Y. Times, Jan. 30, 1911 (quoting N.Y. State Coroner's Office Report). As a result, the study recommended that New York

> should have a law, whereby a person having a revolver in his possession, either concealed or displayed, unless for some legitimate purpose, could be punished by a severe jail sentence. . . . [A] rigid law, making it difficult to buy revolvers, would be the means of saving hundreds of lives.

Id. (quoting N.Y. State Coroner's Office Report).

The Sullivan Law survived constitutional attack shortly after it was passed. *People ex rel. Darling v. Warden of City Prisons*, 154 A.D. 413, 422, 139 N.Y.S. 277, 29 N.Y. Cr. 66 (1st Dep't 1913). [**6] Although the law was upheld, in part, on what is now the erroneous belief that the Second Amendment does not apply to the states, the decision provides additional background regarding the law's enactment:

> There had been for many years upon the statute books a law against the carriage of concealed weapons. . . . It did not seem effective in preventing crimes of violence in this State. Of the same kind and character, but proceeding a step further with the regulatory legislation, the Legislature has now picked out one particular kind of arm, ***the handy, the usual and the favorite weapon of the turbulent criminal class***, and has said that in our organized communities, our cities, towns and villages where the public peace is protected by the officers of organized government, the citizen may not have that particular kind of weapon without a permit, as it had already said that he might not carry it on his person without a permit.

Id. at 423 (emphasis added).

In 1913, the Sullivan Law was amended to impose a statewide standard for the issuance of licenses to carry firearms in public. 1913 Laws of N.Y., ch. 608, at 1627-30. To obtain a license to carry a concealed pistol or revolver the applicant [**7] was required to demonstrate "good moral character, and that proper cause exists for the issuance [of the license]." *Id.* at 1629. One hundred years later, the proper cause requirement remains a feature of New York's statutory regime.

B

New York maintains a general prohibition on the possession of "firearms" absent a license. *See* N.Y. Penal Law §§ 265.01-265.04, 265.20(a)(3). A "firearm" is defined to include pistols and revolvers; shotguns with barrels less than eighteen inches in length; rifles with barrels less than sixteen inches in length; "any weapon made from a shotgun or rifle" with an overall length of less than twenty-six inches; and assault weapons. N.Y. Penal Law § 265.00(3). Rifles and shotguns are not subject to the licensing provisions of the statute.[3]

Section 400.00 of the Penal Law "is the exclusive statutory mechanism for the licensing of firearms in New York State."[4] [*86] *O'Connor v. Scarpino*, 83 N.Y.2d 919, 920, 638 N.E.2d 950, 615 N.Y.S.2d 305 (1994) (Mem.); *see* N.Y. Penal Law § 265.20(a)(3). Licenses are limited to those over twenty-one years of age, of good moral character, without a history of crime or mental illness, and "concerning whom no good cause exists for the denial of the license." N.Y. Penal Law § 400.00(1)(a)-(d), (g).

Most licenses are limited by place or profession. Licenses "shall be issued" to possess a registered handgun in the home or in a place of business by a merchant or storekeeper. N.Y. Penal Law § 400.00(2)(a)-(b). And licenses "shall be issued" for a messenger employed by a banking institution or express company to carry a concealed handgun, as well as for certain state and city judges and those employed [**9] by a prison or jail. § 400.00(2)(c)-(e).

This case targets the license available under section 400.00(2)(f). That section provides that a license "shall be issued to . . . have and carry [a firearm] concealed . . . by any person when proper cause exists for the issuance thereof." N.Y. Penal Law § 400.00(2)(f). This is the ***only*** license available to carry a concealed handgun "without regard to employment or place of possession." *Id.* Given that New York bans carrying handguns openly, applicants—like Plaintiffs in this case—who desire to carry a handgun outside the home and who do not fit within one of the employment categories must demonstrate proper cause pursuant to section 400.00(2)(f).

"Proper cause" is not defined by the Penal Law, but New York State courts have defined the term to include carrying a handgun for target practice, hunting, or self-defense. When an applicant demonstrates proper cause to carry a handgun for target practice or hunting, the licensing officer may restrict a carry license "to the purposes that justified the issuance."[5] *O'Connor*, 83 N.Y.2d at 921. In this regard, "a sincere desire to participate in target

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[3] The possession of rifles and shotguns is also regulated. Subject to limited exceptions, it is unlawful to possess a rifle or shotgun "in or upon a building or grounds, used for educational purposes, of any school, college or university . . . or upon a school bus." N.Y. Penal Law § 265.01(3). It is also unlawful for a person under the age of sixteen to possess a rifle or shotgun unless he or she has a hunting permit issued [**8] pursuant to the environmental conservation law. N.Y. Penal Law § 265.05; *see also* N.Y. Envtl. Conserv. Law § 11-0929.

[4] The prohibition on carrying rifles and shotguns on school grounds, in a school building, and on a school bus also applies to those licensed to carry a firearm under section 400.00. N.Y. Penal Law §§ 265.20(a)(3), 265.01(3).

shooting and hunting . . . constitute[s] a legitimate [**10] reason for the issuance of a pistol permit." *In re O'Connor*, 154 Misc. 2d 694, 585 N.Y.S.2d 1000, 1003 (Westchester Cty. Ct. 1992) (citing *Davis v. Clyne*, 58 A.D.2d 947, 947, 397 N.Y.S.2d 186 (3d Dep't 1977)).

To establish proper cause to obtain a license without any restrictions—the full-carry license that Plaintiffs seek in this case—an applicant must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Klenosky v. N.Y City Police Dep't*, 75 A.D.2d 793, 793, 428 N.Y.S.2d 256 (1st Dep't 1980), *aff'd on op. below*, 53 N.Y.2d 685, 421 N.E.2d 503, 439 N.Y.S.2d 108 (1981). There is a substantial body of law instructing licensing officials on the application of this standard. Unlike a license for target shooting or hunting, "[a] generalized desire to carry a concealed weapon to protect one's person [**11] and property does not constitute 'proper cause.'" *In re O'Connor*, 585 N.Y.S.2d at 1003 (citing *Bernstein v. Police Dep't of City of New* [*87] *York*, 85 A.D.2d 574, 574, 445 N.Y.S.2d 716 (1st Dep't 1981)). Good moral character plus a simple desire to carry a weapon is not enough. *Moore v. Gallup*, 293 N.Y. 846, 59 N.E.2d 439(1944) (per curiam), *aff'g* 267 A.D. 64, 66, 45 N.Y.S.2d 63 (3d Dep't 1943);*see also In re O'Connor*, 585 N.Y.S.2d at 1003. Nor is living or being employed in a "high crime area[]." *Martinek v. Kerik*, 294 A.D.2d 221, 221-22, 743 N.Y.S.2d 80 (1st Dep't 2002); *see also Theurer v. Safir*, 254 A.D.2d 89, 90, 680 N.Y.S.2d 87 (1st Dep't 1998); *Sable v. McGuire*, 92 A.D.2d 805, 805, 460 N.Y.S.2d 52 (1st Dep't 1983).

The application process for a license is "rigorous" and administered locally. *Bach v. Pataki*, 408 F.3d 75, 79 (2d Cir. 2005). Every application triggers a local investigation by police into the applicant's mental health history, criminal history, moral character, and, in the case of a carry license, representations of proper cause. *See* N.Y. Penal Law § 400.00(1)-(4). As part of this investigation, police officers take applicants' fingerprints and conduct a series of background checks with the New York State Division of Criminal Justice Services, the Federal Bureau of Investigation, [**12] and the New York State Department of Mental Hygiene. N.Y. Penal Law § 400.00(4). Upon completion of the investigation, the results are reported to the licensing officer. *Id.*

Licensing officers, often local judges,[6] are "vested with considerable discretion" in deciding whether to grant a license application, particularly in determining whether proper cause exists for the issuance of a carry license. *Vale v. Eidens*, 290 A.D.2d 612, 613, 735 N.Y.S.2d 650 (3d Dep't 2002); *see also Kaplan v. Bratton*, 249 A.D.2d 199, 201, 673 N.Y.S.2d 66 (1st Dep't 1998); *Unger v. Rozzi*, 206 A.D.2d 974, 974-75, 615 N.Y.S.2d 147 (4th Dep't

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[5] A license restricted to target practice or hunting permits the licensee to carry concealed a handgun "in connection" with these activities. *In re O'Connor*, 154 Misc. 2d 694, 585 N.Y.S.2d 1000, 1003 (Westchester Cty. Ct. 1992). For instance, a license restricted to target practice permits the licensee to carry the weapon to and from the shooting range. *Bitondo v. New York*, 182 A.D.2d 948, 948, 582 N.Y.S.2d 819 (3d Dep't 1992).

[6] Except in New York City, Nassau County, and Suffolk County, a "licensing officer" is defined as a "judge or justice of a court of record having his office in the county of issuance." N.Y. Penal Law § 265.00(10). "Licensing officer" is defined in New York City as [**13] "the police commissioner of that city"; in Nassau County as "the commissioner of police of that county"; and in Suffolk County as "the sheriff of that county except in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown, the commissioner of police of that county." *Id.*

1994); *Fromson v. Nelson*, 178 A.D.2d 479, 479, 577 N.Y.S.2d 417 (2d Dep't 1991). An applicant may obtain judicial review of the denial of a license in whole or in part by filing a proceeding under Article 78 of New York's Civil Practice Law and Rules. A licensing officer's decision will be upheld unless it is arbitrary and capricious. *O'Brien v. Keegan*, 87 N.Y.2d 436, 439-40, 663 N.E.2d 316, 639 N.Y.S.2d 1004 (1996).

C

Each individual Plaintiff applied for a full-carry license under section 400.00(2)(f). Four of the five Plaintiffs made no effort to comply with New York's requirements for a full-carry license, that is, they did not claim a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession. Plaintiff Kachalsky asserted that the Second Amendment "entitles him to an unrestricted permit without further establishing 'proper cause.'" J.A. 33. He noted: "[W]e live in a world where sporadic random violence might at any moment place one in a position where one needs to defend on self or possibly others." J.A. 33-34. Plaintiffs Nance and Marcucci-Nance asserted that they demonstrated proper cause because they were citizens in "good standing" in their community and gainfully employed. J.A. 43-44, 48-49. Plaintiff Detmer asserted that he demonstrated [*88] proper [**14] cause because he was a federal law enforcement officer with the U.S. Coast Guard.[7] J.A. 39. Unlike the other Plaintiffs, Plaintiff Nikolov attempted to show a special need for self-protection by asserting that as a transgender female, she is more likely to be the victim of violence. J.A. 36. Like the other applicants, she also asserted that being a law-abiding citizen in itself entitled her to a full-carry license. *Id.*

Plaintiffs' applications were all denied for the same reason: Failure to show any facts demonstrating a need for self-protection distinguishable from that of the general public. J.A. 34 (Kachalsky), 37 (Nikolov), 39 (Detmer), 43-44 (Nance), 48-49 (Marcucci-Nance). Nikolov's contention that her status as a transgender female puts her at risk of violence was rejected because she did not "report . . . any type of threat to her own safety anywhere." J.A. 36. Plaintiffs aver that they have not reapplied for full-carry licenses because they believe it would be futile, and that they would carry handguns [**15] in public but for fear of arrest, prosecution, fine, and/or imprisonment.[8] J.A. 75, 77, 79, 81, 83, 85.

II

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[7] Plaintiffs Nance, Marcucci-Nance, and Detmer have carry licenses limited to the purpose of target shooting. Their applications sought to amend their licenses to full-carry licenses.

[8] Plaintiff Kachalsky was the only Plaintiff who appealed the denial of his full-carry license application. The Appellate Division, Second Department affirmed the denial, holding that Kachalsky "failed to demonstrate 'proper cause' for the issuance of a 'full carry' permit." *Kachalsky v. Cacace*, 65 A.D.3d 1045, 884 N.Y.S.2d 877 (2d Dep't 2009). The New York Court of Appeals dismissed Kachalsky's application for leave to appeal "upon the ground that no substantial constitutional question [was] directly involved." *Kachalsky v. Cacace*, 14 N.Y.3d 743, 743, 925 N.E.2d 80, 899 N.Y.S.2d 748 (2010).

Invoking *Heller*, Plaintiffs contend that the Second Amendment guarantees them a right to possess and carry weapons in public to defend themselves from dangerous confrontation and that New York cannot constitutionally force them to demonstrate proper cause to exercise that right. Defendants counter that the proper cause requirement does not burden conduct protected by the Second Amendment. They share the district court's view that the Supreme Court's pronouncement in *Heller* limits the right to bear arms for self-defense to the home.

Heller provides [**16] no categorical answer to this case. And in many ways, it raises more questions than it answers. In *Heller*, the Supreme Court concluded that the Second Amendment codifies a pre-existing "individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. Given that interpretation, the Court struck down the District of Columbia's prohibition on the possession of usable firearms in the home because the law banned "the quintessential self-defense weapon" in the place Americans hold most dear—the home. *Id.* at 628-29.

There was no need in *Heller* to further define the scope of the Second Amendment or the standard of review for laws that burden Second Amendment rights. As the Court saw it, "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 629. Because the Second Amendment was directly at odds with a complete ban on handguns in the home, the D.C. statute ran roughshod over that right. Thus, the Court simply noted that the handgun ban would be unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated [*89] constitutional rights." *Id.* at 628. *Heller* was never meant "to clarify [**17] the entire field" of Second Amendment jurisprudence.[9] *Id.* at 635.

Two years after *Heller*, the Supreme Court held that the Second Amendment's protections, whatever their limits, apply fully to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026, 3042, 177 L. Ed. 2d 894 (2010). In *McDonald*, the Court struck down a Chicago law that banned handguns in the home. *Id.* at 3050. But it also reaffirmed *Heller's* assurances that Second Amendment rights are far from absolute and that many longstanding handgun regulations are "presumptively lawful." *Heller* 554 U.S. at 627 n.26; *see McDonald*, 130 S. Ct. at 3047. The Court also noted that the doctrine of "incorporation does not imperil every law regulating firearms." *McDonald*, 130 S. Ct. at 3047.

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[9] A number of courts and academics, take the view that *Heller's* reluctance to announce a standard of review is a signal that courts must look solely to the text, history, and tradition of the Second Amendment to determine whether a state can limit the right without applying any sort of means-end scrutiny. *See Heller v. District of Columbia*, 670 F.3d 1244, 1271-74, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (*Kavanaugh, J.*, dissenting); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1463 (2009); Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 405 (2009). We disagree. *Heller* stands for the rather unremarkable proposition that where a state regulation is entirely inconsistent with the protections afforded by an enumerated right—as understood through that right's text, history, and tradition—it is an exercise in futility to apply means-end scrutiny. Moreover, the conclusion that the law would be unconstitutional "[u]nder any of the standards of scrutiny" applicable to other rights implies, [**18] if anything, that one of the conventional levels of scrutiny would be applicable to regulations alleged to infringe Second Amendment rights.

What we know from these decisions is that Second Amendment guarantees are at their zenith within the home. *Heller*, 554 U.S. at 628-29. What we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government. This vast "*terra incognita*" has troubled courts since Heller was decided. [**19] *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, *J.*, for the Court). Although the Supreme Court's cases applying the Second Amendment have arisen only in connection with prohibitions on the possession of firearms in the home, the Court's analysis suggests, as Justice Stevens's dissent in *Heller* and Defendants in this case before us acknowledge, that the Amendment must have ***some*** application in the very different context of the public possession of firearms.[10] Our analysis proceeds on this assumption.

A

Plaintiffs contend that, as in *Heller*, history and tradition demonstrate that there is a "fundamental right" to carry handguns in public, and though a state may regulate open or concealed carrying of handguns, it cannot ban ***both***. While Plaintiffs concede that state legislative efforts have long recognized the dangers presented by both the open and concealed carrying of handguns in public places, they contend that states must suffer a constitutionally imposed choice between two equally inadequate alternatives. Thus, according to Plaintiffs, "access to [New York's] only available [*90] [**20] handgun carry license can[not] be qualified by 'proper cause.'"[11] Appellants' Br. at 38.

To be sure, some nineteenth-century state courts offered interpretations of the Second Amendment and analogous state constitutional provisions that are similar to Plaintiffs' position. In *State v. Reid*, the Supreme Court of Alabama upheld a prohibition on the concealed carrying of "any species of fire arms" but cautioned that the state's ability to regulate firearms was not unlimited and could not "amount[] to a destruction of the right, or . . . require[] arms to be so borne as to render them wholly useless for the purpose of defence." 1 Ala. 612, 1840 WL 229, at *2-3 (1840). Relying on Reid, the Supreme Court of Georgia held that a statute prohibiting the carrying of concealed pistols was

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[10] The plain text of the Second Amendment does not limit the right to bear arms to the home.

[11] Plaintiffs' argument is premised, in part, on *Heller's* enunciation of certain "longstanding" regulatory measures, including concealed carry bans, that the Court deemed "presumptively lawful." *Heller*, 554 U.S. at 626-27; *see also McDonald*, 130 S. Ct. at 3047 (plurality opinion) (same). Thus, plaintiffs contend that regulations that are not similarly "longstanding" are not valid restrictions on Second Amendment rights. We do not view this language as a talismanic formula for determining whether a law regulating firearms is consistent with the Second Amendment. While we find it informative, it simply makes clear that the Second Amendment right is not unlimited.

Moreover, even if this language provided a "test" for determining the validity of a handgun regulation, it is not self-evident what that test might be. The "longstanding" prohibitions on the possession of firearms by felons and the mentally ill were identified as "presumptively lawful," *Heller*, 554 U.S. at 626-27 and n. 26, but these laws were not enacted until the early twentieth century, *see* Carlton F.W. Larson, *Four Exceptions in Search [**21] of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1374-79 (2009). New York's proper cause requirement is similarly "longstanding"—it has been the law in New York since 1913. 1913 Laws of N.Y., ch. 608, at 1627-30.

unconstitutional insofar as it also "contains a prohibition against bearing arms openly." *Nunn v. State*, 1 Ga. 243, 1846 WL 1167, at *11 (1846) (emphasis in original).[12] And in *State v. Chandler*, the Supreme Court of Louisiana upheld a concealed-carry [**22] ban because "[i]t interfered with no man's right to carry arms . . . in full open view." 5 La. Ann. 489, 1850 WL 3838, at *1 (1850) (internal quotation marks omitted).[13]

But this was hardly a universal view. Other states read restrictions on the public carrying of weapons as entirely consistent with constitutional protections of the right to keep and bear arms. [**23] At least four states once banned the carrying of pistols and similar weapons in public, both in a concealed or an open manner. *See, e.g.*, Ch. 96, §§ 1-2, 1881 Ark. Acts at 191-92; Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Terr. Comp. Laws, at 352; Ch. 13, § 1, 1870 Tenn. Acts at 28; Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws at 25. And the statutes in Texas, Tennessee, and Arkansas withstood constitutional [*91] challenges. *See, e.g., Fife v. State*, 31 Ark. 455, 1876 WL 1562, at *4 (1876); *English v. State*, 35 Tex. 473, 1872 WL 7422, at *3 (1871); *Andrews v. State*, 50 Tenn. 165, 1871 WL 3579, at *11 (1871).[14]

It seems apparent to us that unlike the situation in *Heller* where "[f]ew laws in the history of our Nation have come close" to D.C.'s total ban on usable handguns in the home, New York's restriction on firearm possession in public has a number of close and longstanding cousins.[15] *Heller*, 554 U.S. at 629. History and tradition do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to bear arms,

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[12] *Nunn* is cited in Justice Scalia's majority opinion in Heller as an example of state court responses to handgun regulatory efforts within the states. *Heller*, 554 U.S. at 629.

[13] Notably, *Chandler* and *Reid* conflict with Plaintiffs' position, at least in part. Plaintiffs contend that a state may choose to ban open carrying so long as concealed carrying is permitted. But both *Chandler* and *Reid* suggest that open carrying ***must*** be permitted. The *Reid* court explained:

> Under the provision of our constitution, we incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence.

1 Ala. 612, 1840 WL 229, at *5; *see also Chandler*, 5 La. Ann. 489, 1850 WL 3838, at *1.

[14] These cases were decided on the basis of an interpretation of the Second Amendment—that pistols and similar weapons are not "arms" within the meaning of the Second Amendment or its state constitutional analogue—that conflicts with the Supreme Court's present reading of the Amendment. *Fife*, 31 Ark. 455, 1876 WL 1562, at *4; *English*, 35 Tex. 473, 1872 WL 7422, at *3; *Andrews*, 50 Tenn. 165, 1871 WL 3579, at *11. For instance, the Texas court construed the Second Amendment as protecting only the "arms of a militiaman or soldier," which include "the musket and bayonet . . . holster pistols and carbine . . . [and] [**24] side arms." 31 Ark. 455, 1872 WL 7422, at *3. To refer to the non-military style pistols covered by the statute as necessary for a "well-regulated militia" was, according to the court, "simply ridiculous." Id. Similarly, the Tennessee court invalidated the statute to the extent it covered revolvers "adapted to the usual equipment of a solider." *Andrews*, 50 Tenn. 165, 1871 WL 3579, at *11.

[15] The extensive history [**25] of state regulation of handguns in public is discussed in detail in Part II.B.

whether the right was embodied in a state constitution or the Second Amendment. *Compare Bliss v. Commonwealth*, 12 Ky. 90, 1822 WL 1085, at *3 (1822) (concluding that a prohibition on carrying concealed weapons was unconstitutional), *with Aymette v. State*, 21 Tenn. 154, 1840 WL 1554, at **4-6 (1840) (citing to *Bliss* but reaching the opposite conclusion).

Even if we believed that we should look solely to this highly ambiguous history and tradition to determine the meaning of the Amendment, we would find that the cited sources do not directly address the specific question before us: Can New York limit handgun licenses to those demonstrating a special need for self-protection? Unlike the cases and statutes discussed above, New York's proper cause requirement does not operate as a complete ban on the possession of handguns in public. Analogizing New York's licensing scheme (or any other gun regulation for that matter) to the array of statutes enacted or construed over one hundred years ago has its limits.

Plaintiffs raise a second argument with regard to how we should measure the constitutional legitimacy of the New York statute that takes a decidedly different tack. They suggest that we apply First Amendment prior-restraint analysis in lieu of means-end scrutiny to assess the proper cause requirement.[16] They see the nature of the rights guaranteed by each amendment as identical in kind. One has a right to speak and a right to bear arms. Thus, just as the First Amendment [**26] permits everyone to speak without obtaining a license, New York cannot limit the right to bear arms to only some law-abiding citizens. We are hesitant to import ***substantive*** First Amendment principles wholesale into Second Amendment jurisprudence. Indeed, no court has done so. *See, e.g., Woollard v. Sheridan*, 863 F. Supp. 2d 462, 472 [*92] (D. Md. 2012); *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 835-36 (D.N.J. 2012).

We recognize that analogies between the First and Second Amendment were made often in *Heller*. 554 U.S. at 582, 595, 606, 635. Similar analogies have been made since the Founding. *See, e.g., Commonwealth v. Blanding*, 20 Mass. 304, 314, 3 Pick. 304 (1825) ("The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."). Notably, these analogies often used the states' [**27] power to regulate firearms, which was taken as unassailably obvious, to support arguments in favor of upholding limitations on First Amendment rights. But it would be as imprudent to assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second, as to assume that rules developed in the Second Amendment context could be transferred without modification to the First. Endorsing that approach would be an incautious equation of the two amendments and could well result in the erosion of hard-won First Amendment rights. As discussed throughout, there are salient differences between the state's ability to regulate each of these rights. *See generally* L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997) (discussing problems with efforts to associate firearms with the First Amendment's prohibition on prior restraints).

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[16] Plaintiffs also contend that New York's requirement that license applicants be "of good moral character" is an unconstitutional prior restraint. Because, as Plaintiffs admit, this provision was not challenged in their complaint or below, we choose not to consider it here.

But even if we decided to apply prior-restraint doctrine to Second Amendment claims, this case would be a poor vehicle for its maiden voyage. To make out a prior-restraint argument, Plaintiffs would have to show that the proper cause requirement lacks "narrow, objective, and definite [**28] standards," thereby granting officials unbridled discretion in making licensing determinations. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992) (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969)). But Plaintiffs' contention that the proper cause requirement grants licensing officials unbridled discretion is something of a red herring. Plaintiffs admit that there is an established standard for determining whether an applicant has demonstrated proper cause. The proper cause requirement has existed in New York since 1913 and is defined by binding judicial precedent as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Klenosky*, 75 A.D.2d at 793; *see e.g., Bando v. Sullivan*, 290 A.D.2d 691, 693, 735 N.Y.S.2d 660 (3d Dep't 2002); *Bernstein*, 85 A.D.2d at 574.

Plaintiffs' complaint is not that the proper cause requirement is ***standardless***; rather, they simply do not like the ***standard***—that licenses are limited to those with a special need for self-protection. This is not an argument that licensing officials have unbridled discretion in granting full-carry permits. In fact, the State Defendants' determinations [**29] that Plaintiffs do not have a special need for self-protection are unchallenged. Rather, Plaintiffs question New York's ability to limit handgun possession to those demonstrating a threat to their safety. This is precisely the type of argument that should be addressed by examining the purpose and impact of the law in light of the Plaintiffs' Second Amendment right.

Plaintiffs' attempts to equate this case with *Heller* or to draw analogies to First Amendment concerns come up short.

[*93] **B**

Thus, given our assumption that the Second Amendment applies to this context, the question becomes how closely to scrutinize New York's statute to determine its constitutional mettle. *Heller*, as noted above, expressly avoided deciding the standard of review for a law burdening the right to bear arms because it concluded that D.C.'s handgun ban was unconstitutional "[u]nder any of the standards of scrutiny [traditionally] applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628. The Court did, however, rule out a rational basis review because it "would be redundant with the separate constitutional prohibitions on irrational laws." *Id.* at 629 n.27.

We have held that "heightened scrutiny is triggered [**30] only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012). *Decastro* rejected a Second Amendment challenge to 18 U.S.C. § 922(a)(3), which makes it unlawful for an individual to transport into his state of residence a firearm acquired in another state. Because we concluded that § 922(a)(3) did not impose a substantial burden on the defendant's Second Amendment right, we left unanswered "the level of scrutiny applicable to laws that do impose such a burden." *Id.* at 165. Here, some form of heightened scrutiny would be appropriate. New York's proper cause requirement places substantial limits on the

ability of law-abiding citizens to possess firearms for self-defense in public. And unlike *Decastro*, there are no alternative options for obtaining a license to carry a handgun.

We do not believe, however, that heightened scrutiny must always be akin to strict scrutiny when a law burdens the Second Amendment. *Heller* explains that the "core" protection [**31] of the Second Amendment is the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 634-35. Although we have no occasion to decide what level of scrutiny should apply to laws that burden the "core" Second Amendment protection identified in *Heller*, we believe that applying less than strict scrutiny when the regulation does not burden the "core" protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits.[17] It is also consistent with jurisprudential [*94] experience analyzing other enumerated rights. For instance, when analyzing First Amendment claims, content-based restrictions on noncommercial speech are subject to strict scrutiny, *see United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), while laws regulating commercial speech are subject to intermediate scrutiny, *see Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624-25, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).

The proper cause requirement falls outside the core Second Amendment protections identified in *Heller*. New York's licensing scheme affects the ability to carry handguns only ***in public***, while the District of Columbia ban applied ***in the home*** "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. This is a critical difference. The state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home. *Heller* reinforces this view. In striking D.C.'s handgun ban, the Court stressed that banning usable handguns in the home is a "policy choice[]" that is "off the table," *id.* at 636, but that a variety of other regulatory options remain available, including categorical bans on firearm possession in certain public locations, *id.* at 626-27 & n.26.

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[17] *Heller v. District of Columbia*, 670 F.3d 1244, 1261-64, 399 U.S. App. D.C. 314 (D.C. Cir. 2011) (applying intermediate scrutiny to prohibition on possession of magazines with a capacity of more than ten rounds of ammunition); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) [**32] (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9), which prohibits the possession of firearms by a person convicted of a misdemeanor crime of domestic violence), *cert. denied*, 132 S. Ct. 1538, 182 L. Ed. 2d 175 (2012); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (applying intermediate scrutiny to 36 C.F.R. § 2.4(b), which prohibits "carrying or possessing a loaded weapon in a motor vehicle" within national park areas), *cert. denied*, 132 S. Ct. 756, 181 L. Ed. 2d 482 (2011); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9)); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(k), which prohibits the possession of firearms with obliterated serial numbers), *cert. denied* 131 S. Ct. 958, 178 L. Ed. 2d 790 (2011); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(8), which prohibits the possession of firearms while subject to a domestic protection order), *cert. denied*, 131 S. Ct. 2476, 179 L. Ed. 2d 1214 (2011); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc) (applying form of intermediate scrutiny to 18 U.S.C. § 922(g)(9)), *cert. [**33] denied*, 131 S. Ct. 1674, 179 L. Ed. 2d 645 (2011).

Treating the home as special and subject to limited state regulation is not unique to firearm regulation; it permeates individual rights jurisprudence. For instance, in *Stanley v. Georgia*, the Court held that in-home possession of obscene materials could not be criminalized, even as it assumed that public display of obscenity [**34] was unprotected. 394 U.S. 557, 568, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969). While "the States retain broad power to regulate obscenity[] that power simply does not extend to mere possession by the individual in the privacy of his own home." *Id*. Similarly, in *Lawrence v. Texas*, the Court emphasized that the state's efforts to regulate private sexual conduct between consenting adults is especially suspect when it intrudes into the home: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home." 539 U.S. 558, 562, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *see also Kyllo v. United States*, 533 U.S. 27, 37, 121 S. Ct. 2038, 150 L. Ed. 2d 94(2001) ("In the home, our [Fourth Amendment] cases show [that] the entire area is held safe from prying government eyes."); *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)(discussing general right to privacy that was closely connected to "the sanctity of a man's home and the privacies of life" (internal quotation marks omitted)).[18]

But while the state's ability to regulate firearms is circumscribed in the home, "outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." *Masciandaro*, 638 F.3d at 470. There is a longstanding tradition of states regulating firearm possession and use in public because of the [*95] dangers posed to public safety. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 502-16 (2004). During the Founding Era, for instance, many states prohibited the use of firearms on certain occasions and in certain locations. *See, e.g.*, Act of April 22, 1785, ch. 81, 1785 Laws of N.Y. 152; Act of Nov. 16, 1821, ch. LXLIII, 1821 Tenn. Pub. Acts 78; Act of Jan. 30, 1847, 1846-1847 Va. Acts ch. 79, at 67; Act of Dec. 24, 1774, ch. DCCIII, 1774 Pa. Stat. 410.[19] Other states went even further. North Carolina prohibited going armed at night or day "in fairs, markets, nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere." *See* Patrick [**36] J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St.

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[18] That the home deserves special protection from government intrusion is also reflected in the Third Amendment, which provides: "No Soldier shall, in time of peace be quartered in any house, without the consent of the [**35] Owner, nor in time of war, butin a manner to be prescribed by law." U.S. Const. amend. III.

[19] Regulations concerning the militia and the storage of gun powder were also common. *See* Act of May 8, 1792, 1792 Conn. Pub. Acts 440 (forming the state militia); Act of July 19, 1776, ch. I, 1775-1776 Mass. Acts 15 (regulating the militia of Massachusetts); Act of Apr. 3, 1778, ch. 33, 1778 Laws of N.Y. 62 (regulating the militia of New York State); Act of Mar. 20, 1780, ch. CLXVII, 1780 Pa. Laws 347 (regulating the militia of Pennsylvania); Act of Mar. 26, 1784, 1784 S.C. Acts 68 (regulating militia); *see also* Act of June 26, 1792, ch. X, 1792 Mass. Acts 208 (regulating storage of gun powder in Boston); Act of Apr. 13, 1784, ch. 28, 1784 Laws of N.Y. 627 (regulating storage of gun powder in New York); Act of Dec. 6, 1783, ch. CIV, 1783 Pa. Laws 161, ch. MLIX, 11 Pa. Stat. 209 (protecting the city of Philadelphia from the danger of gunpowder).

L. Rev. 1, 31-32 (2012) (citation and internal quotation marks omitted). Massachusetts and Virginia enacted similar laws. *Id.*[20]

In the nineteenth century, laws directly regulating concealable weapons for public safety became commonplace and far more expansive in scope than regulations during the Founding Era. Most states enacted laws banning the carrying of concealed weapons.[21] And as *Heller* noted, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller*, 554 U.S. at 626. Indeed, the nineteenth century Supreme Court agreed, noting that "the [**38] right of the people to keep and bear arms . . . is not infringed by laws prohibiting the [*96] carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82, 17 S. Ct. 326, 41 L. Ed. 715 (1897).

In some ways, these [**39] concealed-carry bans were similar to New York's law because while a few states with concealed-carry bans considered self-defense concerns, the exceptions were extremely limited. For instance, in Ohio there was an exception if "the accused was, at the time of carrying [the concealed weapon] engaged in a pursuit of any lawful business, calling or employment, and that the circumstances . . . justif[ied] a prudent man in carrying the weapon . . . for the defense of his person." Act of Mar. 18, 1859, 1859 Ohio Laws at 56-57. Similarly, in Tennessee, a person was exempted from the concealed carry ban who was "on a journey to any place out of his county or state." Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts at 15-16. By contrast, Virginia's concealed-carry ban was even stricter than New York's statute because it explicitly rejected a self-defense exception. A defendant was guilty under Virginia's concealed-carry ban even if he was acting in self-defense when using the weapon. 1838 Va. Acts ch. 101 at 76.

Some states went even further than prohibiting the carrying of concealed weapons. As discussed above, several states banned concealable weapons (subject to certain exceptions) altogether [**40] whether carried openly or concealed. See Part II.A. Other states banned the sale of concealable weapons. For instance, Georgia criminalized

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[20] Curiously, North Carolina referred to the "King's Justices" after the colonies had won their [**37] independence. The laws in North Carolina, Massachusetts, and Virginia track language from the 1328 Statute of Northampton, which provided that no person shall "go nor ride armed by Night nor by Day in Fairs, Markets, nor in the Presence of the Justices or other Ministers nor in no Part elsewhere." 2 Edw. 3, c. 3 (1328) (Eng.). There is debate in the historical literature concerning whether the Statute of Northampton, and laws adopting similar language, prohibited the carrying of weapons in public generally or only when it would "terrorize" the public. *See* Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. at 31-32.

[21] *See* Act of Feb. 1, 1839, ch. 77, 1839 Ala. Acts at 67-68; Act of Apr. 1, 1881, ch. 96, § 1, 1881 Ark. Acts at 191; Act of Feb. 1, 1881, 1881 Colo. Sess. Laws at 74; Act of Feb. 12, 1885, ch. 3620, 1885 Fla. Laws at 61; Act of Apr. 16, 1881, 1881 Ill. Laws at 73-74; Act of Jan. 14, 1820, ch. 23, 1820 Ind. Acts at 39; 29 Ky. Gen. Stat. art. 29, § 1 (as amended through 1880); Act of Mar. 25, 1813, 1813 La. Acts at 172; 1866 Md. Laws, ch. 375, §1; Neb. Gen. Stat., ch. 58, ch. 5, § 25 (1873); Act of Mar. 5, 1879, ch. 127, 1879 N.C. Sess. Laws at 231; N.D. Pen. Code § 457 (1895); Act of Mar. 18, 1859, 1859 Ohio Laws at 56; Act of Feb. 18, 1885, 1885 Or. Laws at 33; Act of Dec. 24, 1880, no. 362, 1881 S.C. Acts at 447; S.D. Terr. Pen. Code § 457 (1883); Act of Apr. 12, 1871, ch. 34, 1871 Tex. Gen. Laws at 25-27; Act of Oct. 20, 1870, ch. 349, 1870 Va. Acts at 510; Wash. Code § 929 (1881); W. Va. Code, ch. 148, § 7 (1891); *see also* Cornell & DeDino, A *Well Regulated Right*, 73 Fordham L. Rev. at 502-16.

the sale of concealable weapons, effectively moving toward their complete prohibition. Act of Dec. 25, 1837, 1837 Ga. Laws at 90 (protecting citizens of Georgia against the use of deadly weapons). Tennessee enacted a similar law, which withstood constitutional challenge. Act of Jan. 27, 1838, ch. CXXXVII, 1837-1838 Tenn. Pub. Acts 200. In upholding the law, the Supreme Court of Tennessee reasoned that "[t]he Legislature thought the evil great, and, to effectually remove it, made the remedy strong." *Day v. State*, 37 Tenn. (5 Sneed) 496, 500 (1857).

The historical prevalence of the regulation of firearms in public demonstrates that while the Second Amendment's core concerns are strongest inside hearth and home, states have long recognized a countervailing and competing set of concerns with regard to handgun ownership and use in public. Understanding the scope of the constitutional right is the first step in determining the yard stick by which we measure the state regulation. *See, e.g., Bd. Of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) [**41] ("The first step in [analyzing legislation intersecting with enumerated rights] is to identify with some precision the scope of the constitutional right at issue.").

We believe state regulation of the use of firearms in public was "enshrined with[in] the scope" of the Second Amendment when it was adopted. *Heller*, 554. U.S. at 634. As Plaintiffs admitted at oral argument, "the state enjoys a fair degree of latitude" to regulate the use and possession of firearms in public. The Second Amendment does not foreclose regulatory measures to a degree that would result in "handcuffing lawmakers' ability to prevent armed mayhem in public places." *Masciandaro*, 638 F.3d at 471 (internal quotation marks omitted).

Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case. The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest. *See, e.g., Masciandaro*, 638 F.3d [*97] at 471; Skoien, 614 F.3d at 641-42; *see also Ernst J. v. Stone*, 452 F.3d 186, 200 n.10 (2d Cir. 2006) ("[T]he label 'intermediate [**42] scrutiny' carries different connotations depending on the area of law in which it is used.").

As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention. *See, e.g., Schenck v. Pro—Choice Network*, 519 U.S. 357, 376, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997); *Schall v. Martin*, 467 U.S. 253, 264, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981); *Kuck v. Danaher*, 600 F.3d 159, 166 (2d Cir. 2010). The only question then is whether the proper cause requirement is substantially related to these interests. We conclude that it is.

In making this determination, "substantial deference to the predictive judgments of [the legislature]" is warranted. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997). The Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of courts. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727, 177 L. Ed. 2d 355 (2010); *Turner Broad. Sys., Inc.*, 520 U.S. at 195-196; *see also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330-31 n.12, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985). In the context of firearm regulation, the legislature is "far better equipped than the judiciary" [**43] to make sensitive public policy judgments (within constitutional limits) concerning the dangers in

carrying firearms and the manner to combat those risks. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). Thus, our role is only "to assure that, in formulating its judgments, [New York] has drawn reasonable inferences based on substantial evidence." *Id.* at 666. Unlike strict scrutiny review, we are not required to ensure that the legislature's chosen means is "narrowly tailored" or the least restrictive available means to serve the stated governmental interest. To survive intermediate scrutiny, the fit between the challenged regulation need only be substantial, "not perfect." *Marzzarella*, 614 F.3d at 97.

New York's legislative judgment concerning handgun possession in public was made one-hundred years ago. In 1911, with the enactment of the Sullivan Law, New York identified the dangers inherent in the carrying of handguns in public. N.Y. Legislative Service, *Dangerous Weapons* - "*Sullivan Bill*," 1911 Ch. 195 (1911). And since 1913, New York's elected officials determined that a reasonable method for combating these dangers was to limit handgun possession in public to those showing [**44] proper cause for the issuance of a license. 1913 Laws of N.Y., ch. 608, at 1627-30. The proper cause requirement has remained a hallmark of New York's handgun regulation since then.[22]

[*98] The decision to regulate handgun possession was premised on the belief that it would have an appreciable impact on public safety and crime prevention. As explained in the legislative record:

> The primary value to law enforcement of adequate statutes dealing with dangerous weapons is prevention of crimes of violence before their consummation.
>
> . . . .
>
> . . . In the absence of adequate weapons [**45] legislation, under the traditional law of criminal attempt, lawful action by the police must await the last act necessary to consummate the crime. . . . Adequate statutes governing firearms and weapons would make lawful intervention by police and prevention of these fatal consequences, before any could occur.

Report of the N.Y. State Joint Legislative Comm. On Firearms & Ammunition, Doc. No. 6, at 12-13 (1965). Similar concerns were voiced in 1987, during a floor debate concerning possible changes to the proper cause requirement. *See* N.Y. Senate Debate on Senate Bill 3409, at 2471 (June 2, 1987).

The connection between promoting public safety and regulating handgun possession in public is not just a conclusion reached by New York. It has served as the basis for other states' handgun regulations, as recognized by various lower courts. *Piszczatoski*, 840 F. Supp. 2d 813 at 835-36; *Richards v. Cty. of Yolo*, 821 F. Supp. 2d 1169, 1172 (E.D. Cal. 2011); *Peruta v. Cty. of San Diego*, 758 F. Supp. 2d 1106, 1110 (S.D. Cal. 2010).

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[22] New York's statutory scheme was the result of a "careful balancing of the interests involved" and not a general animus towards guns. Report of the N.Y. State Joint Legislative Comm. On Firearms & Ammunition, Doc. No. 6, at 12 (1965). The legislature explained that "[s]tatutes governing firearms . . . are not desirable as ends in themselves." Id. Rather, the purpose was "to prevent crimes of violence before they can happen, and at the same time preserve legitimate interests such as training for the national defense, the right of self defense, and recreational pursuits of hunting, target shooting and trophy collecting." *Id.*

Given New York's interest in regulating handgun possession for public safety and crime prevention, it decided not to ban handgun possession, but to limit it to those individuals [**46] who have an actual reason ("proper cause") to carry the weapon. In this vein, licensing is oriented to the Second Amendment's protections. Thus, proper cause is met and a license "shall be issued" when a person wants to use a handgun for target practice or hunting. N.Y. Penal Law § 400.00(2)(f); *see, e.g., Clyne*, 58 A.D.2d at 947. And proper cause is met and a license "shall be issued" when a person has an actual and articulable—rather than merely speculative or specious—need for self-defense. N.Y. Penal Law § 400.00(2)(f); *see, e.g., Klenosky*, 75 A.D.2d at 793. Moreover, the other provisions of section 400.00(2) create alternative means by which applicants engaged in certain employment may secure a carry license for self-defense. As explained earlier, a license "shall be issued" to merchants and storekeepers for them to keep handguns in their place of business; to messengers for banking institutions and express companies; to state judges and justices; and to employees at correctional facilities. N.Y. Penal Law § 400.00(2)(b)-(e).

Restricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose is substantially related to New York's interests [**47] in public safety and crime prevention. It is not, as Plaintiffs contend, an arbitrary licensing regime no different from limiting handgun possession to every tenth citizen. This argument asks us to conduct a review bordering on strict scrutiny to ensure that New York's regulatory choice will protect public safety more than the least restrictive alternative. But, as explained above, New York's law need only be ***substantially related*** to the state's important public safety interest. A perfect fit between the means and the governmental objective is not required. Here, instead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns [*99] should be allowed to introduce them into the public sphere. That New York has attempted to accommodate certain particularized interests in self defense does not somehow render its concealed carry restrictions unrelated to the furtherance of public safety.

To be sure, we recognize the existence of studies and data challenging the relationship between handgun ownership by lawful citizens and violent [**48] crime. Plaintiffs' Reply Br. at 37-38. We also recognize that many violent crimes occur without any warning to the victims. But New York also submitted studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces. J.A. 453, 486-90. It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments. Indeed, assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives, as New York did, is precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make.

According to Plaintiffs, however, New York's conclusions as to the risks posed by handgun possession in public are "totally irrelevant." Plaintiffs' Reply Br. at 38. Because the constitutional right to bear arms is specifically for self-defense, they reason that the state may not limit the right on the basis that it is too dangerous to exercise, nor may it limit the right to those showing a special need to exercise it. In Plaintiffs' [**49] view, the "'enshrinement'" of the

right to bear arms "'necessarily takes [these] policy choices off the table.'" *Id.* at 39 (quoting *Heller*, 554 U.S. at 636).[23] We disagree.

Plaintiffs misconstrue the character and scope of the Second Amendment. States have long chosen to regulate the right to bear arms because of the risks posed by its exercise. As Plaintiffs admit and *Heller* strongly suggests, the state may ban firearm possession in sensitive places, presumably [**50] on the ground that it is too dangerous to permit the possession of firearms in those locations. 554 U.S. at 626-27. In fact, New York chose to prohibit the possession of firearms on school grounds, in a school building, or on a school bus precisely for this reason. N.Y. Penal Law § 265.01(3); *see also* N.Y. Legislative Service, Governor's Bill Jacket, 1974 Ch. 1041, at 2-4 (1974). Thus, as the Supreme Court has implicitly recognized, regulating firearms because of the dangers posed by exercising the right is entirely consistent with the Second Amendment.

We are also not convinced that the state may not limit the right to bear arms to those showing a "special need for self-protection." Plaintiffs contend that their "desire for self-defense . . . is all the 'proper cause' required . . . by the Second Amendment to carry a firearm." Plaintiffs' Br. at 45. They reason that the exercise of the right to bear arms cannot [*100] be made dependent on a ***need*** for self-protection, just as the exercise of other enumerated rights cannot be made dependent on a ***need*** to exercise those rights. This is a crude comparison and highlights Plaintiffs' misunderstanding of the Second Amendment.

State regulation under [**51] the Second Amendment has always been more robust than of other enumerated rights. For example, no law could prohibit felons or the mentally ill from speaking on a particular topic or exercising their religious freedom. *Cf. Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (invalidating a state law requiring profits from books authored by criminals to be distributed to crime victims). And states cannot prohibit speech in public schools. *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). Not so with regard to the Second Amendment. Laws prohibiting the exercise of the right to bear arms by felons and the mentally ill, as well as by law-abiding citizens in certain locations including public schools, are, according to *Heller*, "presumptively lawful." 554 U.S. at 627 n.26.

Moreover, as discussed above, extensive state regulation of handguns has never been considered incompatible with the Second Amendment or, for that matter, the common-law right to self-defense. This includes significant [**52] restrictions on how handguns are carried, complete prohibitions on carrying the weapon in public, and even in some instances, prohibitions on purchasing handguns.

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[23] Plaintiffs are quick to embrace the majority's view in *Heller* that handguns are the "quintessential self-defense weapon" for law abiding Americans today and extrapolate that right to public possession of a handgun. Thus, for Plaintiffs, handgun possession in public has the ring of an absolute constitutional right. This of course overlooks *Heller's* careful restriction of its reach to the home and is in sharp contrast with New York's view of concealed handguns one-hundred years ago as "the handy, the usual and the favorite weapon of the turbulent criminal class." *Darling*, 154 A.D. at 423-24. It seems quite obvious to us that possession of a weapon in the home has far different implications than carrying a concealed weapon in public.

In this vein, handguns have been subject to a level of state regulation that is stricter than any other enumerated right. In light of the state's considerable authority—enshrined within the Second Amendment—to regulate firearm possession in public, requiring a showing that there is an objective threat to a person's safety—a "special need for self-protection"—before granting a carry license is entirely consistent with the right to bear arms. Indeed, there is no right to engage in self-defense with a firearm until the objective circumstances justify the use of deadly force.[24] *See, e.g., People v. Aiken*, 4 N.Y.3d 324, 327-29, 828 N.E.2d 74, 795 N.Y.S.2d 158 (2005) (discussing duty to retreat in New York).

Plaintiffs counter that the need for self-defense may arise at any moment without prior warning. True enough. But New York determined that limiting handgun possession to persons who have an articulable basis [**53] for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation. New York did not run afoul of the Second Amendment by doing so.

To be sure, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. But there is also a "general reticence to invalidate the acts of [our] elected leaders." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579, 183 L. Ed. 2d 450 (2012). "'Proper respect for a coordinate branch of government' requires that we strike down [legislation] only if 'the lack of constitutional authority to pass [the] act in [*101] question is clearly demonstrated.'" *Id.* (quoting *United States v. Harris*, 106 U.S. 629, 635, 1 S. Ct. 601, 27 L. Ed. 290, 4 Ky. L. Rptr. 739 (1883)). Our review of the history and tradition of firearm regulation does not "clearly demonstrate[]" that limiting handgun possession in public to those who show a special need for self-protection is inconsistent with the Second Amendment. *Id.*

Accordingly, we decline Plaintiffs' invitation to strike down New York's one-hundred-year-old law and call into question the state's traditional authority to extensively [**54] regulate handgun possession in public.

III

In view of our determination that New York's proper cause requirement is constitutional under the Second Amendment as applied to Plaintiffs, we also reject their facial overbreadth challenge.[25] Overbreadth challenges are generally limited to the First Amendment context. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95

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[24] There is no question that using a handgun for self-defense constitutes deadly physical force. *See, e.g., People v. Magliato*, 68 N.Y.2d 24, 29-30, 496 N.E.2d 856, 505 N.Y.S.2d 836 (1986).

[25] We also decline to consider Plaintiffs' claim under the Equal Protection Clause. "It is a settled appellate rule that issues adverted to in a perfunctory [**55] manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001). Plaintiffs made only passing references to the Equal Protection Clause in their brief, noting that "[t]o the extent that [New York's proper cause requirement] implicates the Equal Protection Clause . . . the case might well be decided under some level of means-end scrutiny." Plaintiffs' Br. at 15-16; 54. Thus, this claim is forfeited.

L. Ed. 2d 697 (1987). But even if we assume that overbreadth analysis may apply to Second Amendment cases, it is well settled "that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). This principle "reflect[s] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 610-11; *see also Gonzales v. Carhart*, 550 U.S. 124, 167-68, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007). Accordingly, we reject Plaintiffs' facial challenge.

IV

For the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

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138 S.Ct. 1719
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., et al., Petitioners
v.
COLORADO CIVIL RIGHTS COMMISSION, et al.

No. 16–111.
|
Argued Dec. 5, 2017.
|
Decided June 4, 2018.

Synopsis
Background: Cake shop and its owner sought review of the Colorado Civil Rights Commission's decision and issuance of cease and desist order, in a proceeding arising from shop's refusal to sell a wedding cake to a same-sex couple, requiring shop and owner not to violate Colorado Anti–Discrimination Act (CADA) by discriminating against potential customers because of their sexual orientation. The Colorado Court of Appeals, Taubman, J., 370 P.3d 272, affirmed. Certiorari was granted.

The Supreme Court, Justice Kennedy, held that Commission did not comply with the Free Exercise Clause's requirement of religious neutrality.

Reversed.

Justice Kagan filed a concurring opinion, in which Justice Breyer joined.

Justice Gorsuch filed a concurring opinion, in which Justice Alito joined.

Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined.

Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined.

Procedural Posture(s): Petition for Writ of Certiorari; Review of Administrative Decision.

***1720** *Syllabus* [*]

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that he would sell them other baked goods, *e.g.,* birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti–Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services ... to the public." Under CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

Held : The Commission's actions in this case violated the Free Exercise Clause. Pp. 1727 – 1732.

(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical ***1721** objections to gay marriage are protected views and in some instances protected forms of expression. See *Obergefell v. Hodges,* 576 U.S. ——, ——, 135 S.Ct. 2584, 2594, 192 L.Ed.2d 609. While it is unexceptional that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay marriages performed in the State and before this Court issued *United States v. Windsor,* 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808, or *Obergefell*. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay

marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 1727 – 1729.

(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Another indication of hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of Appeals' brief discussion of this disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection. Pp. 1728 – 1731.

(c) For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected ***1722** citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472. Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540, 113 S.Ct. 2217. In view of these factors, the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of his religious beliefs. The Commission gave "every appearance," *id.*, at 545, 113 S.Ct. 2217, of adjudicating his religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it, *id.*, at 537, 113 S.Ct. 2217, but government has no

role in expressing or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips' religious objection was not considered with the neutrality required by the Free Exercise Clause. The State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners' comments were inconsistent with that requirement, and the Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. Pp. 1730 – 1732.

370 P.3d 272, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. KAGAN, J., filed a concurring opinion, in which BREYER, J., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti–Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for

the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a ***1724** business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

I

A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." App. 148. And he seeks to "honor God through his work at Masterpiece Cakeshop." *Ibid.* One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." *Id.,* at 149. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception

for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." *Id.,* at 152 (emphasis deleted). They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. *Ibid.* He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." *Ibid*. The couple left the shop without further discussion.

The following day, Craig's mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. *Id.,* at 153. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into." *Ibid*. (emphasis deleted).

B

For most of its history, Colorado has prohibited discrimination in places of public ***1725** accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed "An Act to Protect All Citizens in Their Civil Rights," which guaranteed "full and equal enjoyment" of certain public facilities to "all citizens," "regardless of race, color or previous condition of servitude." 1885 Colo. Sess. Laws pp. 132–133. A decade later, the General Assembly expanded the requirement to apply to "all other places of public accommodation." 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti–Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

> "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. § 24–34–601(2)(a) (2017).

The Act defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services ... to the public," but excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes." § 24–34–601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission, in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§ 24–34–306, 24–4–105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See § 24–34–306(9). Available remedies include, among other things, orders to cease-and-desist a discriminatory policy, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public." § 24–34–605. Colorado law does not permit the Commission to assess money damages or fines. §§ 24–34–306(9), 24–34–605.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in September 2012, shortly after the couple's visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation, *id.,* at 35, 48, and that it was Phillips' "standard business practice" not to provide cakes for same-sex weddings, *id.,* at 43.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he ***1726** could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. *Id.,* at 76. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. *Id.,* at 72. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." *Id.,* at 73. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. *Id.,* at 69.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The ALJ first rejected Phillips' argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a–72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins' cake would force Phillips to adhere to "an ideological point of view." *Id.,* at 75a. Applying CADA to the facts at hand, in the ALJ's view, did not interfere with Phillips' freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court's precedent in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. *Id.*, at 879, 110 S.Ct. 1595; App. to Pet. for Cert. 82a–83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. *Id.,* at 57a. The Commission ordered Phillips to "cease and desist from discriminating against ... same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." *Ibid.* It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with ... this Order." *Id.,* at 58a. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken." *Ibid.*

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial ***1727** order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 283 (2015). The court also rejected the argument that the Commission's order violated the Free Exercise Clause. Relying

on this Court's precedent in *Smith, supra,* at 879, 110 S.Ct. 1595, the court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" on the ground that following the law would interfere with religious practice or belief. 370 P.3d, at 289. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U.S. ——, 137 S.Ct. 2290, 198 L.Ed.2d 723 (2017). He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Id.,* at ——, 135 S.Ct., at 2607. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, n. 5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*); see also *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in

our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

***1728** It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4–7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, § 31 (2012); 370 P.3d, at 277. At the time of the events in question, this Court had not issued its decisions either in *United States v. Windsor,* 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases

involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. See *Jack v. Gateaux, Ltd.,* Charge No. P20140071X (Mar. 24, 2015); *Jack v. Le Bakery Sensual, Inc.,* Charge No. P20140070X (Mar. 24, 2015); *Jack v. Azucar Bakery,* Charge No. P20140069X (Mar. 24, 2015).

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in ***1729** effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." Tr. 23. A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." *Id*., at 30. Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

> "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Tr. 11–12.

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention ***1730** those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 540–542, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *id.,* at 558, 113 S.Ct. 2217 (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake

included "wording and images [the baker] deemed derogatory," *Jack v. Gateaux, Ltd.,* Charge No. P20140071X, at 4; featured "language and images [the baker] deemed hateful," *Jack v. Le Bakery Sensual, Inc.,* Charge No. P20140070X, at 4; or displayed a message the baker "deemed as discriminatory, *Jack v. Azucar Bakery,* Charge No. P20140069X, at 4.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies," App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate —thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that "[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the ***1731** requested cakes. 370 P.3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because "the Division found that the bakeries ... refuse[d] the patron's request ... because of the offensive nature of the requested message." *Ibid.*

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal v. Tam,* 582 U.S. ——, —— – ——, 137 S.Ct. 1744, 1762–1764, 198 L.Ed.2d 366 (2017) (opinion of ALITO, J.). The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal

of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

C

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye, supra,* the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id.,* at 534, 113 S.Ct. 2217. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.*, at 547, 113 S.Ct. 2217.

Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.*, at 540, 113 S.Ct. 2217. In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "every appearance," *id.*, at 545, 113 S.Ct. 2217, of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. *Id.*, at 537, 113 S.Ct. 2217. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

***1732** While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the

Commission or by the State at any point in the proceedings that led to affirmance of the order —were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

Justice KAGAN, with whom Justice BREYER joins, concurring.
"[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante,* at 1727. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration." *Ante,* at 1729. I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court's holding.

The Court partly relies on the "disparate consideration of Phillips' case compared to the cases of [three] other bakers" who "objected to a requested cake on the basis of conscience." *Ante,* at 1730, 1732. In the latter cases, a customer named William Jack sought "cakes with images that conveyed disapproval of same-sex marriage, along with religious text"; the bakers whom he

approached refused to make them. *Ante,* at 1730; see *post,* at 1749 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See *ante,* at 1730. And the Court takes especial ***1733** note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested "offensive [in] nature." *Ante,* at 1731 (internal quotation marks omitted). As the Court states, a "principled rationale for the difference in treatment" cannot be "based on the government's own assessment of offensiveness." *Ibid.*

What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti–Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. § 24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation. *Ibid.* The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief. [*]

I read the Court's opinion as fully consistent with that view. The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—"quite ***1734** apart from whether the [Phillips and Jack] cases should ultimately be distinguished." *Ante,* at 1727. And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court says, "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 1728. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State's decisions are not infected by religious hostility or bias. I accordingly concur.

Justice GORSUCH, with whom Justice ALITO joins, concurring.
In *Employment Div., Dept. of Human Resources of Ore. v. Smith,* this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. 494

U.S. 872, 878–879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). *Smith* remains controversial in many quarters. Compare McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), with Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. *Ante,* at 1729 – 1731. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs "offensive." *Ibid.* That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers —or that it could have easily done so consistent with the First Amendment. See *post,* at 1749 – 1750, and n. 4 (GINSBURG, J., dissenting); *ante,* at 1732 – 1734, and n. (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack's case. He approached three bakers ***1735** and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. App. 233, 243, 252. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. *Id.,* at 231, 241, 250. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. *Id.,* at 230, 240, 249. He pointed to Colorado's Anti–Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. See *ibid.*; Colo. Rev. Stat. § 24–34–601(2)(a) (2017). Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. App. 231, 241, 250. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his

religious faith but because the cakes he sought were offensive to their own moral convictions. *Id.,* at 237, 247, 255–256. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. *Id.,* at 230–231, 240, 249. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. *Id.,* at 237, 247, 257. Mr. Jack appealed to the Colorado Civil Rights Commission, but the Commission summarily denied relief. App. to Pet. for Cert. 326a–331a.

Next, take the undisputed facts of Mr. Phillips's case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. App. 168. Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. *Id.,* at 168–169. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. *Ibid.* Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation. *Id.,* at 166–167 ("I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer"). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig's mother. *Id.,* at 38–40, 169. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer, then, would simply mistake the undisputed factual record. See *post,* at 1749, n. 2 (GINSBURG, J., dissenting); *ante,* at 1732 – 1734, and n. (KAGAN, J., concurring)). Nonetheless, the Commission held that Mr. Phillips's conduct violated the Colorado public accommodations law. App. to Pet. for Cert. 56a–58a.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). ***1736** So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. See, *e.g.,* ALI, Model Penal Code §§ 1.13, 2.02(2)(a)(i) (1985); 1 W. LaFave, Substantive Criminal Law § 5.2(b), pp. 460–463 (3d ed. 2018). Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge. See, *e.g.,* Restatement (Second) of Torts § 8A (1965); *Radio Officers v. NLRB,* 347 U.S. 17, 45, 74 S.Ct. 323, 98 L.Ed. 455 (1954).

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from "the offensive nature of the requested message." *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 282, n. 8 (Colo.App.2015); App. 237, 247, 256; App. to Pet. for Cert. 326a–331a; see also Brief for Respondent Colorado Civil Rights Commission 52 ("Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be 'offensive' "). Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a "distinction without a difference." App. to Pet. for Cert. 69a. It concluded instead that an "intent to disfavor" a protected class of persons should be "readily ... presumed" from the knowing failure to serve someone who belongs to that class. *Id.,* at 70a. In its judgment, Mr. Phillips's intentions were "inextricably tied to the sexual orientation of the parties involved" and essentially "irrational." *Ibid.*

Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's objection is "inextricably tied" to a protected class, then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions simply reduce to this: it *presumed* that Mr. Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that "no ***1737** such showing" of actual "animus"—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips's case. 370 P.3d, at 282.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack's case), or it is sufficient to "presume" such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. See *Church of Lukumi Babalu Aye,* 508 U.S., at 543–544, 113 S.Ct. 2217. That is anything but the neutral treatment of religion.

The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of "irrational" or "offensive ... message" that the bakers in the first case refused to endorse. *Ante,* at 1730 – 1731. Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the "proudest boast of our free speech jurisprudence" that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. See *Matal v. Tam,* 582 U.S. ——, ——, 137 S.Ct. 1744, 1764, 198 L.Ed.2d 366 (2017) (plurality opinion) (citing *United States v. Schwimmer,* 279 U.S. 644, 655, 49 S.Ct. 448, 73 L.Ed. 889 (1929) (Holmes, J., dissenting)). Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom. See *Church of Lukumi Babalu Aye, supra,* at 547, 113 S.Ct. 2217; *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 715–716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Wisconsin v. Yoder,* 406 U.S. 205, 223–224, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Cantwell v. Connecticut,* 310 U.S. 296, 308–310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission. It is no answer, for example, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. See *post,* at 1749 – 1750, and n. 4 (GINSBURG,

J., dissenting). It is no answer either simply to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake ***1738** like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. See *ante,* at 1732 – 1734, and n. (KAGAN, J., concurring). These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. See 370 P.3d, at 276 (stating that Mr. Craig and Mr. Mullins "requested that Phillips design and create a *cake to celebrate their same-sex wedding* ") (emphasis added). Like "an emblem or flag," a cake for a same-sex wedding is a symbol that serves as "a short cut from mind to mind," signifying approval of a specific "system, idea, [or] institution." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack's case the choice to refuse to advance a message they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether "high or petty," bear no license to declare what is or should be "orthodox" when it comes to religious beliefs, *id.,* at 642, 63 S.Ct. 1178, or whether an adherent has "correctly perceived" the commands of his religion, *Thomas, supra,* at 716, 101 S.Ct. 1425. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith. See generally *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression," which are "not a condition of constitutional protection").

The second suggestion fares no better. Suggesting that this case is only about "wedding cakes"—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general* ; understanding it as celebrating a same-sex wedding is *too specific* ;

but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed ***1739** them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips's case at "wedding cakes" exactly—and not at, say, "cakes" more generally or "cakes that convey a message regarding same-sex marriage" more specifically? If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack's case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips's case (a cake that conveys no message regarding same-sex marriage). Of course, under *Smith* a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and *Smith,* it must be applied in a manner that treats religion with neutral respect. That means the government must apply the *same* level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description. To some, all wedding cakes may appear indistinguishable. But *to Mr. Phillips* that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points "[r]epeatedly and in many different contexts" over many years. *Smith,* 494 U.S. at 887, 110 S.Ct. 1595. For example, in *Thomas* a faithful Jehovah's Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. 450 U.S., at 711, 101 S.Ct. 1425. Of course, the line Mr. Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed

to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. *Id.,* at 714–716, 101 S.Ct. 1425; see also *United States v. Lee,* 455 U.S. 252, 254–255, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982); *Smith, supra,* at 887, 110 S.Ct. 1595 (collecting authorities). It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding ***1740** cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order "must be set aside." *Ante,* at 1732. Maybe in some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, "[h]owever later cases raising these or similar concerns are resolved in the future, ... the rulings of the Commission and of the state court that enforced the Commission's order" in *this* case "must be invalidated." *Ibid*. Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and concurring in the judgment.

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips' right to freely exercise his religion. As Justice GORSUCH explains, the Commission treated Phillips' case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips' religion. See *ante,* at 1734 – 1737 (concurring opinion). The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips' religion. See *ante,* at 1728 – 1731. Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. See *ante,* at 1723 – 1724. Specifically, the parties dispute whether Phillips refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a premade one). But the Colorado Court of Appeals resolved this factual dispute in Phillips' favor. The court described his conduct as a refusal to "design and create a cake to celebrate [a] same-sex wedding." *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 276

(2015); see also *id.,* at 286 ("designing and selling a wedding cake"); *id.,* at 283 ("refusing to create a wedding cake"). And it noted that the Commission's order required Phillips to sell " '*any* product [he] would sell to heterosexual couples,' " including custom wedding cakes. *Id.,* at 286 (emphasis added).

Even after describing his conduct this way, the Court of Appeals concluded that Phillips' conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

***1741** I

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the "freedom of speech." When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose "incidental burdens" on expression. *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). As the Court explains today, public-accommodations laws usually regulate conduct. *Ante,* at 1727 – 1728 (citing *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995)). "[A]s a general matter," public-accommodations laws do not "target speech" but instead prohibit "the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Id.,* at 572, 115 S.Ct. 2338 (emphasis added).

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law "ha[s] the effect of declaring ... speech itself to be the public accommodation," the First Amendment applies with full force. *Id.,* at 573, 115 S.Ct. 2338; accord, *Boy Scouts of America v. Dale,* 530 U.S. 640, 657–659, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). In *Hurley,* for example, a Massachusetts public-accommodations law prohibited " 'any distinction, discrimination or restriction on account of ... sexual orientation ... relative to the admission of any person to, or treatment in any place of public accommodation.' " 515 U.S., at 561, 115 S.Ct. 2338 (quoting Mass. Gen. Laws § 272:98 (1992); ellipsis in original). When this law required the sponsor of a St. Patrick's Day parade to include a parade unit of gay, lesbian, and bisexual Irish–Americans, the Court unanimously held that the law violated the sponsor's right to free speech. Parades are "a form of expression," this Court explained, and the

application of the public-accommodations law "alter [ed] the expressive content" of the parade by forcing the sponsor to add a new unit. 515 U.S., at 568, 572–573, 115 S.Ct. 2338. The addition of that unit compelled the organizer to "bear witness to the fact that some Irish are gay, lesbian, or bisexual"; "suggest ... that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals"; and imply that their participation "merits celebration." *Id.,* at 574, 115 S.Ct. 2338. While this Court acknowledged that the unit's exclusion might have been "misguided, or even hurtful," *ibid.,* it rejected the notion that governments can mandate "thoughts and statements acceptable to some groups or, indeed, all people" as the "antithesis" of free speech, *id.,* at 579, 115 S.Ct. 2338; accord, *Dale, supra,* at 660–661, 120 S.Ct. 2446.

The parade in *Hurley* was an example of what this Court has termed "expressive conduct." See 515 U.S., at 568–569, 115 S.Ct. 2338. This Court has long held that "the Constitution looks beyond written or spoken words as mediums of expression," *id.,* at 569, 115 S.Ct. 2338, and that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Thus, a person's "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.' " *Texas v. Johnson,* 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American ***1742** flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag. [1]

Of course, conduct does not qualify as protected speech simply because "the person engaging in [it] intends thereby to express an idea." *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). But a " 'particularized message' " is not required, or else the freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley,* 515 U.S., at 569, 115 S.Ct. 2338.

Once a court concludes that conduct is expressive, the Constitution limits the government's authority to restrict or compel it. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say' " and "tailor" the content of his message as he sees fit. *Id.,* at 573, 115 S.Ct. 2338 (quoting *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion)). This

rule "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley, supra,* at 573, 115 S.Ct. 2338. And it "makes no difference" whether the government is regulating the "creati[on], distributi [on], or consum[ption]" of the speech. *Brown v. Entertainment Merchants Assn.,* 564 U.S. 786, 792, n. 1, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011).

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palette with a paintbrush and baker's whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece's website. See http://masterpiececakes.com/wedding-cakes (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ***1743** ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." App. 162.

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, "[w]edding cakes are so packed with symbolism that it is hard to know where to begin." M. Krondl, Sweet Invention: A History of Dessert 321 (2011) (Krondl); see also *ibid.* (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is "so standardised and inevitable a part of getting married that few ever think to question it." Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 95 (1987)Man 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See *id.,* at 98. "A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the

cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards." *Ibid.* Although the cake is eventually eaten, that is not its primary purpose. See *id.,* at 95 ("It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings"); *id.,* at 97 ("Nothing is made of the eating itself"); Krondl 320–321 (explaining that wedding cakes have long been described as "inedible"). The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple. [2]

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), or flying a plain red flag, *Stromberg v. California,* 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). [3] By ***1744** forcing Phillips to create custom wedding cakes for same-sex weddings, Colorado's public-accommodations law "alter[s] the expressive content" of his message. *Hurley,* 515 U.S., at 572, 115 S.Ct. 2338. The meaning of expressive conduct, this Court has explained, depends on "the context in which it occur[s]." *Johnson,* 491 U.S., at 405, 109 S.Ct. 2533. Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to "bear witness to [these] fact[s]," *Hurley,* 515 U.S., at 574, 115 S.Ct. 2338, or to "affir[m] ... a belief with which [he] disagrees," *id.,* at 573, 115 S.Ct. 2338.

B

The Colorado Court of Appeals nevertheless concluded that Phillips' conduct was "not sufficiently expressive" to be protected from state compulsion. 370 P.3d, at 283. It noted that a reasonable observer would not view Phillips' conduct as "an endorsement of same-sex marriage," but rather as mere "compliance" with Colorado's public-accommodations law. *Id.,* at 286–287 (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 64–65, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (*FAIR*); *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 841–842, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 76–78, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980)). It also emphasized that Masterpiece could "disassociat[e]" itself from same-sex marriage by posting a "disclaimer" stating that Colorado law "requires it not to discriminate" or that "the provision of its services does not constitute an endorsement." 370 P.3d, at 288. This reasoning is badly misguided.

1

The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a reasonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it. From the beginning, this Court's compelled-speech precedents have rejected arguments that "would resolve every issue of power in favor of those in authority." *Barnette,* 319 U.S., at 636, 63 S.Ct. 1178. *Hurley,* for example, held that the application of Massachusetts' public-accommodations law "requir[ed] [the organizers] to alter the expressive content of their parade." 515 U.S., at 572–573, 115 S.Ct. 2338. It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party's speech. See *FAIR,* *supra,* at 51, 126 S.Ct. 1297 (law school refused to allow military recruiters ***1745** on campus); *Rosenberger, supra,* at 822–823, 115 S.Ct. 2510 (public university refused to provide funds to a religious student paper); *PruneYard, supra,* at 77, 100 S.Ct. 2035 (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them to endorse that speech. See *FAIR,* *supra,* at 63–65, 126 S.Ct. 1297; *Rosenberger, supra,* at 841–842, 115 S.Ct. 2510; *PruneYard, supra,* at 85–88, 100 S.Ct. 2035. But these decisions do not suggest that the government can force speakers to alter their *own* message. See *Pacific Gas & Elec.,* 475 U.S., at 12, 106 S.Ct. 903 ("Notably absent from *PruneYard* was any concern that access ... might affect the shopping center owner's exercise of his own right to speak"); *Hurley, supra,* at 580, 115 S.Ct. 2338 (similar).

The Colorado Court of Appeals also noted that Masterpiece is a "for-profit bakery" that "charges its customers." 370 P.3d, at 287. But this Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech. See *Pacific Gas & Elec., supra,* at 8, 16, 106 S.Ct. 903 (collecting cases); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 761, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (deeming it "beyond serious dispute" that "[s]peech ... is protected even though it is carried in a form that is 'sold' for profit"). Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely

sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over the messages that Masterpiece sends are still more evidence that Phillips' conduct is expressive. See *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256–258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.,* 576 U.S. ——, ——, 135 S.Ct. 2239, 2251, 192 L.Ed.2d 274 (2015).

2

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as "beg[ging] the core question." *Tornillo, supra,* at 256, 94 S.Ct. 2831. Because the government cannot compel speech, it also cannot "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec.,* 475 U.S., at 16, 106 S.Ct. 903; see also *id.,* at 15, n. 11, 106 S.Ct. 903 (citing *PruneYard,* 447 U.S., at 99, 100 S.Ct. 2035 (Powell, J., concurring in part and concurring in judgment)). States cannot put individuals to the choice of "be[ing] compelled to affirm someone else's belief" or "be[ing] forced to speak when [they] would prefer to remain silent." *Id.,* at 99, 100 S.Ct. 2035.

III

Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law ***1746** withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien,* [4] that test does not apply unless the government would have punished the conduct regardless of its expressive component. See, *e.g., Barnes,* 501 U.S., at 566–572, 111 S.Ct. 2456 (applying *O'Brien* to evaluate the application of a general nudity ban to nude dancing); *Clark,* 468 U.S., at 293, 104 S.Ct. 3065 (applying *O'Brien* to evaluate the application of a general camping ban to a demonstration in the park). Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases

like this one, our precedents demand " 'the most exacting scrutiny.' " *Johnson,* 491 U.S., at 412, 109 S.Ct. 2533; accord, *Holder v. Humanitarian Law Project,* 561 U.S. 1, 28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010).

The Court of Appeals did not address whether Colorado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from " 'denigrat[ing] the dignity' " of same-sex couples, " 'assert[ing] [their] inferiority,' " and subjecting them to " 'humiliation, frustration, and embarrassment.' " Brief for Respondents Craig et al. 39 (quoting *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 142, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 292, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Goldberg, J., concurring)). These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson, supra,* at 414, 109 S.Ct. 2533. A contrary rule would allow the government to stamp out virtually any speech at will. See *Morse v. Frederick,* 551 U.S. 393, 409, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) ("After all, much political and religious speech might be perceived as offensive to some"). As the Court reiterates today, "it is not ... the role of the State or its officials to prescribe what shall be offensive." *Ante,* at 1731. " 'Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' " *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); accord, *Johnson, supra,* at 408–409, 109 S.Ct. 2533. If the only reason a public-accommodations law regulates speech is "to produce a society free of ... biases" against the protected groups, that purpose is "decidedly fatal" to the law's constitutionality, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley,* 515 U.S., at 578–579, 115 S.Ct. 2338; see also ***1747** *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"). "[A] speech burden based on audience reactions is simply government hostility ... in a different guise." *Matal v. Tam,* 582 U.S. ——, ——, 137 S.Ct. 1744, 1767, 198 L.Ed.2d 366 (2017) (KENNEDY, J., concurring in part and concurring in judgment).

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, " 'I'll make your birthday cakes, shower

cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.' " App. 168. It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags"—all of which this Court has deemed protected by the First Amendment. See *Hurley, supra,* at 574–575, 115 S.Ct. 2338; *Dale,* 530 U.S., at 644, 120 S.Ct. 2446; *Snyder v. Phelps,* 562 U.S. 443, 448, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). Moreover, it is also hard to see how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25–foot cross, *Virginia v. Black,* 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); conduct a rally on Martin Luther King Jr.'s birthday, *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to " 'Bury the niggers,' " *Brandenburg v. Ohio,* 395 U.S. 444, 446, n. 1, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*).

Nor does the fact that this Court has now decided *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), somehow diminish Phillips' right to free speech. "It is one thing ... to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted" and unentitled to express a different view. *Id.,* at ——, 135 S.Ct., at 2626 (ROBERTS, C.J., dissenting). This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id.*, at ——, 135 S.Ct., at 2594 (majority opinion). If Phillips' continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected. See *Dale, supra,* at 660, 120 S.Ct. 2446 ("[T]he fact that [the social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view").

* * *

In *Obergefell*, I warned that the Court's decision would "inevitabl [y] ... come into conflict" with religious liberty, "as individuals ... are confronted with demands to participate in and endorse civil marriages between same-sex couples." 576 U.S., at ——, 135 S.Ct., at 2638 (dissenting opinion). This case proves that the conflict has ***1748** already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight

another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy." *Id.,* at ——, 135 S.Ct., at 2642 (ALITO, J., dissenting). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Ante,* at 1727. "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 1727 – 1728. "[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying 'no goods or services will be sold if they will be used for gay marriages.' " *Ante,* at 1728 – 1729. Gay persons may be spared from "indignities when they seek goods and services in an open market." *Ante,* at 1732. [1] I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." *Ante,* at 1731. This conclusion rests on evidence said to show the Colorado Civil Rights Commission's ***1749** (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack, an *amicus* here. *Ante,* at 1732. The Court also finds hostility in statements made at two public hearings on Phillips' appeal to the Commission. *Ante,* at 1728 – 1730. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

> "made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake, he requested [on] one side[,] ... 'God hates sin. Psalm 45:7' and on the opposite side of the cake 'Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red 'X' [Jack] requested [these words]: 'God loves sinners' and on the other side 'While we were yet sinners Christ died for us. Romans 5:8.' " App. to Pet. for Cert. 319a; see *id.,* at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discriminate" and "accept[s] all humans." *Id.,* at 301a (internal quotation marks omitted). The second bakery owner told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." *Id.,* at 310a (internal quotation marks omitted). The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message. *Id.,* at 319a.[2]

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. *Id.,* at 297a, 307a, 316a. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Antidiscrimination Act (CADA) protects. See *id.,* at 305a, 314a, 324a. The Commission summarily affirmed the Division's no-probable-cause finding. See *id.,* at 326a–331a.

***1750** The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections." *Ante,* at 1730. See also *ante,* at 1736 – 1737 (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Cf. *ante,* at 1735 – 1736, 1738 – 1739 (GORSUCH, J., concurring). Colorado, the Court

does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. See *supra,* at 1748. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse. [3]

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers [4] was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer. Cf. *ante,* at 1730.

Nor was the Colorado Court of Appeals' "difference in treatment of these two instances ... based on the government's own assessment of offensiveness." *Ante,* at 1731. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the ***1751** requested product would literally display. As the Court recognizes, a refusal "to design a special cake with words or images ... might be different from a refusal to sell any cake at all." *Ante,* at 1723. [5] The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See App. to Pet. for Cert. 20a, n. 8 ("The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather because of the offensive nature of the requested message.... [T]here was no evidence that the bakeries based their decisions on [Jack's] religion ... [whereas Phillips] discriminat [ed] on the basis of sexual orientation."). I do not read the Court to suggest that the Colorado Legislature's decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. Cf. *ante,* at 1727 – 1728. To repeat, the Court affirms that "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Ante,* at 1728.

II

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see

no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. See App. to Pet. for Cert. 5a–6a. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case *de novo*. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), where the government action that ***1752** violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see *id.,* at 526–528, 113 S.Ct. 2217.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* Justice GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases "would not sell the requested cakes to anyone." *Post,* at 1735. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. Justice GORSUCH can make the claim only because he does not think a "wedding cake" is the relevant product. As Justice GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a "cake celebrating same-sex marriage." *Ibid.*; see *post,* at 1735, 1736 – 1737, 1737 – 1738. But that is wrong. The cake requested was not a special "cake celebrating same-sex marriage." It was simply a wedding cake—one that

(like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See *ante,* at 1724 – 1725 (majority opinion) (recounting that Phillips did not so much as discuss the cake's design before he refused to make it). And contrary to Justice GORSUCH's view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with "religious significance." *Post,* at 1728. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. See *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, n. 5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *ante,* at 1727. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips' religious beliefs—Colorado could have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.

1 *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *Texas v. Johnson,* 491 U.S. 397, 405–406, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Spence v. Washington,* 418 U.S. 405, 406, 409–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (*per curiam*); *Schacht v. United States,* 398 U.S. 58, 62–63, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 505–506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Brown v. Louisiana,* 383 U.S. 131, 141–142, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (opinion of Fortas, J.); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 633–634, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Stromberg v. California,* 283 U.S. 359, 361, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

2 The Colorado Court of Appeals acknowledged that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage," depending on its "design" and whether it has "written inscriptions." *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 288 (2015). But a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 96 (1987)Man 93, 96 (1987). And regardless, the Commission's order does not distinguish between plain wedding cakes and wedding cakes with particular designs or inscriptions; it requires Phillips to make any wedding cake for a same-sex wedding that he would make for an opposite-sex wedding.

3 The dissent faults Phillips for not "submitting ... evidence" that wedding cakes communicate a message. *Post,* at 1748, n. 1 (opinion of GINSBURG, J.). But this requirement finds no support in our precedents. This Court did not insist that the parties submit evidence detailing the expressive nature of parades, flags, or nude dancing. See *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 568–570, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *Spence,* 418 U.S., at 410–411, 94 S.Ct. 2727; *Barnes,* 501 U.S., at 565–566, 111 S.Ct. 2456. And we do not need extensive evidence here to conclude that Phillips' artistry is expressive, see *Hurley,* 515 U.S., at 569, 115 S.Ct. 2338, or that wedding cakes at least communicate the basic fact that "this is a wedding," see *id.,* at 573–575, 115 S.Ct. 2338. Nor does it matter that the couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time. See *id.,* at 569–570, 115 S.Ct. 2338. And by forcing him to provide the cake, Colorado is requiring Phillips to be "intimately connected" with the couple's speech, which is enough to implicate his First Amendment rights. See *id.,* at 576, 115 S.Ct. 2338.

4 "[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien,* 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

1 As Justice THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. See *ante,* at 1740 (opinion concurring in part and concurring in judgment). Nor could it, consistent with our First Amendment precedents. Justice THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. *Ante,* at 1724 – 1725 (citing *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). The record in this case is replete with Jack Phillips' own views on the messages he believes his cakes convey. See *ante,* at 1742 – 1743 (THOMAS, J., concurring in part and concurring in judgment) (describing how Phillips "considers" and "sees" his work). But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 100–101 (1987)Man 93, 100–101 (1987) (no explanation of wedding cakes' symbolism was forthcoming "even amongst those who might be expected to be the experts"); *id.,* at 104–105 (the cake cutting tradition might signify "the bride and groom ... as appropriating the cake" from the bride's parents). And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct. Cf. *ante,* at

1743, n. 2 (THOMAS, J., concurring in part and concurring in judgment); *Hurley v. Irish–American Gay, Lesbian, and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 568–579, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (citing previous cases recognizing parades to be expressive); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (noting precedents suggesting nude dancing is expressive conduct); *Spence v. Washington,* 418 U.S. 405, 410, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (observing the Court's decades-long recognition of the symbolism of flags).

2 The record provides no ideological explanation for the bakeries' refusals. Cf. *ante,* at 1734 – 1735, 1738, 1739 – 1740 (GORSUCH, J., concurring) (describing Jack's requests as offensive to the bakers' "secular" convictions).

3 Justice GORSUCH argues that the situations "share all legally salient features." *Ante,* at 1735 (concurring opinion). But what critically differentiates them is the role the customer's "statutorily protected trait," *ibid.,* played in the denial of service. Change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request. The bakers' objections to Jack's cakes had nothing to do with "religious opposition to same-sex weddings." *Ante,* at 1736 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack's second cake, in particular, where he requested an image of two groomsmen covered by a red "X" and the lines "God loves sinners" and "While we were yet sinners Christ died for us," the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. See *supra,* at 1749. Phillips did, therefore, discriminate *because of* sexual orientation; the other bakers did not discriminate *because of* religious belief; and the Commission properly found discrimination in one case but not the other. Cf. *ante,* at 1735 – 1737 (GORSUCH, J., concurring).

4 But see *ante,* at 1726 (majority opinion) (acknowledging that Phillips refused to sell to a lesbian couple cupcakes for a celebration of their union).

5 The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, "could reasonably be interpreted as being inconsistent as to the question of whether speech is involved." *Ante,* at 1730. But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, http://www.masterpiececakes.com/wedding-cakes (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see *ante,* at 1737 – 1738

(GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.

2022 WL 120952
Supreme Court of the United States.

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al., Applicants
v.
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, et al.
Ohio, et al., Applicants
v.
Department of Labor, Occupational Safety and Health Administration, et al.

Nos. 21A244 and 21A247
|
January 13, 2022

Synopsis

Background: States, businesses, trade groups, nonprofit organizations, and others filed separate petitions for review of emergency temporary standard (ETS) issued by Secretary of Labor, acting through Occupational Safety and Health Administration (OSHA), mandating that employers with more than 100 employees require the employees to undergo COVID-19 vaccination or take weekly COVID-19 tests at their own expense and wear a mask in workplace. The United States Court of Appeals for the Fifth Circuit, Engelhardt, Circuit Judge, 17 F.4th 604, stayed enforcement pending judicial review of petitioners' motions for permanent injunction. Government notified judicial panel on multidistrict litigation of petitions across multiple circuits, invoking lottery procedure to consolidate all petitions in single circuit, and panel designated the United States Court of Appeals for the Sixth Circuit to review the petitions. The United States Court of Appeals for the Sixth Circuit, Stranch, Circuit Judge, 2021 WL 5989357, granted federal government's motion to dissolve the stay, and denied rehearing en banc, 20 F.4th 264. States and a business organization applied for stay pending judicial review.

Holdings: The Supreme Court held that:

petitioners were likely to succeed on claim that ETS exceeded Secretary's statutory authority, and

equities did not justify withholding interim relief through a stay.

Applications granted; rule stayed.

Justice Gorsuch filed a concurring opinion, in which Justices Thomas and Alito joined.

Justices Breyer, Sotomayor, and Kagan filed a dissenting opinion.

Procedural Posture(s): Motion for Stay; Review of Administrative Decision.

West Codenotes

Validity Called into Doubt

29 C.F.R. §§ 1910.501, 1910.504, 1910.505, 1910.509, 1915.1501, 1917.31, 1918.110, 1926.58, 1928.21

Opinion

Per Curiam.

***1** The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here.

Many States, businesses, and nonprofit organizations challenged OSHA's rule in Courts of Appeals across the country. The Fifth Circuit initially entered a stay. But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA's rule to take effect. Applicants now seek emergency relief from this Court, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.

I

A

Congress enacted the Occupational Safety and Health Act in 1970. 84 Stat. 1590, 29 U.S.C. § 651 *et seq.* The Act created the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor and under the supervision of its Secretary. As its name suggests, OSHA is tasked with ensuring *occupational* safety—that is, "safe and healthful working conditions." § 651(b). It does so by enforcing occupational safety and health standards promulgated by the Secretary. § 655(b). Such standards must be "reasonably necessary or appropriate to provide safe or healthful *employment*." § 652(8) (emphasis added). They must also be developed using a rigorous process that includes notice, comment, and an opportunity for a public hearing. § 655(b).

The Act contains an exception to those ordinary notice-and-comment procedures for "emergency temporary standards." § 655(c)(1). Such standards may "take immediate effect upon publication in the Federal Register." *Ibid.* They are permissible, however, only in the narrowest of circumstances: the Secretary must show (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) that the "emergency standard is necessary to protect employees from such danger." *Ibid.* Prior to the emergence of COVID–19, the Secretary had used this power just nine times before (and never to issue a rule as broad as this one). Of those nine emergency rules, six were challenged in court, and only one of those was upheld in full. See *BST Holdings, L.L.C. v. Occupational Safety and Health Admin.*, 17 F.4th 604, 609 (CA5 2021).

B

***2** On September 9, 2021, President Biden announced "a new plan to require more Americans to be vaccinated." Remarks on the COVID–19 Response and National Vaccination Efforts, 2021 Daily Comp. of Pres. Doc. 775, p. 2. As part of that plan, the President said that the Department of Labor would issue an emergency rule requiring all employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week." *Ibid.* The purpose of the rule was to increase vaccination rates at "businesses all across America." *Ibid.* In tandem with other planned regulations, the administration's goal was to impose "vaccine requirements" on "about 100 million Americans, two-thirds of all workers." *Id.,* at 3.

After a 2-month delay, the Secretary of Labor issued the promised emergency standard. 86 Fed. Reg. 61402 (2021). Consistent with President Biden's announcement, the rule applies to all who work for employers with 100 or more employees. There are narrow exemptions for employees who work remotely "100 percent of the time" or who "work exclusively outdoors," but those exemptions are largely illusory. *Id.,* at 61460. The Secretary has estimated, for example, that only nine percent of landscapers and groundskeepers qualify as working exclusively outside. *Id.,* at

61461. The regulation otherwise operates as a blunt instrument. It draws no distinctions based on industry or risk of exposure to COVID–19. Thus, most lifeguards and linemen face the same regulations as do medics and meatpackers. OSHA estimates that 84.2 million employees are subject to its mandate. *Id.,* at 61467.

Covered employers must "develop, implement, and enforce a mandatory COVID–19 vaccination policy." *Id.*, at 61402. The employer must verify the vaccination status of each employee and maintain proof of it. *Id.*, at 61552. The mandate does contain an "exception" for employers that require unvaccinated workers to "undergo [weekly] COVID–19 testing and wear a face covering at work in lieu of vaccination." *Id.*, at 61402. But employers are not required to offer this option, and the emergency regulation purports to pre-empt state laws to the contrary. *Id.,* at 61437. Unvaccinated employees who do not comply with OSHA's rule must be "removed from the workplace." *Id.,* at 61532. And employers who commit violations face hefty fines: up to $13,653 for a standard violation, and up to $136,532 for a willful one. 29 C.F.R. § 1903.15(d) (2021).

C

OSHA published its vaccine mandate on November 5, 2021. Scores of parties—including States, businesses, trade groups, and nonprofit organizations—filed petitions for review, with at least one petition arriving in each regional Court of Appeals. The cases were consolidated in the Sixth Circuit, which was selected at random pursuant to 28 U.S.C. § 2112(a).

Prior to consolidation, however, the Fifth Circuit stayed OSHA's rule pending further judicial review. *BST Holdings*, 17 F.4th 604. It held that the mandate likely exceeded OSHA's statutory authority, raised separation-of-powers concerns in the absence of a clear delegation from Congress, and was not properly tailored to the risks facing different types of workers and workplaces.

When the consolidated cases arrived at the Sixth Circuit, two things happened. First, many of the petitioners—nearly 60 in all—requested initial hearing en banc. Second, OSHA asked the Court of Appeals to vacate the Fifth Circuit's existing stay. The Sixth Circuit denied the request for initial hearing en banc by an evenly divided 8-to-8 vote. *In re MCP No. 165*, 20 F.4th 264 (CA6 2021). Chief Judge Sutton dissented, joined by seven of his colleagues. He reasoned that the Secretary's "broad assertions of administrative power demand unmistakable legislative support," which he found lacking. *Id.,* at 268. A three-judge panel then dissolved the Fifth Circuit's stay, holding that OSHA's mandate was likely consistent with the agency's statutory and constitutional authority. See *In re MCP No. 165*, 2021 WL 5989357, —— F. 4th —— (CA6 2021). Judge Larsen dissented.

***3** Various parties then filed applications in this Court requesting that we stay OSHA's emergency standard. We consolidated two of those applications—one from the National Federation of

Independent Business, and one from a coalition of States—and heard expedited argument on January 7, 2022.

II

The Sixth Circuit concluded that a stay of the rule was not justified. We disagree.

A

Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." *In re MCP No. 165*, 20 F.4th at 272 (Sutton, C. J., dissenting). It is instead a significant encroachment into the lives—and health—of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U.S. ——, ——, 141 S.Ct. 2485, 2489, 210 L.Ed.2d 856 (2021) (*per curiam*) (internal quotation marks omitted). There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.

The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures. See 29 U.S.C. § 655(b) (directing the Secretary to set "*occupational* safety and health standards" (emphasis added)); § 655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace). Confirming the point, the Act's provisions typically speak to hazards that employees face at work. See, *e.g.*, §§ 651, 653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

The dissent protests that we are imposing "a limit found no place in the governing statute." *Post*, at —— (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ.). Not so. It is the text of the agency's Organic Act that repeatedly makes clear that OSHA is charged with regulating "occupational" hazards and the safety and health of "employees." See, *e.g.*, 29 U.S.C. §§ 652(8), 654(a)(2), 655(b)–(c).

The Solicitor General does not dispute that OSHA is limited to regulating "work-related dangers." Response Brief for OSHA in No. 21A244 etc., p. 45 (OSHA Response). She instead argues that the risk of contracting COVID–19 qualifies as such a danger. We cannot agree. Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.

***4** The dissent contends that OSHA's mandate is comparable to a fire or sanitation regulation imposed by the agency. See *post*, at —— – ——. But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, "cannot be undone at the end of the workday." *In re MCP No. 165*, 20 F.4th at 274 (Sutton, C. J., dissenting). Contrary to the dissent's contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not "part of what the agency was built for." *Post*, at ——.

That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "*occupational* safety or health standard." 29 U.S.C. § 655(b) (emphasis added).

In looking for legislative support for the vaccine mandate, the dissent turns to the American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 4. See *post*, at ——. That legislation, signed into law on March 11, 2021, of course said nothing about OSHA's vaccine mandate, which was not announced until six months later. In fact, the most noteworthy action concerning the vaccine mandate by either House of Congress has been a majority vote of the Senate disapproving the regulation on December 8, 2021. S. J. Res. 29, 117th Cong., 1st Sess. (2021).

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This "lack of historical precedent," coupled with the breadth of authority that

the Secretary now claims, is a "telling indication" that the mandate extends beyond the agency's legitimate reach. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (internal quotation marks omitted). [1]

B

The equities do not justify withholding interim relief. We are told by the States and the employers that OSHA's mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs. See Application in No. 21A244, pp. 25–32; Application in No. 21A247, pp. 32–33; see also 86 Fed. Reg. 61475. For its part, the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations. OSHA Response 83; see also 86 Fed. Reg. 61408.

It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.

* * *

***5** The applications for stays presented to Justice KAVANAUGH and by him referred to the Court are granted.

OSHA's COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the Sixth Circuit and disposition of the applicants' petitions for writs of certiorari, if such writs are timely sought. Should the petitions for writs of certiorari be denied, this order shall terminate automatically. In the event the petitions for writs of certiorari are granted, the order shall terminate upon the sending down of the judgment of this Court.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, concurring.
The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency

in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.

*

I start with this Court's precedents. There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the "general power of governing," including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 536, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (opinion of ROBERTS, C. J.); U.S. Const., Amdt. 10. And in fact, States have pursued a variety of measures in response to the current pandemic. *E.g.*, Cal. Dept. of Public Health, All Facilities Letter 21–28.1 (Dec. 27, 2021); see also N. Y. Pub. Health Law Ann. § 2164 (West 2021).

The federal government's powers, however, are not general but limited and divided. See *McCulloch v. Maryland*, 4 Wheat. 316, 405, 17 U.S. 316, 4 L.Ed. 579 (1819). Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U.S. ——, ——, 141 S.Ct. 2485, 2489, 210 L.Ed.2d 856 (2021) (*per curiam*) (internal quotation marks omitted). We sometimes call this the major questions doctrine. *Gundy* v. *United States*, 588 U.S. ——, ——, 139 S.Ct. 2116, 2141, 204 L.Ed.2d 522 (2019) (GORSUCH, J., dissenting).

***6** OSHA's mandate fails that doctrine's test. The agency claims the power to force 84 million Americans to receive a vaccine or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA. Approximately two years have passed since this pandemic began; vaccines have been available for more than a year. Over that span, Congress has adopted several major pieces of legislation aimed at combating COVID–19. *E.g.*, American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 4. But Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. Indeed, a majority of the Senate even voted to *disapprove* OSHA's regulation. See S.J. Res. 29, 117th Cong., 1st Sess. (2021). It seems, too, that the agency

pursued its regulatory initiative only as a legislative " 'work-around.' " *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 612 (CA5 2021). Far less consequential agency rules have run afoul of the major questions doctrine. *E.g.*, *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) (eliminating rate-filing requirement). It is hard to see how this one does not.

What is OSHA's reply? It directs us to 29 U.S.C. § 655(c)(1). In that statutory subsection, Congress authorized OSHA to issue "emergency" regulations upon determining that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful" and "that such emergency standard[s] [are] necessary to protect employees from such danger[s]." According to the agency, this provision supplies it with "almost unlimited discretion " to mandate new nationwide rules in response to the pandemic so long as those rules are " reasonably related " to workplace safety. 86 Fed. Reg. 61402, 61405 (2021) (internal quotation marks omitted).

The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate. See *ante*, at 5–6. Section 655(c)(1) was not adopted in response to the pandemic, but some 50 years ago at the time of OSHA's creation. Since then, OSHA has relied on it to issue only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals. See *In re: MCP No. 165*, 20 F.4th 264, 276 (CA6 2021) (Sutton, C. J., dissenting from denial of initial hearing en banc). As the agency itself explained to a federal court less than two years ago, the statute does "not authorize OSHA to issue sweeping health standards" that affect workers' lives outside the workplace. Brief for Department of Labor, *In re: AFL–CIO*, No. 20–1158, pp. 3, 33 (CADC 2020). Yet that is precisely what the agency seeks to do now—regulate not just what happens inside the workplace but induce individuals to undertake a medical procedure that affects their lives outside the workplace. Historically, such matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers. Meanwhile, at the federal level, OSHA arguably is not even the agency most associated with public health regulation. And in the rare instances when Congress has sought to mandate vaccinations, it has done so expressly. *E.g.*, 8 U.S.C. § 1182(a)(1)(A)(ii). We have nothing like that here.

*

Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. *E.g.*, *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 645, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) (plurality opinion). Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

***7** The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. Sometimes lawmakers may be tempted to delegate power to agencies to "reduc[e] the degree to which they will be held accountable for unpopular actions." R. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. Pub. Pol'y 147, 154 (2017). But the Constitution imposes some boundaries here. *Gundy*, 588 U.S., at ——, 139 S.Ct., at 2131 (GORSUCH, J., dissenting). If Congress could hand off all its legislative powers to unelected agency officials, it "would dash the whole scheme" of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives. *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 61, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015) (ALITO, J., concurring); see also M. McConnell, The President Who Would Not Be King 326–335 (2020); I. Wurman, Nondelegation at the Founding, 130 Yale L. J. 1490, 1502 (2021).

The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. *E.g.*, *King v. Burwell*, 576 U.S. 473, 485–486, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015). Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes." *Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). In this way, the doctrine is "a vital check on expansive and aggressive assertions of executive authority." *United States Telecom Assn. v. FCC*, 855 F.3d 381, 417 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); see also N. Richardson, Keeping Big Cases From Making Bad Law: The Resurgent Major Questions Doctrine, 49 Conn. L. Rev. 355, 359 (2016).

Whichever the doctrine, the point is the same. Both serve to prevent "government by bureaucracy supplanting government by the people." A. Scalia, A Note on the Benzene Case, American

Enterprise Institute, J. on Govt. & Soc., July–Aug. 1980, p. 27. And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion—and certainly impose no "specific restrictions" that "meaningfully constrai[n]" the agency. *Touby v. United States*, 500 U.S. 160, 166–167, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991). OSHA would become little more than a "roving commission to inquire into evils and upon discovery correct them." *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) (Cardozo, J., concurring). Either way, the point is the same one Chief Justice Marshall made in 1825: There are some "important subjects, which must be entirely regulated by the legislature itself," and others "of less interest, in which a general provision may be made, and power given to [others] to fill up the details." *Wayman v. Southard*, 10 Wheat. 1, 43, 23 U.S. 1, 6 L.Ed. 253 (1825). And on no one's account does this mandate qualify as some "detail."

*

The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA. In saying this much, we do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans. Respecting those demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little.

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.

***8** Every day, COVID–19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID–19, in short, is a menace in work settings. The proof is all around us: Since the disease's onset, most Americans have seen their workplaces transformed.

So the administrative agency charged with ensuring health and safety in workplaces did what Congress commanded it to: It took action to address COVID–19's continuing threat in those spaces.

The Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (Standard), requiring *either* vaccination *or* masking and testing, to protect American workers. The Standard falls within the core of the agency's mission: to "protect employees" from "grave danger" that comes from "new hazards" or exposure to harmful agents. 29 U.S.C. § 655(c)(1). OSHA estimates—and there is no ground for disputing—that the Standard will save over 6,500 lives and prevent over 250,000 hospitalizations in six months' time. 86 Fed. Reg. 61408 (2021).

Yet today the Court issues a stay that prevents the Standard from taking effect. In our view, the Court's order seriously misapplies the applicable legal standards. And in so doing, it stymies the Federal Government's ability to counter the unparalleled threat that COVID–19 poses to our Nation's workers. Acting outside of its competence and without legal basis, the Court displaces the judgments of the Government officials given the responsibility to respond to workplace health emergencies. We respectfully dissent.

I

In 1970, Congress enacted the Occupational Safety and Health Act (Act) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources," including "by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U.S.C. §§ 651(b), (b)(5). To that end, the Act empowers OSHA to issue "mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." § 651(b)(3). Still more, the Act requires OSHA to issue "an emergency temporary standard to take immediate effect upon publication in the Federal Register if [the agency] determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." § 655(c)(1).

Acting under that statutory command, OSHA promulgated the emergency temporary standard at issue here. The Standard obligates employers with at least 100 employees to require that an employee either (1) be vaccinated against COVID–19 or (2) take a weekly COVID–19 test and wear a mask at work. 86 Fed. Reg. 61551–61553. The Standard thus encourages vaccination, but permits employers to adopt a masking-or-testing policy instead. (The majority obscures this choice by insistently calling the policy a "vaccine mandate." *Ante,* at ——, ——, ——, ——.) Further, the Standard does not apply in a variety of settings. It exempts employees who are at a reduced risk of infection because they work from home, alone, or outdoors. See 86 Fed. Reg. 61551. It makes exceptions based on religious objections or medical necessity. See *id.*, at 61552. And the Standard does not constrain any employer able to show that its "conditions, practices,

means, methods, operations, or processes" make its workplace equivalently "safe and healthful." 29 U.S.C. § 655(d). Consistent with statutory requirements, the Standard lasts only six months. See § 655(c)(3).

***9** Multiple lawsuits challenging the Standard were filed in the Federal Courts of Appeals. The applicants asked the courts to stay the Standard's implementation while their legal challenges were pending. The lawsuits were consolidated in the Court of Appeals for the Sixth Circuit. See 28 U.S.C. § 2112(a)(3). That court dissolved a stay previously entered, thus allowing the Standard to take effect. See *In re MCP No. 165*, 2021 WL 5989357, —— F. 4th —— (2021). The applicants now ask this Court to stay the Standard for the duration of the litigation. Today, the Court grants that request, contravening clear legal principles and itself causing grave danger to the Nation's workforce.

II

The legal standard governing a request for relief pending appellate review is settled. To obtain that relief, the applicants must show: (1) that their "claims are likely to prevail," (2) "that denying them relief would lead to irreparable injury," and (3) "that granting relief would not harm the public interest." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. ——, ——, 141 S.Ct. 63, 66, 208 L.Ed.2d 206 (2020) (*per curiam*). Moreover, because the applicants seek judicial intervention that the Sixth Circuit withheld below, this Court should not issue relief unless the applicants can establish that their entitlement to relief is "indisputably clear." *South Bay United Pentecostal Church* v. *Newsom*, 590 U.S. ——, ——, 140 S.Ct. 1613, 1613, 207 L.Ed.2d 154 (2020) (ROBERTS, C. J., concurring in denial of application for injunctive relief) (internal quotation marks omitted). None of these requirements is met here.

III

A

The applicants are not "likely to prevail" under any proper view of the law. OSHA's rule perfectly fits the language of the applicable statutory provision. Once again, that provision commands—not just enables, but commands—OSHA to issue an emergency temporary standard whenever it determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). Each

and every part of that provision demands that, in the circumstances here, OSHA act to prevent workplace harm.

The virus that causes COVID–19 is a "new hazard" as well as a "physically harmful" "agent." Merriam-Webster's Collegiate Dictionary 572 (11th ed. 2005) (defining "hazard" as a "source of danger"); *id.*, at 24 (defining "agent" as a "chemically, physically, or biologically active principle"); *id.*, at 1397 (defining "virus" as "the causative agent of an infectious disease").

The virus also poses a "grave danger" to millions of employees. As of the time OSHA promulgated its rule, more than 725,000 Americans had died of COVID–19 and millions more had been hospitalized. See 86 Fed. Reg. 61408, 61424; see also CDC, COVID Data Tracker Weekly Review: Interpretive Summary for Nov. 5, 2021 (Jan. 12, 2022), https://cdc.gov/coronavirus/2019–ncov/covid-data/covidview/past-reports/11052021.html. Since then, the disease has continued to work its tragic toll. In the last week alone, it has caused, or helped to cause, more than 11,000 new deaths. See CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#cases_deathsinlast7days. And because the disease spreads in shared indoor spaces, it presents heightened dangers in most workplaces. See 86 Fed. Reg. 61411, 61424.

Finally, the Standard is "necessary" to address the danger of COVID–19. OSHA based its rule, requiring either testing and masking or vaccination, on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID–19 in most workplaces. The agency showed, in meticulous detail, that close contact between infected and uninfected individuals spreads the disease; that "[t]he science of transmission does not vary by industry or by type of workplace"; that testing, mask wearing, and vaccination are highly effective —indeed, essential—tools for reducing the risk of transmission, hospitalization, and death; and that unvaccinated employees of all ages face a substantially increased risk from COVID–19 as compared to their vaccinated peers. *Id.*, at 61403, 61411–61412, 61417–61419, 61433–61435, 61438–61439. In short, OSHA showed that no lesser policy would prevent as much death and injury from COVID–19 as the Standard would.

***10** OSHA's determinations are "conclusive if supported by substantial evidence." 29 U.S.C. § 655(f). Judicial review under that test is deferential, as it should be. OSHA employs, in both its enforcement and health divisions, numerous scientists, doctors, and other experts in public health, especially as it relates to work environments. Their decisions, we have explained, should stand so long as they are supported by " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 522, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). Given the extensive evidence in the record supporting OSHA's determinations about the risk of COVID–19 and the efficacy of

masking, testing, and vaccination, a court could not conclude that the Standard fails substantial-evidence review.

B

The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the majority does not contest that COVID–19 is a "new hazard" and "physically harmful agent"; that it poses a "grave danger" to employees; or that a testing and masking or vaccination policy is "necessary" to prevent those harms. Instead, the majority claims that the Act does not "plainly authorize[ ]" the Standard because it gives OSHA the power to "set *workplace* safety standards" and COVID–19 exists both inside and outside the workplace. *Ante,* at ——. In other words, the Court argues that OSHA cannot keep workplaces safe from COVID–19 because the agency (as it readily acknowledges) has no power to address the disease outside the work setting.

But nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority. Of course, the majority is correct that OSHA is not a roving public health regulator, see *ante,* at —— – ——: It has power only to protect employees from workplace hazards. But as just explained, that is exactly what the Standard does. See *supra*, at —— – ——. And the Act requires nothing more: Contra the majority, it is indifferent to whether a hazard in the workplace is also found elsewhere. The statute generally charges OSHA with "assur[ing] so far as possible ... safe and healthful working conditions." 29 U.S.C. § 651(b). That provision authorizes regulation to protect employees from all hazards present in the workplace—or, at least, all hazards in part created by conditions there. It does not matter whether those hazards also exist beyond the workplace walls. The same is true of the provision at issue here demanding the issuance of temporary emergency standards. Once again, that provision kicks in when employees are exposed in the workplace to "new hazards" or "substances or agents" determined to be "physically harmful." § 655(c)(1). The statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter. When Congress "enact[s] expansive language offering no indication whatever that the statute limits what [an agency] can" do, the Court cannot "impos[e] limits on an agency's discretion that are not supported by the text." *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U.S. ——, ——, 140 S.Ct. 2367, 2380–81, 207 L.Ed.2d 819 (2020)(alteration and internal quotation marks omitted). That is what the majority today does—impose a limit found no place in the governing statute.

Consistent with Congress's directives, OSHA has long regulated risks that arise both inside and outside of the workplace. For example, OSHA has issued, and applied to nearly all workplaces, rules combating risks of fire, faulty electrical installations, and inadequate emergency exits—even though the dangers prevented by those rules arise not only in workplaces but in many physical

facilities (*e.g.,* stadiums, schools, hotels, even homes). See 29 C.F.R. § 1910.155 (2020) (fire); §§ 1910.302–1910.308 (electrical installations); §§ 1910.34–1910.39 (exit routes). Similarly, OSHA has regulated to reduce risks from excessive noise and unsafe drinking water—again, risks hardly confined to the workplace. See § 1910.95 (noise); § 1910.141 (water). A biological hazard—here, the virus causing COVID–19—is no different. Indeed, Congress just last year made this clear. It appropriated $100 million for OSHA "to carry out COVID–19 related worker protection activities" in work environments of all kinds. American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 30. That legislation refutes the majority's view that workplace exposure to COVID–19 is somehow not a workplace hazard. Congress knew—and Congress said—that OSHA's responsibility to mitigate the harms of COVID–19 in the typical workplace do not diminish just because the disease also endangers people in other settings.

***11** That is especially so because—as OSHA amply established—COVID–19 poses special risks in most workplaces, across the country and across industries. See 86 Fed. Reg. 61424 ("The likelihood of transmission can be exacerbated by common characteristics of many workplaces"). The majority ignores these findings, but they provide more-than-ample support for the Standard. OSHA determined that the virus causing COVID–19 is "readily transmissible in workplaces because they are areas where multiple people come into contact with one another, often for extended periods of time." *Id.,* at 61411. In other words, COVID–19 spreads more widely in workplaces than in other venues because more people spend more time together there. And critically, employees usually have little or no control in those settings. "[D]uring the workday," OSHA explained, "workers may have little ability to limit contact with coworkers, clients, members of the public, patients, and others, any one of whom could represent a source of exposure to" the virus. *Id.*, at 61408. The agency backed up its conclusions with hundreds of reports of workplace COVID–19 outbreaks—not just in cheek-by-jowl settings like factory assembly lines, but in retail stores, restaurants, medical facilities, construction areas, and standard offices. *Id.*, at 61412–61416. But still, OSHA took care to tailor the Standard. Where it could exempt work settings without exposing employees to grave danger, it did so. See *id.*, at 61419–61420; *supra*, at ——. In sum, the agency did just what the Act told it to: It protected employees from a grave danger posed by a new virus as and where needed, and went no further. The majority, in overturning that action, substitutes judicial diktat for reasoned policymaking.

The result of its ruling is squarely at odds with the statutory scheme. As shown earlier, the Act's explicit terms authorize the Standard. See *supra,* at —— – ——. Once again, OSHA must issue an emergency standard in response to new hazards in the workplace that expose employees to "grave danger." § 655(c)(1); see *supra,* at —— – ——. The entire point of that provision is to enable OSHA to deal with emergencies—to put into effect the new measures needed to cope with new workplace conditions. The enacting Congress of course did not tell the agency to issue this Standard in response to this COVID–19 pandemic—because that Congress could not predict the future. But that Congress did indeed want OSHA to have the tools needed to confront emerging

dangers (including contagious diseases) in the workplace. We know that, first and foremost, from the breadth of the authority Congress granted to OSHA. And we know that because of how OSHA has used that authority from the statute's beginnings—in ways not dissimilar to the action here. OSHA has often issued rules applying to all or nearly all workplaces in the Nation, affecting at once many tens of millions of employees. See, *e.g.*, 29 C.F.R. § 1910.141. It has previously regulated infectious disease, including by facilitating vaccinations. See § 1910.1030(f). And it has in other contexts required medical examinations and face coverings for employees. See §§ 1910.120(q)(9)(i), 1910.134. In line with those prior actions, the Standard here requires employers to ensure testing and masking if they do not demand vaccination. Nothing about that measure is so out-of-the-ordinary as to demand a judicially created exception from Congress's command that OSHA protect employees from grave workplace harms.

If OSHA's Standard is far-reaching—applying to many millions of American workers—it no more than reflects the scope of the crisis. The Standard responds to a workplace health emergency unprecedented in the agency's history: an infectious disease that has already killed hundreds of thousands and sickened millions; that is most easily transmitted in the shared indoor spaces that are the hallmark of American working life; and that spreads mostly without regard to differences in occupation or industry. Over the past two years, COVID–19 has affected—indeed, transformed—virtually every workforce and workplace in the Nation. Employers and employees alike have recognized and responded to the special risks of transmission in work environments. It is perverse, given these circumstances, to read the Act's grant of emergency powers in the way the majority does—as constraining OSHA from addressing one of the gravest workplace hazards in the agency's history. The Standard protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA's authority. It is part of what the agency was built for.

IV

***12** Even if the merits were a close question—which they are not—the Court would badly err by issuing this stay. That is because a court may not issue a stay unless the balance of harms and the public interest support the action. See *Trump* v. *International Refugee Assistance Project*, 582 U.S. ——, ——, 137 S.Ct. 2080, 2087, 198 L.Ed.2d 643 (2017) (*per curiam*) ("Before issuing a stay, it is ultimately necessary to balance the equities—to explore the relative harms" and "the interests of the public at large" (alterations and internal quotation marks omitted)); *supra,* at ——. Here, they do not. The lives and health of the Nation's workers are at stake. And the majority deprives the Government of a measure it needs to keep them safe.

Consider first the economic harms asserted in support of a stay. The employers principally argue that the Standard will disrupt their businesses by prompting hundreds of thousands of employees

to leave their jobs. But OSHA expressly considered that claim, and found it exaggerated. According to OSHA, employers that have implemented vaccine mandates have found that far fewer employees actually quit their jobs than threaten to do so. See 86 Fed. Reg. 61474–61475. And of course, the Standard does not impose a vaccine mandate; it allows employers to require only masking and testing instead. See *supra*, at ——. In addition, OSHA noted that the Standard would provide employers with some countervailing economic benefits. Many employees, the agency showed, would be more likely to stay at or apply to an employer complying with the Standard's safety precautions. See 86 Fed. Reg. 61474. And employers would see far fewer work days lost from members of their workforces calling in sick. See *id.*, at 61473–61474. All those conclusions are reasonable, and entitled to deference.

More fundamentally, the public interest here—the interest in protecting workers from disease and death—overwhelms the employers' alleged costs. As we have said, OSHA estimated that in six months the emergency standard would save over 6,500 lives and prevent over 250,000 hospitalizations. See *id.*, at 61408. Tragically, those estimates may prove too conservative. Since OSHA issued the Standard, the number of daily new COVID–19 cases has risen tenfold. See CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#trends_dailycases (reporting a 7-day average of 71,453 new daily cases on Nov. 5, 2021, and 751,125 on Jan. 10, 2022). And the number of hospitalizations has quadrupled, to a level not seen since the pandemic's previous peak. CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions (reporting a 7-day average of 5,050 new daily hospital admissions on Nov. 5, 2021, and 20,269 on Jan. 10, 2022). And as long as the pandemic continues, so too does the risk that mutations will produce yet more variants—just as OSHA predicted before the rise of Omicron. See 86 Fed. Reg. 61409 (warning that high transmission and insufficient vaccination rates could "foster the development of new variants that could be similarly, or even more, disruptive" than those then existing). Far from diminishing, the need for broadly applicable workplace protections remains strong, for all the many reasons OSHA gave. See *id.*, at 61407–61419, 61424, 61429–61439, 61445–61447.

These considerations weigh decisively against issuing a stay. This Court should decline to exercise its equitable discretion in a way that will—as this stay will—imperil the lives of thousands of American workers and the health of many more.

* * *

Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?

***13** Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. It has considered the extent to which various policies will mitigate those risks, and the costs those policies will entail. It has landed on an approach that encourages vaccination, but allows employers to use masking and testing instead. It has meticulously explained why it has reached its conclusions. And in doing all this, it has acted within the four corners of its statutory authorization—or actually here, its statutory mandate. OSHA, that is, has responded in the way necessary to alleviate the "grave danger" that workplace exposure to the "new hazard[ ]" of COVID–19 poses to employees across the Nation. 29 U.S.C. § 655(c)(1). The agency's Standard is informed by a half century of experience and expertise in handling workplace health and safety issues. The Standard also has the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public.

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we "lack[ ] the background, competence, and expertise to assess" workplace health and safety issues. *South Bay United Pentecostal Church*, 590 U.S., at ——, 140 S.Ct., at 1613 (opinion of ROBERTS, C. J.). When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.

All Citations

--- S.Ct. ----, 2022 WL 120952, 22 Cal. Daily Op. Serv. 568

Footnotes

1 The dissent says that we do "not contest," *post*, at ——, that the mandate was otherwise proper under the requirements for an emergency temporary standard, see 29 U.S.C. § 655(c)(1). To be clear, we express no view on issues not addressed in this opinion.

22 Cal. Daily Op. Serv. 568

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SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK STATE RIFLE & PISTOL)
ASSOCIATION, INC., ET AL.,)
Petitioners,)
v.) No. 20-843
KEVIN P. BRUEN, IN HIS OFFICIAL)
CAPACITY AS SUPERINTENDENT OF)
NEW YORK STATE POLICE, ET AL.,)
Respondents.)

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IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL., Petitioners, v. KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL., Respondents.) No. 20-843

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Washington, D.C.

Wednesday, November 3, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

BARBARA D. UNDERWOOD, Solicitor General, New York, New York; on behalf of the Respondents.

BRIAN H. FLETCHER, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice Gorsuch is participating remotely this morning.

We will hear argument this morning in Case 20-843, New York State Rifle & Pistol Association versus Bruen.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The text of the Second Amendment enshrines a right not just to keep arms but to bear them, and the relevant history and tradition, exhaustively surveyed by this Court in the Heller decision, confirm that the text protects an individual right to carry firearms outside the home for purposes of self-defense.

Indeed, that history is so clear that New York no longer contests that carrying a handgun outside of the home for purposes of self-defense is constitutionally protected activity. But that concession dooms New York's law, which makes it a crime for a typical

law-abiding New Yorker to exercise that constitutional right.

This Court in Heller labeled the very few comparable laws that restricted all outlets for carrying firearms outside the home for self-defense outliers that were rightly condemned in decisions like Nunn against Georgia.

New York likens its law to a restriction on weapons in sensitive places. But the difference between a sensitive place law and New York's regime is fundamental. It is the difference between regulating constitutionally protected activity and attempting to convert a fundamental constitutional right into a privilege that can only be enjoyed by those who can demonstrate to the satisfaction of a government official that they have an atypical need for the exercise of that right.

That is not how constitutional rights work. Carrying a firearm outside the home is a fundamental constitutional right. It is not some extraordinary action that requires an extraordinary demonstration of need.

Petitioners here seek nothing more

than their fellow citizens in 43 other states already enjoy, and those states include some of the most populous cities in the country. Those states, like New York, limit the firearms in sensitive places but do not prohibit carrying for self-defense in any location typically open to the general public.

I'm happy to continue by point --

JUSTICE THOMAS: Mr. Clement, sorry to interrupt you. The -- if we analyze this and use history, tradition, the text of the Second Amendment, we're going to have to do it by analogy.

So can you give me a regulation in history that is a base -- that would form a basis for legitimate regulation today? If we're going to do it by analogy, what would we analogize it to? What would that look like?

MR. CLEMENT: Well, Your Honor, I suppose, if you're going to reason by analogy, then you could, you know, go back and you could find analogous restrictions relatively early in our nation's history about prohibiting certain types of firearms or having firearms in -- or any weapon, really, in certain sensitive

locations, and I think you could reason in that way.

Here, I think the reasoning works the opposite direction, which is you typically have a baseline right to carry for self-defense, and the only historical analogs that really restricted the right of a typical law-abiding citizen to carry for self-defense to the same degree as the New York law here were those laws, very few, typically post-Reconstruction laws that purported to eliminate any right to carry, openly or concealed. And those court -- those -- those laws were essentially invalidated by every court that was applying an individual rights view of the Second Amendment.

And those decisions, of course, were exhaustively considered by this Court in Heller. And those decisions were praised for their understanding of the Second Amendment and the relationship between the prefatory clause and the operative clause.

And, equally important, the -- those laws were set forth by this Court and singled out by this Court as the very few restrictions historically that were comparable to what the

District of Columbia was doing in Heller.

JUSTICE THOMAS: So if we look at the -- you mentioned the founding and you mentioned post-Reconstruction. But, if we are to analyze this based upon the history or tradition, should we look at the founding, or should we look at the time of the adoption of the Fourteenth Amendment, which then, of course, applies it to the states?

MR. CLEMENT: So, Justice Thomas, I suppose, if there were a case where there was a contradiction between those two, you know, and the case arose in the states, I would think there would be a decent argument for looking at the history at the time of Reconstruction as -- you know, and -- and -- and giving preference to that over the founding.

I think, for this case and for Heller and I think for most of the cases that will arise, I don't know that the original founding history is going to be radically different from that at Reconstruction.

But I guess what I would say is I do think that's about where it stops, because the point here isn't to look at history for the sake

of studying history. The point is to look at the history that's relevant for understanding the original public meaning of the Second Amendment and the Fourteenth Amendment.

JUSTICE KAGAN: Mr. Clement, how could it stop there? In Heller, we made very clear that laws that restricted felons from carrying or possessing arms and laws that forbade mentally ill people from doing the same -- we, you know, basically put the stamp of approval on those laws. And those laws really came about in the 1920s, didn't they?

MR. CLEMENT: You know, Justice Kagan, I -- I -- I think some of those laws in their current form took that shape in the 1920s, but I also think there was a tradition from the beginning for keeping certain people outside of the group of people that were eligible for possession of firearms.

I -- you know, I think, obviously, there is a different tradition with respect to felons, in part, because, you know, you start at the time of the framing, and most felonies are capital crimes. So, you know, the -- the -- the need to disenfranchise felons for firearm

possession was a little different at the framing. So I think you do need to make those kind of adjustments, but I think those adjustments can be made.

I think, really, there are two reasons to at least be skeptical of post-1871 history. I mean, the first is I just don't really understand why it's terribly relevant in forming the original public meaning of the Constitution. But, of course, the second reason is it's just about that time that the collective rights view started to creep into the decisions of some state supreme courts.

And I think -- so in Heller is a perfect example that this Court didn't absolutely stop its analysis in 1871, but, when it looked at those later sort of postbellum state supreme court decisions, the ones that relied on a collective rights view were given very short shrift. And I think that's the appropriate way to sort of deal with these historical analogs.

JUSTICE BREYER: Well, I have two -- two questions. One -- one is on history. I mean, it's law office history. In McDonald, we

had professors of history ran departments in the English Civil War and they all said the history in Heller was wrong.

You've read the briefs here. I don't know. You read the briefs of the historian of the Air Force, and she says it's this way and the other ones say it's the other way. How are we supposed to deal with that?

There's a good case -- this is a wonderful case for showing both sides. So I'm not sure how to deal with the history.

And my other question is I'm not sure what New York does. We're talking here about outside New York City. New York says we have about 90,000 licenses to carry concealed weapons or maybe it's 40,000 or maybe it's 10,000. But there's been no trial. There's been no proceeding. All it is is dismissed law in the -- so -- so -- so how are we supposed to find out, A, what the history is, which is my minor question, really -- there's a lot of debate on that -- but, second, how are we supposed to know what we're talking about in terms of what New York does since they say they give thou -- including to one of your clients, they give a

license to carry a concealed weapon? So there are concealed weapon licenses all over the place.

So -- so what are we supposed to do about those two things?

MR. CLEMENT: Well, Justice Breyer, let me start with the major question, which is -- because I think that's actually very straightforwardly answered -- which is there's no serious question about the experience of the individual Petitioners in this case.

And they both sought unrestricted licenses and they were both denied unrestricted licenses, notwithstanding that they satisfy every other requirement that the state has to be licensed for a concealed carry.

And so I'm happy to debate why the state statistics don't really prove anything particularly relevant, but I think they're irrelevant for a more fundamental reason. I mean, you know, if there were a debate between the parties about whether 95 percent or 90 percent of the citizens of New York were denied their confrontation rights in criminal trials, but you had before you two individuals

who were clearly denied the right to confront the witnesses against them, you wouldn't worry about the other 95 percent --

JUSTICE KAGAN: Well, I have to say --

MR. CLEMENT: -- or the other --

JUSTICE KAGAN: -- Mr. Clement --

MR. CLEMENT: -- 90 percent.

JUSTICE KAGAN: -- that's not really the way your brief is written. The way your brief is written is to say, you know, this is a -- a -- a -- a regulatory scheme that deprives most people of the right to carry arms in self-defense. And your brief puts a lot of emphasis on that, like don't believe the state that they are going to really take seriously people's need for self-defense because they always reject these licenses.

You know, if you had a bunch of statistics which suggest that the state is quite sensitive to people's need for self-defense and gives these licenses a significant amount of the time, you might think differently about the regulatory scheme, wouldn't you? I mean, that's the way your brief reads to me.

MR. CLEMENT: Well, Justice Kagan, two

points.

One is I wouldn't feel any differently with respect to my two individual clients, who were denied their right to exercise their Second Amendment rights.

But, more broadly, the reason I'm so confident that this regime is problematic on its face is because, on its face, at least as interpreted by the highest court in New York, the requirement you need to show in order to carry concealed for self-defense but not for hunting and target practice is you have to show that you have a need for self-defense that distinguishes you from the generalized community, from the general community.

So New York's law on its face says that the only way that you can carry for self-defense is if you demonstrate your atypicality with respect to your need for self-defense. And that's --

JUSTICE BREYER: So what do they say? Because, look, Mr. Koch can. He has his license. He can carry it for self-defense under the license to and from work and, as you say, can carry it for hunting, target practice, et

cetera, concealed, and in your opinion, is it supposed to say you can carry a concealed gun around the streets or the town or outside just for fun? I mean, they are dangerous, guns. I mean, so what's it supposed to say?

MR. CLEMENT: It's -- it's supposed to be what New York says that they give to lots of applicants at least in other counties, which is an unrestricted license, which basically means that somebody who has demonstrated to the state that they're of good moral character, that they have all the necessary training, whatever the state requires --

JUSTICE BREYER: So 40,000 --

MR. CLEMENT: -- whatever the state --

JUSTICE BREYER: -- or 50,000 or 60,000 is not enough. You have to show you have a good moral character, and then, if you just would like to carry a concealed weapon, which is a dangerous thing, as I said, you can just do it, just that's what the Fourth -- that's -- in your opinion, that's what you want, no restrictions?

MR. CLEMENT: Well, certainly, New York is entitled to have laws that say that you

can't have weapons in sensitive places, in addition to whatever regulation --

JUSTICE BREYER: No, no, I'm not saying --

MR. CLEMENT: -- for carrying that.

JUSTICE BREYER: Right, right. I'm not saying that.

MR. CLEMENT: And -- and -- and New York has those laws, and we don't challenge those. What we would -- what we're asking for -- I mean, one way to think about it is we're asking that the regime work the same way for self-defense as it does for hunting.

When my clients go in and ask for a license to concealed carry for hunting purposes, what they have to tell the state is they have an intent to go hunting. They don't have to say: I have a really good reason to go hunting. I don't have to say I have a better reason to go hunting than anybody else in my general community. And it's there --

JUSTICE BREYER: Yeah. Well, the difference, of course, you have a concealed weapon to go hunting. You're out with an intent to shoot, say, a deer or a rabbit, which has its

problems. But, here, when you have a self-defense just for whatever you want to carry a concealed weapon, you go shooting it around and somebody gets killed.

MR. CLEMENT: With respect, Justice Breyer, that's not been the experience in the 43 jurisdictions that allow their citizens to have the same rights that my -- my clients are looking for. This is not something where we're asking you to take some brave new experiment that no jurisdiction in Anglo-American history have -- have --

JUSTICE SOTOMAYOR: Mr. Clement --

MR. CLEMENT: -- have ever done.

JUSTICE SOTOMAYOR: -- may I -- you're talking about 43 other jurisdictions. And I suspect that when we get into those 43 other jurisdictions that there are going to be a handful that are identical.

The one thing that I've looked at in this history is the plethora of regimes that states pick, and that starts in English law, through the colonies, through post-Constitution, to post-Civil War, to the 19th Century, to even now, those 43 states that you're talking about,

most of them didn't give unrestricted rights to carry in one form or another until recent times.

Before recent times, there were so many different regulations. What it appears to me is that the history tradition of carrying weapons is that states get a lot of deference on this. And the one deference that you don't -- haven't addressed is the question presented is what's the law with respect to concealed weapons.

In 1315, the British Parliament specifically banned the carrying of concealed arms. In colonial America, at least four, if not five, states restricted concealed arms. After the Civil War, there were many, many more states, some include it in their constitution, that you can have a right to arms but not concealed.

You can go to Alabama, Georgia, and Louisiana, which are now more open -- are more free in granting the right to carry guns, but they prohibited through their history concealed weapons, the carrying of concealed weapons.

It seems to me that if we're looking at that history and tradition with respect to

concealed arms that there is not the same requirement that there is in the home.

One of the things Heller pointed to was there were few regulations that prohibited the carrying or the keeping of arms in homes. But that's not true with respect to the regulations about keeping of arms outside of homes.

Putting aside the -- the prohibitions, regulations on sensitive places, regulations on the types of people, it seems to me that I don't know how I get past all that history --

MR. CLEMENT: Well, Justice --

JUSTICE SOTOMAYOR: -- without you sort of making it up and saying there's a right to control states that has never been exercised in the entire history of the United States as to how far they can go in saying this poses a danger.

MR. CLEMENT: So, Justice Sotomayor, there's a lot to that question. I'll try to take it, you know, sequentially if I can.

I mean, you know, let's start with concealed carry restrictions. I mean, it is true that during time periods where open carry

was allowed that some states did specifically restrict concealed carry on the precise theory that if we allow you to carry open, then, if you're carrying concealed, you're probably up to no good.

And Heller did exhaustively survey those cases, and what it concluded is that if a state allows open carry, then it can prohibit concealed carry, I suppose vice versa, and --

JUSTICE SOTOMAYOR: But you're asking us to make the choice for the legislature. We're only looking at concealed here.

MR. CLEMENT: We are not asking you to make that, and --

JUSTICE SOTOMAYOR: Well, yeah, you are, because you're conditioning history on a different fact.

MR. CLEMENT: I don't think we're asking to -- for anybody to make that choice. In fact, the relief we've asked for is to have an unrestricted license because, under New York law as it currently exists, that's the only way that you can have a carry right for a handgun.

But, in framing our relief in the complaint, we, you know, framed it so that there

are other relief consistent with the decision. So, if New York really wanted to say, you know, no, we have a particular problem with concealed carry, notwithstanding that traditionally that's the only way we allow people to carry, if they want to shift to an open carry regime, they could do that consistent with everything we've said here.

Now I don't think anybody expects that to happen because, if you look at the New York law specifically, it's a law that prohibits the carrying of handguns except for permit holders, and then its provisions about permit holders speak specifically to concealed carry.

So that's why we've framed our request the way we have. But what we're doing, I think, is completely consistent with the majority decision in Heller's analysis of the historical cases. We've said that those very few states that tried to prohibit both concealed carry and open carry and so gave no outlet for the right to carry a firearm for self-defense outside the home, those were the laws that the Heller majority identified as being analogous to the D.C. restriction in Heller that was invalidated.

JUSTICE SOTOMAYOR: I do know that many of the laws conditioned or retained the right of the state to decide which people were eligible. And the historians -- to carry the arms, that you had to be subject to the approval of the local sheriff or the local mayor, et cetera. And during the Civil War, that was used to -- to deny Black people the right to hold arms. We now have the Fourteenth Amendment to protect that.

But why is a good cause requirement any different than that discretion that was given to local officials to deny the carrying of firearms to people that they thought it was inappropriate, whether it was the mentally ill or any other qualification? I -- that's how I see the good cause as fitting in -- within that tradition.

MR. CLEMENT: So -- so let me make a point about how it's so different from that tradition, but then also let me make a historical point.

This -- it's radically different to say that if you are a typical New Yorker, so you qualify -- you satisfy every other

qualification, you're not a felon, you don't have any mental health problems, you've done everything else we've asked you, but you are typical in the sense that you don't have an atypical need to carry for self-defense, I don't think there's any historical analog to that.

As to the historical examples, with all due respect, I -- I don't think I read the surety laws the same way that you do. Those surety laws, which were only in -- in -- in place in a minority of jurisdictions, but, nonetheless, I think they help us because those surety laws, first of all, start with the proposition that there's a baseline right for every person, every member of the people, protected by the Second Amendment, to carry.

And what they do is, if somebody, essentially, as a complainant, can come into court and say that somebody is -- has a propensity to use them in an offensive or violent way, then, if you satisfy a neutral fact-finder, then you don't automatically get to disarm that person. You put them to the choice of posting a surety, and then they can continue to possess their firearm.

CHIEF JUSTICE ROBERTS: Mr. Clement, you -- in your opening, you talked about the right applying in any location typically open to the general public.

I'd like to get some sense about what you believe could be off limits, like university campuses. Could they say you're not allowed to carry on a university campus?

MR. CLEMENT: So, Mr. Chief Justice, I -- I think the answer to your question is yes. And I think that what I would say, though, first of all, is the language I was talking about, any location open to the general public, that's right from the license denial on Joint Appendix page 40 -- 41. So that wasn't loose language on my part. That's -- that's right there from where we are told, in capital letters, where we cannot carry, any location, all caps, typically open to --

CHIEF JUSTICE ROBERTS: Well, what sort of place do you think they could be excluded from? In other words, you can get a permit, but the state can impose certain restrictions, for example, any place in which alcohol is served.

MR. CLEMENT: So --

CHIEF JUSTICE ROBERTS: Can they say you cannot carry your gun at any place where alcohol is served?

MR. CLEMENT: So, Mr. Chief Justice, I think you -- probably the right way to look at those cases would be look at them case by case and say, okay -- this Court in Heller, for example, said sensitive places include government buildings and schools. I think those, you can probably tap into a pretty good tradition.

I think any place that served alcohol would be a -- a -- a -- a -- you know, a tougher case for the government. I think we would have a stronger case. They might be able to condition the license holder on not consuming any alcohol. There might be a variety of laws. And we could have those debates, but --

CHIEF JUSTICE ROBERTS: What about a football stadium?

MR. CLEMENT: I -- I -- I -- I think, again, football stadium, you probably take it on its own and -- and look to the historical analogs. But here's -- I guess, if I could

offer some general principles, I think there's two principles.

One is, you know, restriction of access to the place is something that I think would be consistent with the way government buildings have worked and schools have worked. Not any member of the general public can come in there. They restrict access. With -- with or without a gun, if you're an adult that has no business to be in a school, you're excluded. So I think that's a factor that would support treating that as a sensitive place.

A second principle that I would offer is these sensitive place restrictions really are a different animal than a carry restriction because I think a true sensitive place restriction is not just going to limit your ability to carry concealed, but it's going to be, say, this is a place where no weapons are allowed. You know, whether they're firearms or other weapons, no weapons are allowed.

And then the third point that I would say -- and this is just an analogy, but I think it's a useful analogy -- is I think the way to think about this is a little like the nonpublic

forum doctrine in the First Amendment, which is you -- you start with the place and you try to understand is this a place where, given the nature of the place, its function, its restrictions on access, that weapons are out of place? And, if so, that's probably a sensitive place --

JUSTICE KAGAN: So -- but --

MR. CLEMENT: -- where the state can say --

JUSTICE KAGAN: -- but I think --

JUSTICE BARRETT: But what --

JUSTICE KAGAN: -- what the Chief Justice is trying to do is figure out how those cash out in the real world. So I'll give you a few more. New York City subways.

MR. CLEMENT: So, you know, I -- I think that the -- the question of whether you could restrict arms in the subways, you know, I mean, you -- you'd have to go through the analysis, I think, and say, you know, is there a restriction on access generally? I suppose it's --

JUSTICE KAGAN: No, I mean, I got the analysis --

MR. CLEMENT: Okay.

JUSTICE KAGAN: -- all three parts of it. How does it cash out? What does it mean?

MR. CLEMENT: You know, I -- I don't know how those are going to cash out in particular cases because I think the way that you would normally deal with that is you'd, you know, look at all the briefing we had in the this case on the history of these various things.

And so, you know, on behalf of my individual clients, I suppose I could give away the subway because they're not looking to go -- you know, they're not in Manhattan.

JUSTICE KAGAN: The Chief Justice --

MR. CLEMENT: They're in Rensselaer County.

JUSTICE KAGAN: -- started with universities, and you said that that would be all right. Did you mean that?

MR. CLEMENT: Yeah, I -- I -- I -- yes, I -- I -- I --

JUSTICE KAGAN: Because --

MR. CLEMENT: -- I did mean that.

JUSTICE KAGAN: -- because -- because

that's open for -- you know, anybody can walk around the NYU campus.

MR. CLEMENT: Well, NYU doesn't have much of a campus.

(Laughter.)

JUSTICE KAGAN: I -- I would -- I would go back to New York, and I think you'll find that that's wrong. Similarly, the Columbia campus.

MR. CLEMENT: Columbia's got a campus, and I don't know whether they restrict access there at all. And -- and, you know -- and maybe, you know, if they don't restrict access to parts of the campus, maybe those are parts of the campus where they wouldn't enforce the policy anyways.

The point I'm trying to make, though --

JUSTICE KAGAN: But you can't say, you know, there are 50,000 people in one place, you know, a -- a -- a ballpark, there are 50,000 people in one place, they're all on top of each other, we don't want guns there. That's -- you -- you couldn't -- the -- the -- the city or the state couldn't do that?

MR. CLEMENT: I think they might well be able to, because, again, you can't get into Yankee Stadium without a ticket. I'd have to understand in, you know, many of these jurisdictions -- you know, I don't know every jurisdiction. I don't know enough about Yankee Stadium. But, you know, a lot of these stadiums are not run by the government anyway. So, if a private entity wants to restrict access, I don't know where the state action is for there to be a second --

JUSTICE KAGAN: Suppose the state says no protest or event that has more than 10,000 people.

MR. CLEMENT: I -- I -- I think that might be, you know, trickier. Maybe they could justify that under strict scrutiny, but I don't think that would be a sensitive places --

JUSTICE BARRETT: But why not?

MR. CLEMENT: -- restriction.

JUSTICE BARRETT: I mean, I guess it's about the level of generality, all these questions that Justice Kagan's asking you or that the Chief asked you, if -- if you concede, as I think the historical record requires you

to, that states did outlaw guns in sensitive places, can't we just say Times Square on New Year's Eve is a sensitive place? Because now we've seen, you know, people are on top of each other, we've -- we've had experience with violence, so we're making a judgment, it's a sensitive place.

MR. CLEMENT: So here -- here's what I would suggest, that the right way to think about limiting guns in Times Square on New Year's Eve is not as a sensitive place but as a time, place, and manner restriction.

And that might be a perfectly reasonable time, place, and manner restriction, but I don't think that's -- the sensitive places doctrine, as I understood it, from -- and, obviously, it's a brief reference in the Heller decision, so I -- I may not fully understand it -- but I understood that those were certain places where they were just no weapon zones all of the time because of the nature of that institution.

And I think it's probably worth thinking about rallies and Times Square, that there may be restrictions, but they would be

done --

JUSTICE ALITO: Well, Mr. Clement --

MR. CLEMENT: -- under the rubric of --

JUSTICE ALITO: -- could we --

MR. CLEMENT: -- time, place, and manner.

JUSTICE ALITO: -- could we start with the purpose of the personal right to keep and bear arms? And the core purpose of that right, putting aside the military aspect, is self-defense.

So starting with that, could we analyze the sensitive place question by asking whether this is a place where the state has taken alternative means to safeguard those who frequent that place?

If it's a -- if it's a place like a courthouse, for example, a government building, where everybody has to go through a magnetometer and there are security officials there, that would qualify as a sensitive place.

Now that doesn't provide a mechanical answer to every question, and -- but it -- would that be a way of analyzing -- of -- of beginning

to analyze this?

MR. CLEMENT: Justice Alito, that might be a way of analyzing it. The reason I'm a little bit reluctant to go that route as opposed to really think about the nature of the place and the restrictions that are associated with its core activity is because I worry that, if you went that direction, then the state would say: Well, you know, this part of the city, we have a lot of police officers, and so you really don't need to exercise your own individual self-defense right there because we -- we have your back. And I --

JUSTICE ALITO: Well, I don't know --

MR. CLEMENT: -- and I don't think that's --

JUSTICE ALITO: -- I don't know what the -- I don't know what those places would be, but continue.

MR. CLEMENT: Well, I think my friends would tell you that, you know, the whole City of New York is that way.

And I -- I -- I think there are a lot of people in New York, and New York may have a lot of reasons to have regulations that are a

little bit different than in upstate New York, where my individual Petitioners reside, but I don't think that they can take all those people in New York and deny them of their fundamental constitutional --

JUSTICE BREYER: So how --

MR. CLEMENT: -- rights.

JUSTICE BREYER: -- how do we do this?

JUSTICE KAGAN: But you just said --

JUSTICE BREYER: How --

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: How? I mean, so far, we've been -- and to my mind, I think NYU does have a campus. You're not certain. All right?

(Laughter.)

JUSTICE BREYER: You think that in New York City people should have considerable freedom to carry concealed weapons. I think that people of good moral character who start drinking a lot and who may be there for a football game or -- or some kind of soccer game can get pretty angry at each other, and if they each have a concealed weapon, who knows?

And there are plenty of statistics in

these briefs to show there's some people who do know, and a lot of people end up dead, okay? So what are we supposed to do? To sort of float around, like with NYU, and say, hey, oh, this is the rule, it seems to work out in upstate New York, we don't know, of course, and we do know that your client is carrying a concealed weapon because he has a right to in some instances?

And even following Heller and following the history, which I thought was wrong, even so, what are we supposed to say in your opinion that is going to be clear enough that we will not produce a kind of gun-related chaos?

MR. CLEMENT: So, Justice Breyer, I would sort of point you to two things that maybe would give you some comfort. I mean, one is the experience of the 43 states, and there are amicus briefs on both sides getting into the empirical evidence, but there really isn't a case that those 43 states that include very large cities like Phoenix, like Houston, like Chicago, they have not had demonstrably worse problems with this than the five or six states that have the regime that New York has. So

that's one place to look.

The other place that I think you would find some -- some -- something persuasive there is their own amicus brief on their side by the City of Chicago, because the City of Chicago is in a shall issue jurisdiction, and the City of Chicago goes on to sort of, you know, essentially brag about all of the ways that they've done, consistent with that regime, to reduce crime in Chicago that probably doesn't have a direct analog in downstate Illinois.

But, of course, you know, one of the problems with this case --

JUSTICE KAGAN: I mean, most people think that Chicago is, like, the -- the world's worst city with respect to gun violence, Mr. Clement.

MR. CLEMENT: Chicago in their corporate --

JUSTICE KAGAN: And Chicago doesn't think that, but everybody else thinks it about Chicago.

MR. CLEMENT: And nobody thinks that about Phoenix, and nobody thinks that about Houston, and nobody thinks that about Dallas,

and nobody thinks that about San Diego, which, even though it's in a restricted state, is a shall issue jurisdiction.

JUSTICE SOTOMAYOR: Mr. Clement?

CHIEF JUSTICE ROBERTS: Thank you, Mr. Clement.

Justice Thomas, anything further?

JUSTICE THOMAS: Mr. Clement, where does Mr. Nash live?

MR. CLEMENT: Mr. Nash lives in Rensselaer County, New York, which --

JUSTICE THOMAS: Is that close to NYU?

MR. CLEMENT: That is nowhere near NYU, Justice Thomas. And, you know, I think, if you -- if you look at their -- the county website, they talk about there are 153,000 people spread over 955 square miles. And yet that's the context in which my individual clients are being denied their Second Amendment rights.

CHIEF JUSTICE ROBERTS: Justice Breyer, anything further?

Justice Alito?

Justice Sotomayor?

JUSTICE SOTOMAYOR: Counselor, your

client is permitted to -- Mr. Nash, one of the two -- to carry when engaged in outdoor activities of any kind, like camping, hunting, and fishing, on back roads, with the few -- substantially lesser number of people.

Tell me how many places in Rensselaer County does your client have a self-defense risk.

MR. CLEMENT: Well --

JUSTICE SOTOMAYOR: A serious -- I mean, at what point do we look at the restriction and the burden it places? Meaning, yes, I'm sure it has a center of town, I'm sure it may have a shopping center or two, but it's not like he's totally restricted from carrying a gun. He's just restricted from carrying one basically in those sensitive places --

MR. CLEMENT: Well --

JUSTICE SOTOMAYOR: -- because the rest of his home is pretty distant from each -- from other homes.

MR. CLEMENT: So, Justice Sotomayor, just so we start on the same wavelength or the same page, literally, page 41 of the Joint Appendix, this tells Mr. Nash where he can carry

concealed. And what the officer, McNally, told him was: "I emphasize that the restrictions are intended to prohibit" -- italicized -- "you from carrying concealed in ANY LOCATION" -- all caps -- "ANY LOCATION typically open to and frequented by the general public."

Now I would submit --

JUSTICE SOTOMAYOR: That's the point.

MR. CLEMENT: -- that's -- that's a pretty broad number of places in Rensselaer County. And it would include, I fear, most of the roads in the county at night when you're traveling and might think that you have a need.

I mean, if -- if Mr. Nash has a relative whose car breaks down and has to have a -- a change of tire and he wants to go out and assist them with that and wants to make sure that he is -- he -- he is in a position to defend himself, I don't think he can do it consistent with this license restriction.

And at the end of the day, I think what it means to give somebody a constitutional right is that they don't have to satisfy a government official that they have a really good need to exercise it or they face atypical risks.

CHIEF JUSTICE ROBERTS: Justice Kagan, anything further?

JUSTICE KAGAN: Mr. Clement, you -- you said, I think, in passing that it would be fine if New York banned open carry so long as it allowed concealed carry. Is that correct?

MR. CLEMENT: Certainly, that's consistent with the relief we're looking for. We're looking for some outlet to exercise our constitutional right to carry firearms outside the home.

JUSTICE KAGAN: How is it consistent with the history? I mean, the history seems very clear to me that it's sort of like the exact opposite of how we think about it now, in other words, that there are lots of places that wanted people to display their arms as a matter of transparency, and what they prohibited was the concealed carry.

So I'm thinking, like, if you look to the history, you end up with a completely different set of rules from the ones that you're suggesting with respect to concealed versus open. And it's a -- it's an example, I think, of -- of the difficulties of looking to history,

where people were operating on such different, to use your term, wavelengths.

MR. CLEMENT: So, Justice Kagan, first of all, I would have thought that, you know, we sort of crossed the bridge to use history in this context in Heller.

But, if we're going to look to history --

JUSTICE KAGAN: No, I think --

MR. CLEMENT: -- I actually think, if --

JUSTICE KAGAN: -- Mr. Clement, the question is how to use history and, you know, where do you look, you know, how far do you look. Do you look to the 1920s when all these felon laws were passed, as well as public purpose laws of exactly the same kind as New York.

So one question is, how far up do you look? Another question is, you know, with what sense of flexibility do you look? And I think that this is an example of that. It's like, no, we're not going to ask for an exact analog because we realize that the world has changed and regulatory schemes are very different

because regulatory interests are very different.

If we tried to copy history, we would find ourselves in a world in which the only thing that a state could do is tell people, you know, you can't carry it concealed, you have to carry it open.

MR. CLEMENT: So, Justice Kagan, let me give you an example of how I think the Court should use history in this context, and I'll go exactly to the Georgia statute that was at issue in Nunn against Georgia. Now that was a statute that, on its face, prohibited carrying simpliciter. So it didn't say open. It didn't say concealed.

Now the court that analyzed that reversed -- vacated the indictment of somebody under the statute because the statute didn't specify and they didn't think that person had carried concealed, but when they looked at it, they interpreted it in light of the context at the time and they thought, boy, it is not consistent with the Second Amendment that Georgia actually -- that court actually thought directly applied to the state, which is interesting, but -- but they said that's not

consistent with the Second Amendment to prohibit any means for carrying.

Then, consistent with kind of the norms of the time, kind of almost as like a severability holding, dare I say it, they said, well, all right, the open carry, that's allowed. I mean, rather, that's -- that's -- we're going to say that to the extent this statute prohibits open carry, that's unconstitutional, but to the extent that it prohibits concealed carry, that's constitutional.

Now the -- the -- the fundamental problem with the law that carries over as a direct analogy is it gave no outlet to exercise the constitutional right to carry for self-defense. The norms of the time had a favoring for open carry over concealed. I will grant you that the norms of the time have flipped, and, certainly, in New York, based on the rest of their licensing regime, I assume that they would prefer that my client -- clients carry concealed rather than openly.

But I think that's the way you can use the history, and you can use it with some contextual sensitivity, but you cannot sort of,

you know, throw it all out, because I do think the analogy is pretty clean between a law that prohibits any form of carry and what New York is doing here.

And, of course, that was one of the laws that this Court specifically looked to in the Heller decision as well.

JUSTICE KAGAN: And -- and when you look at this history in the properly contextual way, do you see no difference between the kind of regulation that was allowed in the home and the kind of regulation that was allowed in public places? Because it seems to me that the history -- and -- and Justice Sotomayor developed it at some length -- but the history is replete with that distinction, that the -- and, indeed, Heller recognizes that.

Heller recognizes that the home is a very special place, both because -- you know, for similar reasons for the Fourth Amendment but also because the need for self-defense is so much greater there.

MR. CLEMENT: So I -- I -- I think, in terms of -- I'm not going to tell you that the context doesn't matter at all. I mean, take the

sensitive places law, right? They just -- they don't really affect the keep right the way that they affect the carry right, unless you try to say the entirety of Manhattan is a sensitive place, and then they might affect both. But, in general, the -- the analysis is going to be slightly different.

But I would say that, you know, I don't think those differences are material here. I think, if the District, instead of just banning handguns inside the home, had adopted a permitting regime that required District residents to show that they had an atypical need to possess a handgun inside the home, I'm not sure anything in Heller would have been different because it's just inconsistent with a constitutional right to either ban the exercise of it or say that it's a privilege that you can only exercise if you show that you are atypical from the rest of the people who are equally protected by the constitutional right.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: Mr. Clement, are you

-- are you able to hear me?

MR. CLEMENT: Loud and clear.

JUSTICE GORSUCH: Great. Some of your amici have asked us to provide further guidance to lower courts in cases beyond your own. And so, putting aside your -- your case for the moment, they've pointed out that some lower courts have refused to apply the history test, for example, and said they will not extend Heller outside the home until this Court does.

Other courts have applied intermediate scrutiny and variations of that. Some have suggested that strict scrutiny would be appropriate to treat this right comparably to other rights under our modern tiers of scrutiny.

I -- I -- I -- I'd just be curious what -- what -- what views you have about all that.

MR. CLEMENT: Thank you, Justice Gorsuch. I -- I think we would start with the idea that text, history, and tradition is an appropriate way to deal with this right. That's what the Court said in Heller.

I think this Court would allow the Court to make clear that the same analysis

applies outside of the home. And I think this case, like Heller, is such an outlier that the Court wouldn't have to say too much more unless it wanted to.

I think, if it wanted to, though, it would already, I think, go a long way to correcting some of the mistakes in the lower court to say that text, history, and tradition is the test, not part of the test but the test inside and outside the home.

And if this Court prefers to go the level of scrutiny route, I would simply say two things. One, we would prefer strict scrutiny as being consistent with a fundamental constitutional right. But, even if it's going to be intermediate scrutiny, probably the single-most important thing to remind the lower courts is that intermediate scrutiny requires narrow tailoring.

And a law like this that takes a person who has no proclivity whatsoever, unlike the surety laws, to misuse firearms and says you simply can't carry them for self-defense anywhere frequented by the public because you haven't demonstrated an atypical need, I mean,

that's about as untailored a law as I can imagine.

So I think, if you did one of those two things -- either make clear that it's text, history, and tradition outside the home as well as inside or made clear that narrow tailoring is an integral component of the test -- that would go a long way to clearing up some of the confusion in the lower courts.

JUSTICE GORSUCH: And I know you -- you've had a substantial debate with your friends on the other side about the Statute of Northampton. We haven't heard about that today, and I just wanted to give you a chance.

MR. CLEMENT: Thank you, Justice Gorsuch. I'd say just a couple of quick things about the Statute of Northampton.

First of all, I think that it was very clear from the Knight's Case and the treatises that this Court relied on in Heller that by the time of the framing of the English Bill of Rights, that was not a general prohibition on carrying outside the home but was a prohibition on either carrying unusual and dangerous weapons or using common weapons in a way that terrorized

the public. And so I don't think that that supports the other side's position here.

And the second thing I would say is that probably the single-most obvious point about the history is there just are no reported cases on this side of the Atlantic, not in actual reporters, not in newspaper reports about crimes of the day, that show anybody being prosecuted for a violation of the Northampton crime simply by carrying common firearms for self-defense.

And the one U.S. early court that dealt with this, the common law equivalent of the statute, was State against Huntly in North Carolina, which was an opinion that was cited favorably in the majority opinion in Heller, and that case went out of its way to say that simply carrying firearms per se is not an offense; it's the intent to terrorize the people that is prohibited by Northampton.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Mr. Clement, I have several questions.

First, I want to make sure I understand your main problem here with this permitting regime, as I understand it, is the discretion that's involved with the permitting officials, and your point that that's just not how we do constitutional rights, where we allow basic blanket discretion to grant or deny something for all sorts of reasons.

But I understand you would not object or do not object to the regimes that are used in many of the other 42 states, the shall issue regimes. I mean, there could be particular problems with those, but I do not understand you to object to shall issue regimes.

Is that accurate?

MR. CLEMENT: That's accurate, Justice Kavanaugh. And as you say, they're the -- you know, especially if you have something like good moral character, there is the possibility for discretionary abuse in those regimes as well.

But the thrust of this case is, you know, we -- we'd like what they're having. We'd like what the people in the other 43 states are allowed to do and exercise their rights, and in many of those states, it's shall issue.

And -- and that is, of course -- you know, New York purports to have effectively a shall issue regime with respect to hunting. The only other caveat I wanted to add is it's the discretion combined with the atypicality requirement.

So, if they came up with some, you know, sort of, like, magic wand that gave them a precise reading of typicality, and so there was no discretion, but the standard was still at the end of the day you have to show that you are atypical from the rest of the people protected by the Second Amendment, we would have a problem with that as well.

JUSTICE KAVANAUGH: Right. A shall issue regime with an atypicality requirement would be no good in your view?

MR. CLEMENT: Exactly.

JUSTICE KAVANAUGH: Yeah.

MR. CLEMENT: Even if it could be somehow if you could come up with some objective standard of typicality.

JUSTICE KAVANAUGH: Okay. And the issue before us, as I understand it, is the permitting regime. We don't have to answer all

the sensitive places questions in this case, some of which will be challenging no doubt, is that accurate?

MR. CLEMENT: That's 100 percent accurate. And it's -- so there's sort of a market test of the accuracy of that, which is New York does have sensitive place laws, and we have not challenged them in this litigation.

JUSTICE KAVANAUGH: And then, to follow up on Justice Thomas's question and also Justice Gorsuch's, we should focus on American law and the text of the Constitution and we don't start the analysis in a vacuum, but we start it with the text, which you say grants a right to carry, and then historical practice can justify certain kinds of regulations, but the baseline is always the right established in the text. And there will be tough questions, as the questions -- arguments revealed, about what the historical practice shows, but the default or baseline is the text, correct?

MR. CLEMENT: That -- that -- that's absolutely right, Justice Kavanaugh. And, of course, that's no different from something like the First Amendment, where, of course, you start

with the text, and it's very emphatic text, you know, no law abridging speech, but then you look to history and tradition just to realize, oh, well, there's a long tradition of treating defamation and libel different going back to the framing, so you use that history to inform the text, but the focus is on the text.

JUSTICE KAVANAUGH: And last question, following up on Justice Gorsuch's question, is he points out some courts have used intermediate scrutiny or strict scrutiny. You know, those are balancing tests. I think Professor Alicea's amicus brief is very helpful on that. There's well-developed law in other areas.

But it'll be no surprise to you I have concern that that would just be a balancing test that would leave -- make it a policy judgment basically for the courts.

And I don't know why we would -- you say you'd be okay with that, but I'm not sure why we would smuggle all that into here and then it would just be a policy judgment that would be unanchored from the historical practice.

MR. CLEMENT: So, Justice Kavanaugh, two points just in response to that.

One, you know, as -- as you articulate the concerns with interesting balancing, that might be a reason that if you're going to go with the level of scrutiny's approach, you would go to strict scrutiny, where I just think there's less play in the joints.

But the second --

JUSTICE KAVANAUGH: Well, I mean, maybe. But what's a compelling interest? Do you have a compelling -- there's a lot of play in the joints in -- in some of the other areas, so I don't know that you want to open that door.

MR. CLEMENT: And -- and -- and -- and the second point I was going to make, though, Justice Kavanaugh, which is maybe more consonant with the thrust of the question is, you know, whatever was the case in Heller, where I -- I sort of read the majority opinion as actually already rejecting interesting balancing, but whatever was the case in Heller, you know, we now have this 13 years of experience with lower courts applying the test.

And in -- in our view, you know, they've made a muddle of it and the -- you know, it's -- it's probably -- the experience of the

last 13 years is probably a very good reason to prefer a text, history, and tradition approach to this area of the law.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Mr. Clement, I have one question.

So a couple times, in response to my question about Times Square and New Year's Eve and then just now as well to Justice Kavanaugh, you made reference to the First Amendment. And, obviously, a lot of the questions that have been asked have been focused on how do we -- how can the state fairly regulate, because everybody agrees there have to be some regulations, and it might not be the case that we can always find exact historical analogs, so we're turning to the First Amendment.

In response to me, you said, well, that might be analogous to a time, place, and manner restriction. So do you think the First Amendment and the, you know, edifices that we have structured around it would be a helpful place to look? Is that what you're suggesting?

MR. CLEMENT: Well, I'm suggesting that there is a lot of useful teaching in the First Amendment. I'm not sure I'm suggesting you should just take sort of doctrines lock, stock, and barrel from the First Amendment.

But, you know, I mean, going back, you know, well over a hundred years to, like, Robertson, when the Court was just talking in dictum about the First and the Second Amendment, it drew the analogy between allowing some restrictions on the Second Amendment and, in the First Amendment context, the First Amendment being consistent with libel and defamation.

As I suggested to the Chief Justice, I think the way you think about a nonpublic forum and why that's different from First Amendment purposes from a park, I think, could be useful in some of these contexts.

You know, if you focus on the nature of the location, you might say this is inappropriate for weapons. But, in the same way as in the First Amendment, you just don't get to say, well, we're going to make it a nonpublic forum by saying no First Amendment activity there. You can't just take a location and say

we're going to make this a sensitive place by saying no Second Amendment activity there.

So those kind of analogies, and, lastly, the analogy being you look at a law that says no concealed carry in a particular place on one night of the year quite differently from a law like this that says there's really no way for a typical New Yorker to conceal carry anywhere that the general public is allowed to go.

Those -- under the First Amendment, those are radically different laws, and I think, under the Second Amendment, those are radically different laws.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Underwood.

ORAL ARGUMENT OF BARBARA D. UNDERWOOD

ON BEHALF OF THE RESPONDENTS

MS. UNDERWOOD: Mr. Chief Justice, and may it please the Court:

For centuries, English and American law have imposed limits on carrying firearms in public in the interest of public safety. The

history runs from the 14th Century statute of Northampton, which prohibited carrying arms in fairs and markets and other public gathering places, to similar laws adopted by half of the American colonies and states in the founding period, to later state laws that relaxed restrictions for people who had a concrete need for armed self-defense.

Starting as early as the early 1800s, states began taking different approaches to regulating firearm-carrying in public. Some states provided that a person who carried firearms in public without reasonable cause could be arrested and required to post a bond. Other states made it a misdemeanor to carry a handgun without reasonable grounds to fear an attack.

Other states and territories began -- banned carrying handguns in towns and cities altogether or restricted it to situations of immediate threat. And in the early 1900s, many states made good cause a requirement for a license to carry a concealed handgun while also prohibiting in some cases the open carrying of handguns.

In total, from the founding era through the 20th Century, at least 20 states have at one time or another either prohibited all carrying of handguns in populous areas or limited it to those with good cause.

New York's law fits well within that tradition of regulating public carry. It makes a carry license available to any person not disqualified who has a non-speculative reason to carry a handgun for self-defense.

New York is not an outlier in the extent to which the state restricts the ability to carry firearms in public, and it's not an outlier in asking a licensed applicant to show good cause for a carry license.

Many ordinary people have received carry licenses in New York State. If the Court has questions about how the law works in practice, it should remand for fact-finding, and if the Court finds the history ambiguous, it should review the law under intermediate scrutiny and uphold it.

JUSTICE THOMAS: General Underwood, you seem to rely a bit on the density of the population. You say, I think, that states like

New York have high-density areas.

And implicit in that is that the more rural an area is, the more unnecessary a strict rule is. So, when you are -- when you suggest that, how rural does the area have to be before your restrictions shouldn't apply?

MS. UNDERWOOD: Well, I -- I think the way the New York statute works is consistent with a reasonable rule, which is that there's not a cutoff, there's not a number at which things change, but that licenses -- unrestricted licenses are much more readily available in more -- in less densely populated upstate counties than they are in dense metropolitan areas.

And that is a virtue of the system of having licenses handled by licensing officers who are part of the local community and who take the density of population into account, as well as the -- many other factors.

JUSTICE THOMAS: Well, the -- Mr. Nash lives in a -- quite a low-density area. That's why I'm interested in where your cutoff is. It's one thing to talk about Manhattan or NYU's campus. It's another to talk about rural upstate New York.

MS. UNDERWOOD: He actually lives in what I would call an intermediate area. He lives in Rensselaer County, which is not that far from Albany, and it contains the City of Troy and a university and a downtown shopping district, but it also contains substantial rural areas.

And that is precisely what the licensing officer here was taking into account when he made the differentiation between, you know, don't take it to the shopping mall, don't take it downtown, but you can take it in the -- in the sort of back-country areas.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: General, you -- you mentioned that the -- the gun is -- I -- I guess permits are read -- more readily available in a less populated area.

MS. UNDERWOOD: Unrestricted permits --

CHIEF JUSTICE ROBERTS: Unrestricted permits.

MS. UNDERWOOD: -- are -- are more readily available in less populated areas, yes.

CHIEF JUSTICE ROBERTS: Now Heller

relied on the right to defense as a basis for its reading of the -- of the Second Amendment, or that was its reading.

Now I would think that arises in more populated areas. If you're out in the woods, presumably, it's pretty unlikely that you're going to run into someone who's going to rob you on the street. On the other hand, there are places in a -- in a densely populated city where it's more likely that that's where you're going to need a gun for self-defense and, you know, however many policemen are assigned, that, you know, there are high-crime areas.

And it seems to me that what you're saying is that's probably the last place that someone's going to get a permit to carry a gun.

How is that -- regardless of what we think of the policy of that, how is that consistent with Heller's reasoning that the reason the Second Amendment applies a -- a direct personal right is for self-defense?

MS. UNDERWOOD: Well, I'll say a couple of things about that.

One, we -- if you go right to history and tradition, the history was to regulate most

strenuously in densely populated places. That's what fairs and markets are. So we have history.

But we also have a rationale for that history, which is that where there is dense population, there is also the deterrent of lots of people and there is the availability of law enforcement. In -- in England, the idea was that it was the King's Peace and it was, in fact, an insult to the king for people to take things into their own hands and --

CHIEF JUSTICE ROBERTS: Well, but that's not always true. It depends, obviously, in the jurisdiction and all that, but simply because a place is -- well, it's paradoxical that you say a place is a high-crime area, but don't worry about it because there are a lot of police around.

MS. UNDERWOOD: Well, and the other thing is that this is -- that these regulations are all an effort to accommodate the right, to -- to recognize and -- and respect the right of self-defense while regulating it to protect the public safety. And in areas where people are packed densely together, as the questioning that just happened displays, the risks of harm from

people who are packed shoulder to shoulder, all having guns, are much more acute than they are at --

CHIEF JUSTICE ROBERTS: Oh, sure, and I can understand, for example, a regulation that says you can't carry a gun into, you know, Giants Stadium, just because a lot of things are going on there and it may not be safe to have -- for people to have guns.

On the other hand, if the purpose of the Second Amendment is to allow people to protect themselves, that's implicated when you're in a high-crime area. It's not implicated when you're out in the woods.

MS. UNDERWOOD: Well, I -- I think it is implicated when you're out in the woods. It's just a different set of problems. I mean, you're --

CHIEF JUSTICE ROBERTS: Yeah, deer.

MS. UNDERWOOD: -- you're deserted there and you can't -- and law enforcement is not available to come to your aid if something does happen. But --

CHIEF JUSTICE ROBERTS: Well, how many muggings take place in the forest?

(Laughter.)

MS. UNDERWOOD: If we -- if we --

CHIEF JUSTICE ROBERTS: How many do you think?

MS. UNDERWOOD: I don't know, but I will tell you that our licensing officer told us that rapes and -- and robberies happen on the deserted bike paths and that he has some concern about that.

So, I mean, I take your point that there is a different risk in the city, but there is also a different public safety consideration, and that is why the licensing officer is meant to take into account not just the risk but also the -- the population and the availability of law enforcement and all these considerations.

I -- I won't say that the risk -- I think it's not correct to characterize the risk as atypical. The risk has to be specific to the person, that what -- what the cases say is that you can't just say I'm afraid because -- based on facts that are not specific to you.

But what Mr. Nash did was convince the licensing officer that his trip to a deserted parking lot every night was sufficient to --

CHIEF JUSTICE ROBERTS: What if it's -- what if it's one of these, you know, crime waves, whether it's, you know, a celebrated spate of murders carried out by a particular person -- I don't know who that is -- you know, the Son of Sam or somebody else? Is that a good reason to -- is that -- is that a atypical reason? Is that a justification? Some random person is going around shooting people. I'd like to have a firearm even though I didn't feel the need for one before?

MS. UNDERWOOD: Well, I think that it would have to be brought home to you in particular, to your route, to your parking lot, to your -- you know, your apartment building, but something specific to you rather than it's happening in the world at large. So --

JUSTICE KAVANAUGH: I don't --

MS. UNDERWOOD: -- that's -- that's what meant by something non-speculative.

JUSTICE ALITO: Could I -- could I -- could I explore what that means for ordinary law-abiding citizens who feel they need to carry a firearm for self-defense?

So I want you to think about people

like this, people who work late at night in Manhattan, it might be somebody who cleans offices, it might be a doorman at an apartment, it might be a nurse or an orderly, it might be somebody who washes dishes.

None of these people has a criminal record. They're all law-abiding citizens. They get off work around midnight, maybe even after midnight. They have to commute home by subway, maybe by bus. When they arrive at the subway station or the bus stop, they have to walk some distance through a high-crime area, and they apply for a license, and they say: Look, nobody has told -- has said I am going to mug you next Thursday. However, there have been a lot of muggings in this area, and I am scared to death.

They do not get licenses, is that right?

MS. UNDERWOOD: That is in general right, yes. If there's nothing particular to them, that's right.

JUSTICE ALITO: How is that consistent with the core right to self-defense, which is protected by the Second Amendment?

MS. UNDERWOOD: Because the core right

to self-defense doesn't -- as -- as this Court said, doesn't allow for all to -- to be armed for all possible confrontations in all places.

JUSTICE ALITO: No, it doesn't, but does it mean that there is the right to self-defense for celebrities and state judges and retired police officers but pretty much not for the kind of ordinary people who have a real, felt need to carry a gun to protect themselves?

MS. UNDERWOOD: Well, if that ordinary person -- Mr. Nash had a -- a concern about his parking lot, and he got a permit. I think the extra problem in Manhattan is that you -- your hypothetical quite appropriately entailed the subways, entailed public transit, and there are lots of people on the subways even at midnight, as I can say from personal experience, and the particular specter of a lot of armed people in an enclosed space --

JUSTICE ALITO: There are -- there are a lot of armed people on the streets of New York and in the subways late at night right now, aren't there?

MS. UNDERWOOD: I don't know that there are a lot of armed people.

JUSTICE ALITO: No?
MS. UNDERWOOD: I think there are people --
JUSTICE ALITO: How many -- how many --
MS. UNDERWOOD: -- there are people with illegal guns if that's what you're --
JUSTICE ALITO: Yeah, that's what I'm talking about.
MS. UNDERWOOD: -- referring to. Yeah.
JUSTICE ALITO: How many illegal guns were seized by the -- by the New York Police Department last year? Do you -- do you have any idea?
MS. UNDERWOOD: I don't have that number, but I'm sure there's a -- it's a substantial number.
JUSTICE ALITO: But the people -- all -- all these people with illegal guns, they're on the subway --
MS. UNDERWOOD: I don't -- I don't --
JUSTICE ALITO: -- they're walking around the streets, but the ordinary hard-working, law-abiding people I mentioned,

no, they can't be armed?

MS. UNDERWOOD: Well, I think the subways, when there are problems on the subways, are protected by the -- the -- the transit police, is what happens, because the idea of proliferating arms on the subway is precisely, I think, what terrifies a great many people.

The other point is that proliferating guns in a populated area where there is law enforcement jeopardizes law enforcement because, when they come, they now can't tell who's shooting, and the -- the -- the -- the shooting proliferates and accelerates. And, in the end, that's why there's a substantial law enforcement interest in not having widespread carrying of guns in densely --

JUSTICE KAVANAUGH: On the standard of particular to them, just to follow up on the other questions, why isn't it good enough to say I live in a violent area and I want to be able to defend myself?

MS. UNDERWOOD: Well, what happens in these license hearings is that a question is asked: What -- what exactly do you mean? Because it -- it's --

JUSTICE KAVANAUGH: Well, the statistics.

MS. UNDERWOOD: Well, it depends on how large an area you describe. You could say, I live in a violent area, and that could be all of New York City, and -- or it could be your particular neighborhood, and the closer it gets to your particular neighborhood, the better your -- the better your claim is, or your block.

Now I know that -- that one of the Petitioners made an assertion about robberies on his block. I also know that there was a hearing about that. And he evidently did not convince the licensing officer that they were sufficiently recent or relevant or couldn't be dealt with adequately by his own premises license, which he would be entitled to have without any -- any justification or proper cause at all.

So what I know happens is that those claims are examined by a licensing officer.

JUSTICE KAVANAUGH: How --

MS. UNDERWOOD: Now this gets to your -- to questions about discretion and whether that's effectively handled. But --

JUSTICE KAVANAUGH: Well, that's the real concern, isn't it, with any constitutional right? If it's the discretion of an individual officer, that seems inconsistent with an objective constitutional right.

I mean, what if you're a runner and you say I run a lot, and, as you correctly pointed out earlier, there are a lot of serious violent crimes on running paths. It's a real problem. Is that good enough?

MS. UNDERWOOD: Well, probably. I mean, that's -- that's the --

JUSTICE KAVANAUGH: And I walk --

MS. UNDERWOOD: -- counterpart to Nash's -- Nash's claim, but --

JUSTICE KAVANAUGH: Probably, though --

MS. UNDERWOOD: -- if that's the question --

JUSTICE KAVANAUGH: Yeah.

MS. UNDERWOOD: -- that -- that is not the way this case was tried. That's not the way this claim was framed. And if the question is does the system actually operate in the way that we're describing, then this case should be

remanded for a hearing to determine whether it does.

JUSTICE KAVANAUGH: And what's the problem with the shall issue regimes from your perspective that exist in many other states, including very populous states, you know, Florida, Illinois?

MS. UNDERWOOD: The problem with the shall issue regimes is that they multiply the number of firearms that are being carried in very densely populated places, and there is a much higher risk -- with -- without assuming any ill intent on the part of the carriers of weapons, they -- they greatly proliferate the likelihood that mistakes will be made, fights will break out --

JUSTICE KAVANAUGH: But --

MS. UNDERWOOD: -- guns will be sold.

JUSTICE KAVANAUGH: -- has that happened in those states? I mean, can you make a comparative judgment? Because it seems like before you impose more restrictions on individual citizens and infringe their constitutional rights based on this theory, you should have to show, well, in those other states

that have shall issue regimes, actually, there is a lot more accidents, crime. And I don't see any real evidence of that.

MS. UNDERWOOD: Yeah, I think the -- there is a brief from the social scientists that addresses this, but this law has been in place since 19 -- for over a hundred years, starting when the -- at -- at a time when the -- when the law was not as well understood in this area as -- as -- as it is now.

And so it's a little bit anachronistic to talk about before you put this law in place you should have evidence. But I -- I believe there is evidence about the success that New York has had in keeping -- in -- in -- that is -- in keeping gun violence down that is attributable to the reduced number of guns that are being carried and particularly in these densely populated places. So --

JUSTICE KAGAN: General, you know, one of the things that strikes me about this area is that, on the one hand, it -- it seems completely intuitive to me and I think to many people. I mean, if you think about Justice Thomas's questions about less populated areas, the rural

areas of New York versus the cities, I mean, it seems completely intuitive that there should be different gun regimes in New York than in Wyoming or that there should be different gun regimes in New York City than in rural counties upstate.

But it's a -- it's -- it's a hard thing to -- to match with our notion of constitutional rights generally.

I mean, Mr. Clement makes a big point of this in his brief about how we would never really dream of doing that for the First Amendment or other constitutional rights, allow that level of local flexibility that you're basically saying we should allow in this context.

So I guess I just want to hear you say why you think that is. You know, what justification is there for allowing greater flexibility here?

MS. UNDERWOOD: Well, I think one point is that there is a very wide range of sort of distribution of rural and urban, different kinds of areas, not just across the whole state but within counties.

And so delegating the decision-making with appropriate criteria to somebody who is local, which is what this is, these are local judges, in most of the states, they're -- they're judges, to make the relevant fact-findings, to make the relevant inquiry. This is a -- this is an interactive process in which these individuals and others are told I'm not going to lift the restrictions now, but if you come back, if you have more to -- to say about this, you know, feel free to come back.

It's an ongoing process. It's one reason why there isn't so much appellate litigation, is that it is -- is that that is what happens.

So it's hard to see how you could specify everything in advance and have it be a clear on/off switch and still take adequate account of, on the one hand, the need for self-defense and, on the other hand, the strong public safety concerns. And that's why I think this system --

JUSTICE SOTOMAYOR: I don't think that was Justice Kagan's question.

MS. UNDERWOOD: Oh, I'm sorry.

JUSTICE SOTOMAYOR: It was on a broader level, I believe. She can correct me if I'm wrong. The issue is no other constitutional right do we condition on permitting different jurisdictions to pass different regulations or -- but do we have any other constitutional right whose exercise in history has been as varied as gun possession and use?

MS. UNDERWOOD: Well, I think that's -- that's right, both at the level -- the local level and at the -- at the state-to-state level. We have a strong history here of a range of responses from state to state that is based on local conditions and local concerns.

And what we have within New York is an effort to recognize we have the same -- almost the same range of different kinds of spaces within the state, and this is the effort to accommodate that.

And if the history warrants taking local conditions and local population density and so forth into account, it's hard to think of another way to -- to effectively do that.

There is, after all, appellate review available here, all the way to the central, you

know, to the highest state court.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

JUSTICE THOMAS: But there are -- let's just take, for example, hunting. That's something, I think, we can agree on. You can't hunt in, I'm sure, with a gun in Central Park. But I'm certain that there are places in upstate New York or even in western New York where you can. I -- I don't know.

MS. UNDERWOOD: Including Rensselaer County, yes.

JUSTICE THOMAS: Yeah. So I think what we're asking is, if you can have that difference for the purpose of hunting specifically, why can't you have a similar tailored approach for Second Amendment based upon, if it's density in New York City, if that's a problem, the subway, then you have a different set of concerns in upstate New York?

MS. UNDERWOOD: Well, hunting permits work for particular locations, for particular areas, and -- but it's all one statewide regime, I mean, and so too here licenses are handled

locally. It's not exactly the same, but it's the same model that licensing of -- of -- of handguns -- to carry a handgun for self-defense is handled locally under a single set of criteria but with reference to local conditions. I think that's my answer to the question.

CHIEF JUSTICE ROBERTS: Justice Breyer?

JUSTICE BREYER: Are we considering here just the upper state New York law? We're not considering New York City, are we?

MS. UNDERWOOD: I don't see any reason to be considering New York City.

JUSTICE BREYER: Okay. So it's not in the case?

MS. UNDERWOOD: The Petitioners are not from --

JUSTICE BREYER: They're -- they're not, okay. All right.

MS. UNDERWOOD: Yeah.

JUSTICE BREYER: Now, if you're trying to get uniformity, doesn't the First Amendment -- isn't it filled with -- local statutes use the word "may," parade permits, event permits.

MS. UNDERWOOD: Yes.
JUSTICE BREYER: So it's not special?
MS. UNDERWOOD: Correct. In a -- in a --
JUSTICE BREYER: Can -- can you think of --
MS. UNDERWOOD: -- in -- in the areas where permitting happens, which includes First Amendment areas --
JUSTICE BREYER: Yeah.
MS. UNDERWOOD: -- it could be parades, it could be solicitation for charity, there are various areas where First Amendment activity is --
JUSTICE BREYER: All right. So -- so my -- my -- what I'm driving towards -- and I -- and I thought also there is a brief here -- I think it's the social scientists, I don't remember the name of it -- which says in instances where -- and they do it statistically -- they are more liberal in allowing people to carry concealed weapons who are good character people and there is a greater risk of -- of crime or harm, where that happens, there are more deaths of innocent people.

What is that brief? I'd like to go back and look at the figures.

MS. UNDERWOOD: Yeah, I believe it is --

JUSTICE BREYER: Do you know?

MS. UNDERWOOD: -- a brief of social scientists, but --

JUSTICE BREYER: All right. I'll find it.

MS. UNDERWOOD: Yeah.

JUSTICE BREYER: But do you think it's useful to -- were we to have a trial, could we go into that? I mean, I think the -- the great problem would be, fine, let's have some absolute rules, rules, uniform national rules. I'm not sure we have those in the First Amendment, but assume we do.

What are they? What are those rules?

MS. UNDERWOOD: Well, I think they would end up being factors that have to be taken into account because the range of situations is so different both on the -- on the need side, on the -- on the -- and on the -- on the -- on the counter- -- on the public safety side.

So I think it's very hard. In fact,

that's one of the things that I think is hard about the suggestion that a sensitive place regime could replace a system like this.

JUSTICE BREYER: All right. If you had to guess on how many carry -- conceal carry licenses are given in the area under consideration, upstate New York or outside of New York City, in a given year or around -- any way you want to put it, are they in the tens of thousands?

MS. UNDERWOOD: Well, in --

JUSTICE BREYER: Are they in the five --

MS. UNDERWOOD: So I -- I can't do it statewide -- I have statewide estimates --

JUSTICE BREYER: Yeah. Uh-huh.

MS. UNDERWOOD: -- not estimates, I have permits I -- I -- for Rensselaer County and for statewide. It would be possible to get more, but we don't -- I don't have that.

JUSTICE BREYER: Are they -- are they rough? What are they?

MS. UNDERWOOD: So -- so -- and this is in Footnote 10 of our brief. In the two-year period, 2018 to 2019, in -- in the state, there

were approximately 37,800 grants of --

JUSTICE BREYER: Okay. I get the idea -- rough idea. And if, in fact, it were remanded, I guess we could go into that in more depth?

MS. UNDERWOOD: That's correct. That's correct. We have the grants. Of course, there are licenses that weren't granted in those years that are still valid. So that doesn't tell you how many -- how many licenses there are out there altogether. The thing we had to estimate was the grant rate because we don't have application data. We had to -- we had to estimate that from other information. But we have the permits.

CHIEF JUSTICE ROBERTS: Justice Alito?

JUSTICE ALITO: Is it correct that the non-speculative standard applies throughout the state?

MS. UNDERWOOD: It --

JUSTICE ALITO: It applies equally in New York City and in the most rural location in upstate New York?

MS. UNDERWOOD: Well, it has been -- the law has been interpreted to mean that,

although the experience of granting licenses, the experience with license applications is that it is apparently more readily satisfied upstate.

JUSTICE ALITO: So the -- the individual officers have a degree of discretion?

MS. UNDERWOOD: Well, yes, they are asked -- like -- like judges on many issues, they are asked to take into account certain factors. They can be reversed if they took the wrong factors into account or if they failed to take the specified factors into account.

It's not unguided discretion, but it is discretion --

JUSTICE ALITO: What --

MS. UNDERWOOD: -- in the sense that --

JUSTICE ALITO: -- what -- what guarantees, if any, are there in your regime that a licensing officer is not taking into account improper factors?

MS. UNDERWOOD: I mean, this is a question about the judicial system generally. If he correctly records the factors that he took into account, they -- they write letters or opinions which may or may not fully disclose --

one assumes will disclose what they thought was important. When there's a -- there's a -- often there are not just the papers, but there are the -- if -- if he denies a license, he will say why. He has to say why.

JUSTICE ALITO: We've been presented in your brief and all the other briefs in this case with an enormous amount of history, citations to all sorts of statutes and other sources.

Would you be willing to concede that maybe you got a little bit overly enthusiastic in your summary of some of the historical sources that you cited in your brief?

I'm going to give you an --

MS. UNDERWOOD: We did our best to be accurate --

JUSTICE ALITO: -- I'm going to give you -- well, I'm going to give you an --

MS. UNDERWOOD: -- in reporting what we reported. I don't know what you have in mind.

JUSTICE ALITO: Yeah. Well, I'm going to give you an example, which is -- you know, it's troubling. I can see how it would slip

through. I'm not accusing you personally of anything.

But, on page 23, you say that in founding-era America, legal reference guides advised local officials to "arrest all such persons as in your sight shall ride or go armed." And this is a citation to John Haywood, A Manual of the Laws of North Carolina, 1814.

So I looked at this manual, and what it actually says is "you shall arrest all such persons as in your sight shall ride or go armed offensively." And somehow that word "offensively" got dropped --

MS. UNDERWOOD: Well, our --

JUSTICE ALITO: -- from your brief.

MS. UNDERWOOD: I will --

JUSTICE ALITO: Do you think that's an irrelevant word?

MS. UNDERWOOD: I think it would have been better to put it in and make an explanation, but I do think it's an irrelevant word because we have substantial authority for the proposition that guns were deemed to be offensive weapons.

And that's why we have this dispute

about whether saying -- I mean, there are different ways of putting it, offensively or with offensive weapons or to the terror of the people. These either describe a separate characterization -- a -- a separate feature that not all weapons have -- that's my friend's position on this -- or they describe the belief that all such weapons are offensive.

JUSTICE ALITO: Well, I don't want to belabor the point, but, of course, if any possession of weapons outside the home was illegal, then there would be no need to put in the term "offensively," the inclusion of that term.

MS. UNDERWOOD: Well, there are many other weapon -- usually the -- there's a list that's -- it's not in this particular instruction, but there would be a list of weapons. They were talking about much more than guns, and it was guns that were said over and over again to be offensive --

JUSTICE ALITO: All right. Well, thank you.

MS. UNDERWOOD: -- weapons.

JUSTICE ALITO: Thank you.

MS. UNDERWOOD: But that's the explanation. I'm --

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

Justice Kagan?

JUSTICE KAGAN: You -- you started a thought and then you were taken off someplace else, so I just wanted to allow you to finish the thought. You -- this -- what you said was that there was a reason why the sensitive -- a sensitive place regime cannot serve as a replacement, and then you were not given an opportunity to say why. So why?

MS. UNDERWOOD: Well, essentially, because there are -- it -- it is -- it would be very hard in the first instance and I think also not very acceptable in the second -- to -- to my adversaries, on the -- in the second instance, to specify in advance all the places that ought properly to be understood as sensitive.

So it sounds like a very convenient alternative, but, for example, we were talking about Times Square on New Year's Eve. Times Square on -- when the theater district -- when -- when -- when commerce is in full swing, Times

Square almost every night is shoulder-to-shoulder people.

So then you -- you end up having a very big difficulty in specifying what all the places are that have the characteristics that should make them sensitive. It -- it's -- it has a -- in principle, it has an attractive quality to it, but, in implementation, I think it would be unsuccessful.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: No further questions. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: No. Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Yes, I have one.

General Underwood, do you think Heller was rightly decided?

MS. UNDERWOOD: I think there is a lot of support historically and otherwise for it, so I'm -- I'm quite content to treat it as rightly decided. I think there was an argument on the

other side too, but that's true about many of -- maybe most of the difficult questions that come before this Court. I have no quarrel with Heller.

JUSTICE BARRETT: Do you think that we are bound by the way that we characterized history in that opinion? You know, Mr. Clement has pointed out that in some respects the way that we treated, say, the Statute of Northampton is different from the way that you argue that we should interpret that and the follow-on, you know, statutes, and the colonies, you argue that we should understand those and some other cases differently than we did in Heller.

Are we free to do that?

MS. UNDERWOOD: I think you are because I think the Heller decision made very clear that it was not deciding anything other than the right to keep arms in the home.

In the course of arriving at that decision, it necessarily said a lot of other things that led to that decision, but I don't think they are controlling or they -- I think the opinion itself says we're not trying to do a full exegesis of the whole Second Amendment

right, and there's more to be -- there's more to be done, and it would be odd and really inconsistent with general practice to treat every -- every sentence or every reference to a historical source as controlling for all time as distinguished from for the purposes for which it was invoked.

JUSTICE BARRETT: Thank you, General.

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. Fletcher.

ORAL ARGUMENT OF BRIAN H. FLETCHER,
FOR THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE RESPONDENTS

MR. FLETCHER: Thank you, Mr. Chief Justice, and may it please the Court:

New York's proper cause requirement is consistent with the Second Amendment because it is firmly grounded in our nation's history and tradition of gun regulation.

As Justice Alito said, there's a lot of history floating around this morning, and so I want to be clear that, when I say that, I am putting to the side all of the disputed bits about the Statute of Northampton, about the

surety laws, and I'm putting to the side laws that restricted concealed carry but do not restrict open carry, and I am focusing on laws that either prohibited or required a showing of good cause to carry a concealable weapon, like a pistol.

Tennessee enacted one of those laws in 1821. Texas followed in 1871. New Mexico and Arkansas likewise enacted such laws in the years immediately after the ratification of the Fourteenth Amendment. And over the decades that followed, more than a dozen other states enacted other laws that were at least as restrictive as New York's. Like my friends from New York, I count about 20 laws in total that fit that description.

Those laws remain in force in seven states today, and more than 80 million Americans live under their protection. They are, in short, both traditional and common regulations.

I'd welcome the Court's questions or I'm happy to continue.

JUSTICE THOMAS: How do we determine which states we should look to? And these are -- and you -- you -- you focus a lot on western

states, but the west is different.

MR. FLETCHER: I agree, Justice Thomas, and I think there might be reason to be skeptical about a tradition that's only reflected in one state.

I think that's a problem for Mr. Clement in relying on some of the cases exclusively from the antebellum south. But the cases that we're relying on come from the south, like the Tennessee, Arkansas, and Texas law I described. West Virginia had a similar law, as did Alabama, New York, Massachusetts, California, Hawaii.

The tradition that I am drawing on spans two centuries going back to the Tennessee law, spans 150 years when you broaden it out to many states, and spans all regions or virtually all regions of the country.

So I think that's the sort of tradition that you can look to when defining a national tradition of gun regulation.

CHIEF JUSTICE ROBERTS: I mean, what is the appropriate analysis? I mean, you sort of -- we -- we, I think, generally don't reinvent the wheel. I mean, the first thing I

would look to in answering this question is not the Statute of Northampton, it's Heller, and Heller has gone through all this stuff and, obviously, in a somewhat different context, although that's part of the debate, self-defense at home. You know, this is different.

But I still think that you have to begin with -- with Heller and its recognition that the Second Amendment, you know, it -- it has its own limitations, but it is to be interpreted the same way you'd interpret other provisions of the Constitution.

And I wonder what your best answer is to the point that Mr. Clement makes in his brief, which is that, for example, if you're asserting a claim to confront the witnesses against you under the Constitution, you don't have to say I've got a special reason, this is why I think it's important to my -- my defense.

The Constitution gives you that right. And if someone's going to take it away from you, they have to justify it. You don't have to say when you're looking for a permit to speak on a street corner or whatever that, you know, your speech is particularly important.

So why do you have to show in this case, convince somebody, that you're entitled to exercise your Second Amendment right?

MR. FLETCHER: So let me start with the general question and then get to that --

CHIEF JUSTICE ROBERTS: Sure.

MR. FLETCHER: -- specific point for Mr. Clement.

As to the general question about Heller, we agree completely that the Court ought to apply the method from Heller, which we, like I think all the parties, take to be look to the text, history, and tradition of the Second Amendment right, and we're applying that now to a somewhat different issue with the benefit of somewhat broader materials.

Now, as to the question about why you have to have a showing of need, I think the problem with Mr. Clement's formulation is that it assumes the conclusion.

If you had a right, the Second Amendment conferred a right to carry around a weapon for possible self-defense just because an individual wants to have one available, then, obviously, you couldn't take away that right or

make it contingent upon a discretionary determination.

But the whole question is whether the Second Amendment right to keep and bear arms confers that right to have a pistol with you for self-defense even absent a showing of demonstrated need.

CHIEF JUSTICE ROBERTS: Well, I'm not sure that's right. I mean, you would -- regardless of what the right is, it would be surprising to have it depend upon a permit system. You can say that the right is limited in a particular way, just as First Amendment rights are limited, but the idea that you need a license to exercise the right, I think, is unusual in the context of the Bill of Rights.

MR. FLETCHER: So I -- I agree with that, but I think I heard even Mr. Clement in response to a question from Justice Kavanaugh say he doesn't have a quarrel with licensing regimes in general.

And I think what that is one illustration of is that the Second Amendment has a distinct history and tradition and that the way to be faithful to the Second Amendment is to

be faithful to that history and tradition and not to draw analogies to other rights with -- with their own histories and traditions.

CHIEF JUSTICE ROBERTS: Well, there's licensing and there's licensing. Maybe it's one thing to say we need to check, make sure you don't have a criminal record, make sure that -- all the --

MR. FLETCHER: Right.

CHIEF JUSTICE ROBERTS: -- all the other things you can check on, but not that we assume you don't have a right to exercise your -- your --

MR. FLETCHER: So I guess --

CHIEF JUSTICE ROBERTS: It's hard to say it without saying it, exercise your right under the Second Amendment, and you've got to show us that -- that you do.

MR. FLETCHER: So we would ask that question by looking to the history and tradition of the Second Amendment. And in Tennessee, in 1821, you couldn't carry a pistol at all. In Texas, in 1871, you had to have a showing of need if you were going to carry a pistol.

And that showing of need was actually

much less favorable than the New York regime. In Texas, in West Virginia, and in Alabama, in those laws that we cite, need to carry a firearm was a need that you had to show when you were prosecuted for violating the law. It was essentially a self-defense requirement. And you had to persuade a jury in a criminal trial that you had an immediate pressing need to be carrying the gun when you were carrying it.

The laws, of which New York's is one but by no means the only example that began to become more prevalent in the 20th Century, said we're going to make that determination of need ex ante. We're going to require a showing of good cause.

JUSTICE KAVANAUGH: Can --

MR. FLETCHER: New York has done that for a century. I'm sorry, Justice Kavanaugh.

JUSTICE KAVANAUGH: This might be a level of generality issue, but I think Mr. Clement responded to what -- some of what you're saying on history and tradition by saying you have to look at carry laws more generally. And there was open carry traditions in a lot of those states.

And so I think he followed up by saying so open carry is one option. Shall carry permit regimes for concealed carry, another option. But what you can't have is no open carry and simply a may issue discretionary regime that will, in practice, he says, limit the right.

So can you respond to that?

MR. FLETCHER: Yeah. I meant to be taking that into account in the history -- account of history that I'm giving you. So the Tennessee laws refer specifically to carry publicly or privately. Texas, the same story.

If I were here defending a regime that just prohibited concealed carry and allowed open carry, I would have many, many, many more states. But I'm focused on just this type of law, and even there, our submission is there's a substantial history and tradition of that kind of regulation. It's not the sort of outlier that the Court confronted in Heller and McDonald.

And if I -- I could speak to -- Mr. Clement has spoken some about the case law from the 19th Century and has suggested that laws

like these were struck down. And with all respect to my friend, that's not correct.

The cases that he is relying on are primarily dicta. The two cases he has that actually struck down laws -- or, I'm sorry, the three cases that he has that actually struck down laws are the Nunn decision from Georgia, which struck down a law that was -- banned even the keeping of pistols. The Court did say in dicta that open carry was required, but that would -- that would -- the law was actually much more restrictive than that.

The Andrews case that he relies on and that Heller relies on as well is actually more helpful to us because the Court upheld a prohibition on the carrying of belt or pocket pistols, and it prohibited a ban on revolvers only because the Court construed that ban to be so broad that it would prohibit even carrying it around your house.

And in the very next sentence, the Court said: But, of course, the legislature, if it wanted to, could regulate the carrying of that firearm publicly.

And then, when you turn to laws like

the ones that we have here, which include some sort of self-defense exception, either ex-ante or ex-post, the trend in the cases is in favor of -- of upholding their constitutionality.

We've cited about six decisions from the 1800s and the early 1900s, including the Duke and English cases from Texas, the Isaiah case from Alabama, the Haley and Fife cases from Arkansas, and the Workman case from West Virginia, all of which upheld those laws.

And Mr. Clement's answer to those decisions is that they rested on the erroneous understanding that the Second Amendment or its state equivalents protected only the right to use arms in the militia.

But that is not what those cases say. They do not stop by saying that the defendants were not militiamen and so had no rights. The Texas cases in particular, in Duke and English, say that the law makes all necessary allowances for self-defense by including the type of -- of exception we described earlier.

And so our submission is that that body of case law that New York law carries forward is part of our nation's history and

tradition of firearms regulation and that New York ought to be allowed to continue to make the choice that it has made.

Now we understand, and there's force to Mr. Clement's argument, that other states have made other choices. Justice Alito made powerful points about how some individuals have a powerful claim to have a gun for self-defense. But the question before the Court is, of all of the different approaches to these difficult issues that states and other jurisdictions have taken over our nation's history, is this one that the Second Amendment takes off the table?

And our submission is that when it's an option that New York has and other states have had for a century or more and that traces as far back as some of the laws that I've been discussing into our nation's history, that's an option that is consistent with our tradition of gun regulation and is an option that ought to be available to the states.

CHIEF JUSTICE ROBERTS: Justice Thomas?

JUSTICE THOMAS: No.

CHIEF JUSTICE ROBERTS: Justice

Breyer, any?

Justice Alito?

JUSTICE ALITO: Is it correct that the Sullivan Law was an innovation when it was adopted?

MR. FLETCHER: It was relatively new. I think the Sullivan Law was 1911. The licensing requirement at issue here was 1913. I think Massachusetts had done something similar in 1906. Hawaii did its as well in 1913. And we view those as lineal descendents and, in fact, improvements upon the sort of Texas laws which made you prove self-defense at the back end rather than giving you a chance to demonstrate it up front.

JUSTICE ALITO: There's a -- there's a debate about the -- the impetus for the enactment of the Sullivan Law, is there not? There's -- there are those who argue, and they cite -- they cite support for this interpretation -- that a major reason for the enactment of the Sullivan Law was the belief that certain disfavored groups, members of labor unions, Blacks and Italians, were carrying guns and they were dangerous people and they wanted

them disarmed.

MR. FLETCHER: There have been those arguments made, and there's certainly evidence that those sentiments existed in New York at the time. I have not seen things that persuade me that those were the impetus for the Sullivan Law.

And to the extent that that was a question, I think the fact that similar laws have been enacted and maintained not just in New York and not just at that moment in time but in a number of different states throughout the country throughout large swaths of our nation's history is -- is good reason to believe that this is not just prejudice, that this is a legitimate regulation.

JUSTICE ALITO: I think one more question about the major point that you've made this morning, which is that there are scattered statutes, local ordinances, judicial decisions from various points in the 19th Century extending into the 20th Century, the early 20th Century, with the Sullivan Law and the other laws that you mentioned that are inconsistent with Mr. Clement's argument.

But what does that show about the original understanding of the right that's protected by the Second Amendment? Would -- would we be receptive to arguments like that if we were interpreting, let's say, the First Amendment or the Confrontation Clause of the Sixth Amendment? Would we say, well, you know, you can find a lot of state laws and state court decisions from the late -- from the 19th Century, early 20th Century, that are inconsistent with a claim that is made based on the original meaning of -- of a provision of the Bill of Rights, and that shows that that's what that was understood to mean at the time?

MR. FLETCHER: Well, Justice Alito, I think Heller was receptive to those types of arguments and conducted a review of history through the 20th Century and rightly so, I think. It's not unusual to look to the nation's tradition to understand the meaning of constitutional rights. I think that's especially appropriate here for a couple of reasons.

One is that I think everyone agrees that the right codified in the Second Amendment

is a right that is subject to some reasonable regulations, and in deciding what regulations are reasonable, we think the fact that they've been prevalent throughout our history is a good sign that they are. We think that's especially so because of a point that this Court made in McDonald, which is that throughout the nation's history, this is a right that's been recognized and codified in state constitutions as well. It's not something that people were not aware of.

And so the fact that this type of regulation coexisted for so long with that understanding, we think, is a particularly strong indication of its consistency.

JUSTICE ALITO: Well, Heller -- and -- and I will stop after this -- Heller cited decisions going into the 19th Century as confirmation of what it had already concluded based on text and history at or before the time of the adoption of the Second Amendment and said this is what it was understood to mean at the time and it's further evidence that this is what this right was understood to mean because it kept being reaffirmed by decisions that came

after.

But I find it hard to understand how later decisions and statutes, particularly when you start to get into the late 19th Century and the early 20th Century, can be used as a substitute for evidence about what the right was understood to mean in 1791 or 1868 if you think that's the relevant date.

MR. FLETCHER: So you're certainly right about the way that Heller looked to decisions to -- on its core holding of does the Second Amendment protect only a militia-focused right or an individual right.

But, when Heller turned to the question presented here, which is what sorts of regulations are consistent with the right that it was recognizing, I think it's fairly read to extend the analysis into the 20th Century for the reason that Justice Kagan identified, that it validated as presumptively lawful felon-in-possession requirements, bans on the possession of firearms by the mentally ill that date to much later than the 19th Century.

JUSTICE ALITO: All right. Thank you.

CHIEF JUSTICE ROBERTS: Justice

Sotomayor?

JUSTICE SOTOMAYOR: What do you do with Heller and its recognition of categories of exclusion? Mentally ill, felons, domestic violence, presumably, although it didn't mention it. Can any of those pass strict scrutiny on their face?

MR. FLETCHER: I don't know. I -- I think what -- the lesson from Heller, though, is that you don't need to apply strict scrutiny or any other level of scrutiny because those are the types of regulations that are validated by our nation's history and tradition of gun regulations. And so we would take that lesson from Heller as exemplifying the proper mode of analysis and apply it here as well.

JUSTICE SOTOMAYOR: So what do you do with the -- the view of your -- Mr. Clement's view that the essence that Heller says is that you do have some sort of right outside of the home to guns for self-defense? So how do you finish what you think that right is or how do you describe it?

MR. FLETCHER: So we don't quarrel at all with the notion that the Second Amendment

has something to say outside the home. Our submission is just that to understand how it applies outside the home, one has to look to the history and tradition of regulations.

And what we've tried to argue in our brief and this morning is that there is a substantial history and tradition of the regulation of the public carrying of concealable weapons, including pistols, because of the dangers that they present and that regulations of that type, of which New York's is one, are consistent with the right recognized in the Second Amendment.

JUSTICE SOTOMAYOR: How about -- let's go to the extreme. There's no exception for good cause, there's no exception for long -- no exceptions whatsoever, no rifles for hunting, no -- nothing. Outside the home, you can't possess any kind of ammunition-driven weapon.

MR. FLETCHER: Yeah.

JUSTICE SOTOMAYOR: Where would we be with that?

MR. FLETCHER: I think that is an -- a type of regulation that fortunately no state has today and that I don't think there's any

historical precedent for. I don't think you could make this sort of argument --

JUSTICE SOTOMAYOR: So --

MR. FLETCHER: -- for that sort of law.

JUSTICE SOTOMAYOR: -- so give me the limiting principle of what regulations and how far they can go that don't achieve that.

MR. FLETCHER: Right. So I think, like Mr. Clement, it's -- it's going to be difficult for me to give you definitive answers because, in our view, this is an inquiry that has to be driven by history and tradition, and that requires a careful examination of history and tradition.

But let me give you a couple of guideposts. I think there is a tradition of laws like the Tennessee law that I alluded to earlier and others that prohibit the carrying of concealable weapons without any exception for self-defense or -- or any good cause exception like the one that you have in the New York law.

So we think, and -- and Judge Bybee for the en banc Ninth Circuit concluded after an exhaustive historical analysis, that those types

of regulations are consistent with the Second Amendment. But I acknowledge that that's a tougher historical case to make than the case that you can make with respect to laws like New York's that include self-defense exceptions.

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Mr. Fletcher, I -- I think I probably should have asked General Underwood this question, but I forgot, so here you are.

And the United States also has law enforcement officers, even though they operate differently from sort of the cop on the beat, but I'm just wondering if there is anything that you can say, any evidence that you can share, are there studies, is there information about how this actually affects how getting rid of -- of this regime in the way that Mr. Clement would want this Court to do, how it affects policing, how it affects the ability of police officers to keep the streets safe and -- and how it affects their own safety?

Is there information about that? Is there -- are there studies?

MR. FLETCHER: There are. I think the -- the best place I can point you to for studies are some of the amicus briefs, including the social scientists' brief that Justice Breyer discussed with my colleague, General Underwood.

In terms of sort of the United States' perspective specifically, I don't have any sort of quantifiable statistics. What I can tell you is that we do share the concern behind the New York law, which is the concern that having more guns on the street does escalate -- does complicate and increase the danger inherent in citizen/law enforcement encounters. We do think that's a real concern and it's one of a number of real concerns that are reflected in the law that New York has.

JUSTICE KAGAN: I mean, do police officers stop people in the same way in -- notwithstanding what -- whether there are -- whether it's a -- a New York regime or -- or a more permissive regime?

MR. FLETCHER: I -- you know, I apologize, I don't have studies on that. All that I can give you is my own sense that if I were a police officer, I would certainly think

prominently in my mind about what are the odds that the person that I'm stopping or approaching in the middle of the highway, you know, late at night is likely to be armed. And the licensing regime in the state is going to be an important factor in the risk that that's the situation.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: Mr. Fletcher, in -- in your brief, you -- you suggest that the New York law passes both the history -- text and history approach and -- and intermediate scrutiny should we apply that.

And I guess I'd like to pose the same question to you that I did to Mr. Clement, and that is, what is the appropriate test between those two or others?

The lower courts seem very divided over how to approach Second Amendment questions. Some apply the text and history approach to the challenge before them. Others say, yes, text and history is appropriate, but we're not going to extend the Heller right until and unless the Court first does so through its own text and

history analysis. We're not going to do it ourselves. Others have applied intermediate scrutiny. Others have applied what might be described as a watered down version of immediate -- intermediate scrutiny. And some have suggested strict scrutiny or some modification of it should apply.

I -- I -- I'd just be grateful for your thoughts.

MR. FLETCHER: I appreciate the question, Justice Gorsuch, and I think our view is that courts ought to follow what we understand to be the lesson from Heller, which is that you start with text, history, and tradition, and when those sources provide you an answer one way or the other, either that the law is valid or that it's invalid, you end there and that's the end of the inquiry.

We take that approach to be consistent with the approach described by Justice Kavanaugh in his dissent in Heller II. I think the one place where we might differ from him a little bit is that we think there may come a point, especially as -- when courts confront new regulations, where history gives out, where it's

not possible to draw those historical analogies anymore.

And at that point, our suggestion is that the way to be faithful to history and tradition is to look to the broader method that you find in that history and tradition. And the method that we find in a half dozen or so cases from the mid-1800s that we cite is to ask whether the law is a reasonable regulation. And as we explained in our brief, we think that the modern judicial method that is most faithful to that approach is a form of intermediate scrutiny.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you.

Mr. Fletcher, appreciate your focus on history and tradition and want to explore that and get your thoughts on one thing. As you say, there is a history and tradition, and it exists to the present day, of permitting regimes, and so the issue before us will have effects, but it's a narrow legal issue of "shall issue" versus "may issue." And it'll have substantial

effects, but there is a tradition of permitting regimes.

But how do we think about, do you think, kind of a separate tradition that the Chief Justice and others have referred to in our constitutional law of concern about too much discretion in exercise of authority over constitutional rights and that too much discretion can lead to all sorts of problems, as our history shows?

So you've got the tradition of permitting, but how -- how do we think about, fold in, just a general concern about too much discretion?

MR. FLETCHER: So I -- I appreciate that concern, and I think here's how I would think about it.

First, I would say you -- there is a substantial history of discretion in this particular area, starting out with juries in the Texas and West Virginia type regimes that I talked about now moving into permitting officers. And I think that's inherent in any system if you say a permit is going to be conditioned upon a showing that you have a

genuine, specific need for self-defense, then someone's got to make the decision about whether or not you've made that showing. New York has decided it's best to do that by delegating the authority to local officers, local judges, who are most familiar with local conditions.

I do appreciate the concern about discretion, and I think, if the Court were to conclude that some sort of good cause sort of self-defense-based exception is -- is required, then the Court might conclude that some more predictable or stringent or prescriptive guidelines are required, that you can't have that much discretion if the Court concludes that that sort of good cause exception is actually constitutionally required.

JUSTICE KAVANAUGH: Thank you. Appreciate it.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: No.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Clement?

REBUTTAL ARGUMENT OF PAUL D. CLEMENT
ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Thank you, Mr. Chief Justice. Just a few quick points in rebuttal.

First of all, I want to highlight that when the government was asked for its interest behind this permitting regime, it said that if it went to a different regime, it would multiply the number of firearms in circulation.

In a country with the Second Amendment as a fundamental right, simply having more firearms cannot be a problem and can't be a government interest just to put a cap on the -- the number of firearms.

And that just underscores how completely non-tailored this law is. It might be well tailored to keeping the number of handguns down, but it's not well tailored to identifying people who pose a particular risk or anything else because it deprives a typical New Yorker of their right to carry for self-defense.

The second point I want to make is just about population density. There's been a lot of discussion about that, but it's very much a double-edged sword because, when there's

population density, that's an awful lot of people who all have Second Amendment rights, and so you can't just simply say we're not going to have Second Amendment rights in the areas where there's dense population.

And I would say, here, experience does tell you a lot. By my count, seven of the 10 largest cities in America, measured by population, are in shall issue jurisdictions. And I've mentioned them, cities like Phoenix, Chicago, Houston. These are large cities where it hasn't been a problem.

If you want to look at the empirical evidence -- and I know, Justice Breyer, you asked about this -- please also look at the English brief on the top side because it's a very rigorous statistical analysis that shows that, as a matter of actually doing statistics right, there's no difference here, and what -- the only difference you really see is that people who have a handgun for self-defense end up with a better outcome. They're not shot. They're -- they're not made victims. But the English brief, I think, is really worth taking a look at.

I want to say a quick word just about permitting. There may be limiting permitting in other contexts, like parade permitting, but I'm not aware of any context whatsoever where, in order to get a permit, you have to show that you have a particularly good need to exercise your constitutional right. And I think that is the absolute central defect with New York's regime here.

I want to say a quick word about the history that my friend from the Solicitor General's Office emphasized. It's telling that his first example is Tennessee. If you look at the Heller decision, Tennessee is a problematic state in terms of its history. The court gave -- that Tennessee Supreme Court first came out with the Aymette decision, which the majority opinion in Heller criticized. It then came out with the Simpson decision and the Andrews decision, both of which protected Second Amendment rights, and the majority opinion in Heller praised those decisions at the same time that it criticized Aymette. So, to the extent there was an 1821 statute, I would put it in the same box as the Aymette decision.

Texas, which is their next example and their only other 19th Century example if I heard my friend correctly, is even more problematic to rely on because Texas had a specific constitutional amendment that was similar to the English Bill of Rights but differed from the Second Amendment, that allowed the legislature to put specific restrictions on the right. So relying on 1871 Texas is highly problematic from a historical perspective.

And that just leaves them with 20th Century examples, which we concede, but, by that point, the collective rights view of the Second Amendment was everywhere.

Let me finish just by saying there's absolutely no need for a remand here. There are interesting statistics that could be developed, but none of them are relevant to the two central defects in this regime.

First, that in order to exercise a constitutional right that New York is willing to concede extends outside the home, you have to show that you have an atypical need to exercise the right that distinguishes you from the general community. That describes a privilege.

It does not describe a constitutional right. That is a sufficient basis to invalidate the law.

But then there's the discretion, and the discretion here has real-world costs. If you want to look at it, look at the amicus brief in our support by the Bronx Public Defenders and other public defenders. The cost of this kind of discretion is that people are charged with violent crimes even though they have no private -- no prior record just because they are trying to exercise their constitutional right to self-defense.

And if you want to know how this impacts policing, one of the ways essentially making everybody in New York City a presumptive person who is unlawfully carrying is that leads to stopping and frisking everybody.

The framers, I think, had a different vision of the Fourth Amendment and the Second Amendment, and that is that individuals get to make their decision about whether or not they want to carry a firearm outside the home for self-defense.

In 43 states, people are able to do

that. It has not -- it doesn't mean everybody ends up carrying, and it doesn't mean that those 43 states have any more problems with violent crimes or anything else than the six or seven jurisdictions that don't honor the text, the history of the Second Amendment, and Heller.

Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:58 a.m., the case was submitted.)

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2021 WL 5043558
Supreme Court of the United States.

ROMAN CATHOLIC DIOCESE OF ALBANY, et al., Petitioners,
v.
Shirin EMAMI, Acting Superintendent, New York Department of Financial Services, et al.

No. 20-1501.
|
November 1, 2021.

Case below, 185 A.D.3d 11, 127 N.Y.S.3d 171.

Opinion

***1** On petition for writ of certiorari to the Appellate Division, Supreme Court of New York, Third Judicial Department. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Appellate Division, Supreme Court of New York, Third Judicial Department for further consideration in light of *Fulton v. Philadelphia*, 593 U.S. ——, 141 S.Ct. 1868, 210 L.Ed.2d 137 (2021).

Justice Thomas, Justice Alito, and Justice Gorsuch would grant the petition for a writ of certiorari.

All Citations

--- S.Ct. ----, 2021 WL 5043558 (Mem), 21 Cal. Daily Op. Serv. 10,807

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185 A.D.3d 11, 127 N.Y.S.3d 171, 2020 N.Y. Slip Op. 03707

**1 Roman Catholic Diocese of Albany et al., Appellants,
v
Maria T. Vullo, as Superintendent of Financial Services, et al.,
Respondents, et al., Defendants. (And Another Related Action.)

Supreme Court, Appellate Division, Third Department, New York
529350
July 2, 2020

CITE TITLE AS: Roman Catholic Diocese of Albany v Vullo

SUMMARY

Appeal from an order of the Supreme Court, Albany County (Richard J. McNally, Jr., J.), entered January 10, 2019. The order, among other things, granted a motion by defendants Superintendent of Financial Services and Department of Financial Services for summary judgment dismissing the complaints against them.

Roman Catholic Diocese of Albany v Vullo, 2018 NY Slip Op 33829(U), affirmed.

HEADNOTES

Courts
Stare Decisis
Same Constitutional Claims Already Addressed and Rejected by Court of Appeals—Challenge to Insurance Regulation Requiring Coverage for Medically Necessary Abortions

(1) In actions challenging a regulation promulgated by defendant Superintendent of Financial Services requiring health insurance companies to provide coverage for "medically necessary abortions," with an exemption for insurance policies offered by "[r]eligious employers" (11 NYCRR 52.1 [p] [1]; 52.2 [y]), Supreme Court properly dismissed plaintiffs' constitutional claims

on the basis of stare decisis since the same claims were addressed and rejected in *Catholic Charities of Diocese of Albany v Serio* (7 NY3d 510 [2006]). In the prior case, the Court of Appeals rejected each of the plaintiffs' constitutional challenges to the Women's Health and Wellness Act (WHWA) (L 2002, ch 554), which requires health insurance policies that provide coverage for prescription drugs to include coverage for prescription contraceptives and also provides an exemption from coverage for "religious employers" (Insurance Law § 3221 [*l*] [16] [former (A), now (E)]) containing the identical criteria as the exemption applicable here. The overriding reason for such rejection—equally applicable to the instant case—was that the WHWA set forth a neutral directive with respect to prescription medications to be uniformly applied without regard to religious belief or practice, except for those who qualified for a narrowly tailored religious exemption. The same analysis applied to the regulation here—a neutral regulation that treats, in terms of insurance coverage, medically necessary abortions the same as any other medically necessary procedure. The factual differences in the cases were immaterial to the relevant legal analyses that were identical in both cases. Moreover, the fact that a regulation was at issue as opposed to a legislatively-enacted statute was of no moment, since a properly promulgated regulation is entitled to the same deference as a legislative act.

***12** Administrative Law
Validity of Regulation
Separation of Powers—Challenge to Insurance Regulation Requiring Coverage for Medically Necessary Abortions

(2) In promulgating a regulation requiring health insurance companies to provide coverage for "medically necessary abortions" (11 NYCRR 52.1 [p] [1]), defendant Superintendent of Financial Services did not exceed the agency's regulatory authority (*see Boreali v Axelrod*, 71 NY2d 1 [1987]). Insurance Law § 3217 (b) (1) sets forth a directive that regulations promulgated pursuant to the statute ensure "reasonable standardization and simplification of [health insurance] coverages," which undergirds a long-standing 1972 regulation that prohibits a health insurance policy from limiting or excluding coverage based on the "type of illness, accident, treatment or medical condition," except in several enumerated cases not applicable here (11 NYCRR 52.16 [c]). From that non-exclusion directive, and the regulations issued in accordance with the Model Language provisions of the Affordable Care Act pertaining to surgical procedures (*see* 11 NYCRR 52.6, 52.7), it follows that any medically necessary surgery include "medically necessary" abortion procedures, as set forth in section 52.1 (p) (1). Thus, the regulation made explicit what was implicitly mandated in section 3217 and the 1972 regulation—that insurance coverage of specific treatments and procedures must tend toward being inclusive rather than exclusive when medical necessity is present. Several futile legislative efforts undertaken to either include or exclude coverage for medically necessary abortions did not support a finding of a separation of

powers violation. The proposed bills never cleared their respective committees, and none of the bills mentioned by plaintiffs was introduced after the regulation was promulgated. Finally, the regulation was well within the expertise and competence of defendant, who is charged by statute with the responsibility for standardizing health insurance coverages (Insurance Law § 3217 [b] [1], [4]).

RESEARCH REFERENCES

Am Jur 2d Constitutional Law § 255; Am Jur 2d Courts §§ 125, 129, 130, 138; Am Jur 2d Insurance §§ 20, 21, 27, 32.

Carmody-Wait 2d Courts and Their Jurisdiction §§ 2:312, 2:318, 2:331.

McKinney's, Insurance Law § 3217.

11 NYCRR 52.1 (p) (1); 52.2 (y).

NY Jur 2d Constitutional Law § 169; NY Jur 2d Courts and Judges §§ 205, 208, 210, 218; NY Jur 2d Insurance § 678.

ANNOTATION REFERENCE

See ALR Index under Health and Accident Insurance; Precedents; Rules and Regulations; Separation of Powers.

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***13** Query: “stare decisis” /p constitutional /s addressed

APPEARANCES OF COUNSEL

Tobin and Dempf, LLP, Albany (*Michael L. Costello* of counsel), for appellants.
Letitia James, *Attorney General*, Albany (*Laura Etlinger* of counsel), for respondents.
Edward T. Mechmann, New York City, for New York State Catholic Conference, amicus curiae.

OPINION OF THE COURT

Colangelo, J.

Appeal from an order of the Supreme Court (McNally Jr., J.), entered January 10, 2019 in Albany County, which, among other things, granted a motion by defendants Superintendent of Financial Services and Department of Financial Services for summary judgment dismissing the complaints against them.

Plaintiffs—several religious organizations, a single individual and a construction company—collectively challenge a regulation of defendant Superintendent of Financial Services requiring that health insurance policies in New York provide coverage for medically necessary abortion services. The regulation specifically exempts "religious employers," a term defined in the regulation, from the coverage requirement (*see* 11 NYCRR 52.1 [p] [1]; 52.2 [y]). Plaintiffs challenge the regulation under the free exercise of religion, free speech, expression and association, and equal protection provisions of the US and NY Constitutions, certain statutory provisions and the separation of powers doctrine.

The Superintendent is empowered to promulgate regulations establishing "minimum standards" for, among other things, the "content and sale of accident and health insurance policies" offered in this state (Insurance Law § 3217 [a]). The Superintendent is authorized to, among other things, "prescribe" and "amend, in writing, rules and regulations and issue orders and guidance involving financial products and services, not inconsistent with," among other statutes, "the [I]nsurance [L]aw" (Financial Services Law § 302 [a]).[1] In 2013, in response to regulations implementing the Federal Affordable Care Act (*see* ***14** The Patient Protection and Affordable Care Act, Pub L 111-148, 124 US Stat 119 [111th Cong, 2d Sess, Mar. 23, 2010]) that required each state to identify a "base-benchmark" plan to guide required coverage of essential health benefits (45 CFR 156.100 [a], [b]; *see* 156.110 [a]), defendant Department of Financial Services (hereinafter DFS) developed a standard health insurance policy template, referred to as the "Model Language" (*see* Department of Financial Services, Accident and Health Product Filings, https://www.dfs.ny.gov/apps_and_licensing/health_insurers/model_language). An insurance policy issued in accordance with the Model Language covered medically necessary abortions (*see* Department of Financial Services, Accident and Health Product Filings, Outpatient and Professional Services at 6-7, https://www.dfs.ny.gov/system/files/documents/2020/04/outpatient-and-professional-services.doc [last updated Apr. 13, 2020], cached at http://www.nycourts.gov/reporter/webdocs/outpatient-and-professional-services.pdf).

In April 2016, plaintiffs commenced the first of two actions against the Superintendent and DFS (hereinafter collectively referred to as defendants), as well as several of their health insurance companies,[2] seeking to invalidate certain provisions of the Model Language pertaining to medically necessary abortions. In this action for declaratory and injunctive relief, plaintiffs asserted that, based upon their religious beliefs, they hold "moral, ethical, conscience and religious" opposition to "the inclusion of coverage and funding of all abortions." Defendants moved to dismiss the complaint for failure to state a cause of action. Plaintiffs opposed, submitted an

amended complaint[3] and cross-moved for injunctive relief (*see* CPLR 6311). In 2017, while the motions were pending, the Superintendent amended 11 NYCRR part 52 to make explicit that health insurance companies must provide coverage for "medically necessary abortions," with an exemption for insurance policies offered by "[r]eligious employers" (11 NYCRR 52.1 [p]; *see* 52.2 [y]).[4] Thereafter, plaintiffs commenced a second action, challenging the 2017 regulation. The complaint in the second action mirrored the amended complaint in the first action, ***15** except that it contained the additional claim that the regulation violated the separation of powers doctrine and rule-making provisions of the NY Constitution and did not assert the claim pursuant to the Religious Freedom Restoration Act. Supreme Court joined the two actions.[5]

After the two actions were joined, defendants moved to dismiss the complaints and plaintiffs cross-moved for an order granting summary judgment and a preliminary injunction. Supreme Court granted defendants' motion dismissing the complaints, finding that plaintiffs failed to meaningfully distinguish their federal and state religious, speech and association claims from those presented and rejected by the Court of Appeals in *Catholic Charities of Diocese of Albany v Serio* (7 NY3d 510 [2006], *cert denied* 552 US 816 [2007]) and, therefore, the principle of stare decisis "require[ed] dismissal of plaintiffs ['] constitutional claims" (2018 NY Slip Op 33829, *8 [Sup Ct, Albany County 2018]). The court further concluded that the amended regulation did not violate the separation of powers doctrine and that it was not "an improper delegation of legislative authority to [DFS]" (*id.*). Plaintiffs appeal.

We affirm. As an initial matter, plaintiffs contend that *Catholic Charities of Diocese of Albany* should not apply here because the nature of the conduct governed by the regulation at issue —medically necessary abortion procedures—is more morally and religiously offensive to them than the conduct upheld by the Court of Appeals in *Catholic Charities of Diocese of Albany*. In defense of the regulation at issue, defendants argue that the constitutional issues raised by plaintiffs were squarely addressed and rejected by the Court in *Catholic Charities of Diocese of Albany*, and that such decision is controlling and binding precedent that preempts de novo review by this Court. In essence, plaintiffs' position boils down to the argument that, based upon their religious beliefs, there is a fundamental difference between prescribing contraceptives and performing an abortion procedure. The crux of defendants' argument is that there is no substantive difference between an abortion and any other medically necessary procedure. Neither argument proves particularly satisfying: plaintiffs' position because when viewed through the dispassionate prism of judicial analysis, it amounts ***16** to a distinction without a legal difference, in addition to the fact that it would require this Court to enter the thicket of making a religious value judgment; and defendants' position because it ignores the twin realities that the contrary view is held with deep religious fervency and that this particular "medically necessary" procedure has been among the most divisive issues in our politics for several decades, despite the effort of the Supreme Court

of the United States to put it to rest over 47 years ago (*see* *Roe v Wade*, 410 US 113 [1973]). The ultimate resolution of this issue may well lie in another arena, outside of our judicial purview.

Our recourse as judges, when confronted with this or any issue of such constitutional dimension, controversial or otherwise, is more straightforward—to apply neutral principles to the issue at hand and, through the rigors of judicial reasoning, arrive at a resolution of the specific controversy before us. Chief among such neutral principles, particularly for an intermediate appellate court, is stare decisis. That doctrine, when applied to the precise issues presented by this appeal, proves decisive here in determining the constitutional claims advanced by plaintiffs that were addressed and rejected by the Court of Appeals in *Catholic Charities of Diocese of Albany*.

(1) At issue in *Catholic Charities of Diocese of Albany* was the validity of a provision of the Women's Health and Wellness Act (*see* L 2002, ch 554 [hereinafter WHWA]) that requires health insurance policies that provide coverage for prescription drugs to include coverage for prescription contraceptives (*see* *Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 518). The WHWA also provided an exemption from coverage for "religious employers" (Insurance Law § 3221 [*l*] [16] [former (A), now (E)]), which exemption contains the identical criteria as the exemption applicable here (*see* 11 NYCRR 52.2 [y]). In that action, the Court of Appeals rejected each of the plaintiffs' federal and state constitutional challenges to the statute. As the constitutional arguments raised by plaintiffs here are the same as those raised and rejected in *Catholic Charities of Diocese of Albany*, Supreme Court properly concluded that they must meet the same fate by operation of the doctrine of stare decisis. "Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem" (*Matter of* ***17** *State Farm Mut. Auto. Ins. Co. v Fitzgerald*, 25 NY3d 799, 819 [2015] [internal quotation marks and citations omitted]).

The overriding reason for such rejection—equally applicable in the instant case—was that the WHWA set forth a neutral directive with respect to prescription medications to be uniformly applied without regard to religious belief or practice, except for those who qualified for a narrowly tailored religious exemption (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 522-526). The same analysis applies to the regulation at issue here—a neutral regulation that treats, in terms of insurance coverage, medically necessary abortions the same as any other medically necessary procedure (*see* 11 NYCRR 52.1 [p] [1]). The factual differences in these cases are immaterial to the relevant legal analyses that are identical in both cases. In addition, the fact that a regulation is at issue here as opposed to a statute enacted by the Legislature in *Catholic Charities of Diocese of Albany* is of no moment, as it is well settled that a properly promulgated regulation is entitled to the same deference as a legislative act (*see* *Raffellini v State Farm Mut. Auto. Ins. Co.*, 9 NY3d 196, 201 [2007]). No compelling reason has been presented to this Court to depart from that

holding. [6] Accordingly, Supreme Court properly dismissed plaintiffs' constitutional claims, which were addressed in *Catholic Charities of Diocese of Albany*, on the basis of stare decisis. [7]

Plaintiffs' challenge to the instant regulation on the ground that, in promulgating it, the Superintendent exceeded regulatory authority, was also properly rejected by Supreme Court. Plaintiffs argue that the regulation at issue, which they characterize as an "abortion mandate," violates the separation of powers and rule-making provisions of ***18** NY Constitution, article III, § 1 and NY Constitution, article IV, § 8. As the Court of Appeals has recognized, "[s]eparation of powers challenges often involve the question of whether a regulatory body has exceeded the scope of its delegated powers and encroached upon the legislative domain of policymaking" (*Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 608 [2018]). "The constitutional principle of separation of powers requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Matter of Dry Harbor Nursing Home v Zucker*, 175 AD3d 770, 772-773 [2019] [internal quotation marks, brackets and citations omitted]). "As a creature of the Legislature, an agency is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication" (*Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 221 [2017] [internal quotation marks and citation omitted]; *see Matter of New York State Bd. of Regents v State Univ. of N.Y.*, 178 AD3d 11, 19 [2019]). To this end, "an agency can adopt regulations that go beyond the text of its enabling legislation, provided they are not inconsistent with the statutory language or its underlying purposes" (*Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d at 609 [internal quotation marks, brackets and citation omitted]). Thus, it is undisputed that the Legislature may delegate authority to an administrative body to, by regulation, determine the best methods for pursuing objectives articulated and outlined by legislation. However, "[i]f an agency promulgates a rule beyond the power it was granted by the [L]egislature, it usurps the legislative role and violates the doctrine of separation of powers" (*Matter of LeadingAge N.Y., Inc. v Shah*, 32 NY3d 249, 260 [2018]).

There is no rigid test to determine whether, in a particular case, an administrative agency has exceeded its authority. Because the boundary between proper administrative rulemaking and legislative policymaking is difficult to define, the Court of Appeals developed a set of factors or, in the words of that Court, "coalescing circumstances," to be used as a guide to determine whether the legislative branch of government has ceded its fundamental policy-making responsibility to an administrative agency (*Boreali v Axelrod*, 71 NY2d 1, 11 [1987]; *see Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d at 609-610; *Matter of Reardon v Global Cash Card, Inc.*, 179 AD3d 1228, 1230-1231 [2020]; ***19** *Matter of LeadingAge N.Y., Inc. v Shah*, 153 AD3d 10, 16-18 [2017], *affd* 32 NY3d 249 [2018]). The *Boreali* factors include (1) whether the agency merely "balance[d] costs and benefits according to preexisting guidelines [or] instead made value judgements entailing difficult and complex choices between broad policy goals to resolve

social problems," (2) whether the agency "wrote on a clean slate, creating its own comprehensive set of rules without [the] benefit of legislative guidance," (3) "whether the [L]egislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve" and (4) "whether the agency used [any] special expertise or [technical] competence" in the development of the challenged regulation (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 610-612 [2015] [internal quotation marks, brackets and citations omitted]).

(2) We agree with Supreme Court that an analysis of the *Boreali* factors weighs in favor of rejecting plaintiffs' challenge that the Superintendent exceeded regulatory authority in promulgating the regulation at issue here. The first *Boreali* factor is met by virtue of the fact that the instant regulation is based upon long-standing legislative and regulatory efforts to standardize and simplify health insurance coverages. The directive set forth in Insurance Law § 3217 (b) (1) that regulations promulgated pursuant to the statute ensure "reasonable standardization and simplification of [health insurance] coverages" undergirds a long-standing 1972 regulation that prohibits a health insurance policy from limiting or excluding coverage based on the "type of illness, accident, treatment or medical condition," except in several enumerated cases not applicable here (11 NYCRR 52.16 [c]). It necessarily follows from this non-exclusion directive—as well as the regulations issued in accordance with the Model Language provisions of the Affordable Care Act pertaining to surgical procedures (*see* 11 NYCRR 52.6, 52.7)—that any medically necessary surgery include "medically necessary" abortion procedures, as set forth in the regulation at issue here (*see* 11 NYCRR 52.1 [p] [1]). With regard to the second *Boreali* factor, rather than writing on a "clean slate" to create their "own set of rules without the benefit of legislative authority," defendants, by the instant regulation, made explicit what was implicitly mandated in Insurance Law § 3217 and the 1972 regulation—that insurance coverage of specific treatments and procedures must tend toward being ***20** inclusive rather than exclusive when medical necessity is present (*see* 11 NYCRR 52.6, 52.7, 52.16; *see also* Insurance Law §§ 4900 [a]; 4904).

With respect to the third *Boreali* "circumstance" relating to putative legislative efforts in an area embraced by the regulation, the mere fact that several futile legislative efforts were undertaken to either include or exclude coverage for medically necessary abortions does not support a finding of a separation of powers violation. Aside from the fact that the Legislature may decline to act for any number of reasons—including a judgment that further legislation is unnecessary in light of the current regulatory framework—here, the proposed bills never cleared their respective committees, a situation hardly indicative of the "vigorous debate" referred to in the third *Boreali* factor (*National Rest. Assn. v New York City Dept. of Health & Mental Hygiene*, 148 AD3d 169, 178 [2017]; *see Matter of LeadingAge N.Y., Inc. v Shah*, 32 NY3d at 265-266). Moreover, none of the bills mentioned by plaintiffs was introduced after the 2017 regulation at issue was promulgated (*see Rent Stabilization Assn. of N.Y. City v Higgins*, 83 NY2d 156, 170 [1993], *cert denied* 512 US 1213 [1994]). The presence of multiple unsuccessful bills on a subject within an agency's

authority may well reflect a consensus that the law "already delegates to [the agency] the authority" to act on the matter (*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, 184 [2016]; *see Matter of National Rest. Assn. v Commissioner of Labor*, 141 AD3d 185, 192 [2016]).

Finally regarding the fourth *Boreali* factor, we find that making the judgment to include medically necessary abortion procedures under the insurance coverage umbrella by promulgating the instant regulation was well within the expertise and competence of the Superintendent. Indeed, the Superintendent is charged by statute with the responsibility for standardizing health insurance coverages (*see* Insurance Law § 3217 [b] [1], [4]).

Thus, the "coalescing circumstances" set forth in *Boreali* weigh, on balance, in favor of sustaining the instant regulation. In short, the instant regulation makes explicit what is, at the very least, implicit in more general regulations unquestionably based upon statutory authority—that "medically necessary" procedures should be covered without regard to the underlying reason for them. The regulation at issue simply ***21** makes clear that one type of medically necessary procedure is within that broad legislative and regulatory ambit (*see* Financial Services Law §§ 202 [c]; 302 [a]; Insurance Law § 3217 [a]). We therefore agree with Supreme Court's finding that the Superintendent had the authority to promulgate the regulation at issue. As the court correctly found, the "promulgation of 11 NYCRR 52.1 (p) is derived from the above statutory mandates and thus is not an improper delegation of legislative authority to DFS." To the extent that we have not expressly discussed any of plaintiffs' remaining contentions, they have been considered and found to be without merit.

Garry, P.J., Clark, Aarons and Pritzker, JJ., concur.

Ordered that the order is affirmed, without costs.

Footnotes

1 Insurance Law § 3221 sets forth the standard provisions that must be included in health insurance policies providing major medical or comprehensive-type coverage to be delivered or issued in New York.

2 The insurance companies did not appear in the action.

3 The amended complaint asserted a claim under the Religious Freedom Restoration Act of 1993 (*see* 42 USC § 2000bb *et seq*.).

4 Plaintiffs do not contend on appeal that they qualify as "religious employers" for purposes of the exemption.

5 Although Supreme Court maintained that these actions were consolidated, the court continued to use both captions and index numbers in the order on appeal (*see e.g. Matter of Consolidated Edison Co. of N.Y., Inc. v New York State Bd. of Real Prop. Servs.*, 176 AD3d 1433, 1436-1437 [2019]).

6 The challenged regulation does not violate plaintiffs' state statutory rights under the Human Rights Law or the Religious Corporation Law. Although the Court of Appeals in *Catholic Charities of Diocese of Albany* did not address these claims, this Court did in that case and rejected them, and its reasoning controls here (*Catholic Charities of Diocese of Albany v Serio*, 28 AD3d 115, 136-137 [2006], *affd* 7 NY3d 510 [2006], *cert denied* 552 US 816 [2007]).

7 Although the plaintiffs in *Catholic Charities of Diocese of Albany* did not assert an equal protection claim, the analysis and rulings of the Court of Appeals require rejection of that claim raised by plaintiffs here. The distinction between qualifying "religious employers" and other religious entities for purposes of the exemption is not a denominal classification (*see* 7 NY3d at 528-529), and the Court of Appeals expressly so stated. The distinction turns on the basis of a religious organization's activities and has a rational basis (*see id.* at 529).

Roman Catholic Diocese of Albany v. Emami

Share

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Appellate Division, Supreme Court of New York, Third Judicial Department for further consideration in light of Fulton v. Philadelphia, on Nov. 1, 2021.

Docket No.	Op. Below	Argument	Opinion	Vote	Author	Term
20-1501	**N.Y. App. Div.**	N/A	N/A	N/A	N/A	**OT 2021**

Issues: (1) Whether New York's regulation mandating that employer health insurance plans cover abortions, which
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ndment; and (3) whether — if, under the rule announced in *Smith*, the free exercise clause of the First Amendment allows states to demand that religious entities opposing abortions subsidize them — *Smith* should be overruled.

SCOTUSblog Coverage

- **Court declines to hear cases on religious rights, surveillance rulings** (Amy Howe, November 1, 2021)
- **No new relists, but you should read anyway** (John Elwood, October 27, 2021)
- **Foreign intelligence surveillance and immigration** (John Elwood, October 14, 2021)
- **Free exercise, greenhouse-gas regulation, and a slew of other relists from the long conference** (John Elwood, October 5, 2021)
- **Court issues orders from "long conference," but relists some high-profile cases** (Amy Howe, October 4, 2021)
- **More warrantless searches, more abortion and more Second Amendment** (Andrew Hamm, May 21, 2021)

Date	Proceedings and Orders (**key to color coding**)
Apr 23 2021	**Petition for a writ of certiorari filed. (Response due May 27, 2021)**
May 07 2021	**Motion to extend the time to file a response from May 27, 2021 to June 28, 2021, submitted to The Clerk.**
May 10 2021	Motion to extend the time to file a response is granted and the time is extended to and including June 28, 2021.
May 25 2021	**Brief amici curiae of Jewish Coalition For Religious Liberty filed.**
May 25 2021	**Brief amicus curiae of Wisconsin Institute for Law & Liberty, Inc. filed.**
May 26	**Brief amici curiae of The Church of Jesus**

2021	**Christ of Latter-day Saints, et al. filed.**
May 27 2021	**Brief amici curiae of Eight Legal Scholars filed.**
May 27 2021	**Brief amici curiae of States of Texas, Alabama, et al. filed.**
May 27 2021	**Brief amici curiae of The Bruderhof, et al. filed.**
Jun 14 2021	**Motion to extend the time to file a response from June 28, 2021 to August 23, 2021, submitted to The Clerk.**
Jun 15 2021	Motion to extend the time to file a response is granted and the time is further extended to and including August 23, 2021.
Aug 23 2021	**Brief of respondent Linda A. Lacewell; NY State Department of Financial Services in opposition filed.**
Sep 03 2021	**Reply of petitioners Roman Catholic Diocese of Albany, et al. filed. (Distributed)**
Sep 03 2021	**Letter pursuant to Rule 35.3 of Roman Catholic Diocese of Albany, et al. submitted.**
Sep 08 2021	DISTRIBUTED for Conference of 9/27/2021.
Oct 04 2021	DISTRIBUTED for Conference of 10/8/2021.
Oct 12 2021	DISTRIBUTED for Conference of 10/15/2021.
Oct 25 2021	DISTRIBUTED for Conference of 10/29/2021.

2021	
Nov 01 2021	Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of Fulton v. Philadelphia, 593 U. S. ___ (2021). Justice Thomas, Justice Alito, and Justice Gorsuch would grant the petition for a writ of certiorari.
Dec 03 2021	MANDATE ISSUED.
Dec 03 2021	JUDGMENT ISSUED.

Today at SCOTUS: At 10 a.m. EST, the court will release one or

No. 20-____

IN THE

Supreme Court of the United States

ROMAN CATHOLIC DIOCESE OF ALBANY, ET AL.,
Petitioners,

v.

LINDA A. LACEWELL, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New York, Appellate Division, Third Department

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2017, New York promulgated a regulation mandating that employer health insurance plans cover abortions. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16(o). The regulation provides an exemption for certain religious organizations: tax-exempt entities that have the "purpose" of "inculcat[ing] … religious values" and primarily "employ[]" and "serve[]" those of the same religious persuasion. *Id.* § 52.2(y). But religious organizations that have a broader purpose, such as serving the poor, or that employ or serve members of other faiths or no faith, must cover abortions in their health plans. The questions presented are:

1. Is New York's mandate, which burdens a subset of religious organizations by forcing them to cover abortions, "neutral" and "generally applicable" under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)?

2. Does New York's mandate interfere with the autonomy of religious entities, in violation of the Religion Clauses of the First Amendment?

3. If, under the rule announced in *Smith*, the Free Exercise Clause of the First Amendment allows states to demand that religious entities opposing abortions subsidize them, should *Smith* be overruled?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners, who were plaintiffs in the state court proceedings, are the Roman Catholic Diocese of Albany; the Roman Catholic Diocese of Ogdensburg; Trustees of The Diocese Of Albany; Sisterhood of St. Mary; Catholic Charities, Diocese of Brooklyn; Catholic Charities of the Diocese Of Albany; Catholic Charities of The Diocese of Ogdensburg; St. Gregory The Great Catholic Church Society Of Amherst, N.Y.; First Bible Baptist Church; Our Savior's Lutheran Church, Albany, N.Y.; Teresian House Nursing Home Company, Inc.; Teresian House Housing Corporation; Depaul Housing Management Corporation; and Renee Morgiewicz.

No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of the Petitioners, and none of the Petitioners is a subsidiary or an affiliate of any publicly owned corporation.

Respondents, who were defendants in the state court proceedings, are Linda A. Lacewell, Superintendent, New York State Department of Financial Services,* and the New York State Department of Financial Services. One other plaintiff in the state court proceedings, Murnane Building Contractors, Inc., is not a Petitioner here, and thus is a Respondent under Rule 12.6.

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* During the state court proceedings, the superintendent of the New York State Department of Financial Services was Maria T. Vullo.

LIST OF RELATED PROCEEDINGS

Roman Catholic Diocese of Albany, et al. v. Maria T. Vullo, &c. et al., New York Court of Appeals, Mo. No. 2020-549 (Nov. 24, 2020).

Roman Catholic Diocese of Albany et al. v. Maria T. Vullo, as Superintendent of Financial Services, et al., Supreme Court of New York, Appellate Division, 3rd Department, Case No. 529350 (July 2, 2020).

The Roman Catholic Diocese of Albany, N.Y. et al. v. Maria T. Vullo, Superintendent, New York State Department of Financial Services, et al., Supreme Court of New York, Index Nos. 2070-16, 7536-17 (Jan. 10, 2019).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

In a 2017 regulation, the New York State Department of Financial Services mandated that employers fund abortions through their employee health insurance plans. This regulatory command exempts religious entities whose "purpose" is to inculcate religious values and who "employ" and "serve" primarily coreligionists. But religious organizations must cover abortions if they have a broader religious mission (such as service to the poor) or if they employ or serve people regardless of their faith.

Needless to say, this regulation imposes enormous burdens on the countless religious entities opposed to abortion as a matter of longstanding and deep-seated religious conviction. To take one example, the Catholic Church's opposition to abortion is well known. Yet under New York's regulation, Catholic Charities, which serves the poor, must cover abortions. Catholic-affiliated religious orders, like the Carmelite Sisters who operate the Teresian Nursing Home, dedicated to the elderly and infirm, must do likewise. The same is true of the Episcopalian, Lutheran, and Baptist groups who are also parties to this challenge.

Because New York's regulation forces these organizations to violate their religious beliefs, they filed suit in New York state court seeking to enjoin this abortion mandate as a violation of the Religion Clauses of the First Amendment. They argued that the mandate runs afoul of the Free Exercise Clause because it imposes severe burdens on their religious

exercise, and that it runs afoul of both Religion Clauses because it interferes with religious autonomy.

New York's Appellate Division, Third Department, nevertheless upheld the regulation. In that court's view, the mandate is a "neutral and generally applicable" law under this Court's decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Thus, it declined to subject the mandate to strict scrutiny and rejected Petitioners' challenge.

But that decision was erroneous, and it exacerbates *two* splits of authority on how to determine whether a law is "neutral and generally applicable." *First*, some courts, including the appellate division here, the Third Circuit, Ninth Circuit, and California Supreme Court, hold that a law is "neutral and generally applicable," regardless of how many exemptions it includes, unless it specifically targets religious conduct. Other courts, including the Second, Sixth, Tenth, and Eleventh Circuits, use a different approach: a law is "neutral and generally applicable" only if it pursues its interests across the board, without material exemptions. *Second*, most courts recognize that a government cannot pick and choose which religious entities will be burdened by its laws—but New York and California courts allow religious exemptions limited to preferred religious entities, provided that the law is not, in their view, intended to discriminate against religion.

The appellate division is on the wrong side of both of these splits, which are of enormous significance not

just to Petitioners and many other religious entities across the country, but to the very fabric of this Court's First Amendment jurisprudence. The provision of exemptions for some preferred organizations *but not others* necessarily undermines a law's "general applicability," because it means a government "decide[d] that the … interests it seeks to advance are worthy of being pursued only against" certain "religious[ly] motivat[ed] … conduct." *Lukumi*, 508 U.S. at 542–43. Indeed, this Court's recent decision in *Tandon v. Newsom*, No. 20A151, 2021 WL 1328507 (U.S. Apr. 9, 2021), reinforces that a regulation is not generally applicable if it has "*any*" exemption that undermines "the asserted government interest that justifies the regulation." *Id.* at *1. That the abortion mandate undermines New York's interest in ensuring comprehensive coverage by exempting some religious organizations but not others should thus be more than sufficient to trigger strict scrutiny.

The appellate division's second error was just as clear. Exempting only certain religious organizations while imposing burdens on others necessarily triggers strict scrutiny. "[N]o State can 'pass laws' … that 'prefer one religion over another.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982). Imposing burdens on some religious entities while exempting others flouts the "constitutional prohibition of denominational preferences." *Id.* at 245.

For these reasons alone, this Court's plenary review of New York's regulation is essential, but this case raises additional issues that warrant this Court's review. New York's mandate is also invalid because it impermissibly "interfere[s]" with internal religious governance and doctrine, which "obviously violate[s]"

the Religion Clauses. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Indeed, "any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Id.* Yet that is exactly what New York has done, by exerting pressure on religious groups to employ only coreligionists, serve only coreligionists, and limit their "purpose" to inculcating religious values.

Finally, if there is a question as to whether the Free Exercise Clause protects religious entities against this mandate under *Smith*, the Court should revisit that decision. Indeed, this Court has already decided that the continuing vitality of *Smith* is a question worth answering. *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020). But if the Court does not reach that question in *Fulton*, it should consider it here. It cannot be that the Constitution allows New York to require religious groups to participate in a practice so fundamentally in conflict with their religious beliefs.

OPINIONS BELOW

The order of the New York Court of Appeals, denying leave to appeal, is reported at 36 N.Y.3d 927, 160 N.E.3d 321, and reproduced in the appendix at Pet.App.29a. The decision of the Supreme Court of New York, Appellate Division, Third Judicial Department, is reported at 185 A.D.3d 11, 127 N.Y.S.3d 171, and reproduced in the appendix at Pet.App.1a. The decision of the Supreme Court of New York is unpublished, reported at 2018 WL 11149776, and reproduced in the appendix at Pet.App.15a.

JURISDICTION

The New York Court of Appeals denied Petitioners' motion for leave to appeal on November 24, 2020, Pet.App.29a, thus leaving in place the decision of the Supreme Court of New York, Appellate Division, Third Judicial Department, Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The New York regulatory provisions at issue, N.Y. Comp. Codes R. & Regs. tit. 11, §§ 52.2(y), 52.16(o), are included in the Appendix at Pet.App.159a.

STATEMENT

A. Statutory and Regulatory Background

New York regulates the content of employer health insurance plans both by statute and through regulations promulgated by Respondent, the Superintendent of the New York State Department of Financial Services. *See* N.Y. Ins. Law § 3217 ("The superintendent shall issue such regulations he deems necessary or desirable to establish minimum standards … for the form, content and sale of accident and health insurance policies."). New York statutory law includes various substantive requirements of group insurance plans and insurance providers. *See, e.g.*, *id.* § 3221; *id.* § 4303.

At the same time, the Superintendent also regulates the content of group health insurance plans. As a general matter, the Superintendent's regulations require that "[n]o policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition," save with respect to a number of specified "except[ions]." N.Y. Comp. Codes R. & Regs. tit. 11,

§ 52.16(c). Care for many foot, vision, and dental conditions, for example, can be excluded from coverage. *Id.* § 52.16(c)(6), (9), (10). Other regulatory exceptions are more complicated, allowing a variety of maladies to be excluded to varying degrees, such as "mental [and] emotional disorders." *Id.* § 52.16(c)(2).

B. Promulgation of the Abortion Mandate

Against this background, in early 2017, the Superintendent proposed a rule that would require group health insurance plans to cover "medically necessary abortions." Pet.App.68a. In the Superintendent's view, "Insurance Law section 3217 and regulations promulgated thereunder" prohibited "health insurance policies from limiting or excluding coverage based on type of illness, accident, treatment or medical condition," and "[n]one of the exceptions apply to medically necessary abortions." *Id.* The new regulation would "make[] explicit that group and blanket insurance policies that provide hospital, surgical, or medical expense coverage … shall not exclude coverage for medically necessary abortions." Pet.App.69a.

Accordingly, the Superintendent proposed a new regulatory subsection, § 52.16(o), which would provide that "[n]o policy delivered or issued for delivery in this State that provides hospital, surgical, or medical expense coverage shall limit or exclude coverage for abortions that are medically necessary." Pet.App.71a.

The proposed regulation and the eventual published version do not define "medically necessary abortions." But in "model language" for health insurance contracts, the Superintendent stated that "medically necessary abortions" include at least

"abortions in cases of rape, incest or fetal malformation." Pet.App.19a. And in responses to comments on the proposed rule, the Superintendent explained that "[m]edical necessity determinations are regularly made in the normal course of insurance business by a patient's health care provider in consultation with the patient." Pet.App.148a. The mandate thus appears to cover abortions of babies afflicted with Down Syndrome and other maladies.

Apparently recognizing the severe burden this regulation would impose on religious employers, the Superintendent proposed to include a religious exemption. "[R]eligious employer[s] or qualified religious organization employer[s] may exclude coverage for medically necessary abortions" if they followed certain procedures. Pet.App.71a. And "[q]ualified religious organization[s]" would include any organization that "opposes medically necessary abortions on account of a firmly-held religious belief" and was either (i) a nonprofit that "holds itself out as a religious organization" or (ii) a closely held for-profit that "adopted a resolution … establishing that it objects to covering medically necessary abortions on account of the owners' sincerely held religious beliefs." Pet.App.69a–70a. That definition largely tracked the scope of federal religious liberty exemptions created after this Court's rulings in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *see also* Pet.App.77a (Superintendent "decided to use the current definition because it is more analogous to the definition in federal regulations").

Later that year, the Superintendent published the new regulation ("Abortion Mandate"). Pet.App.140a.

Between the time of proposal and the time of promulgation, however, the religious exemption was eviscerated. The Superintendent otherwise promulgated the rule as proposed but removed the exemption for qualified religious organizations. Pet.App.140a. Instead, the religious exemption applies only to "[r]eligious employer[s]," defined as "an entity for which each of the following is true":

> (1) The inculcation of religious values is the purpose of the entity.
>
> (2) The entity primarily employs persons who share the religious tenets of the entity.
>
> (3) The entity serves primarily persons who share the religious tenets of the entity.
>
> (4) The entity is a [tax-exempt] nonprofit organization … .

Pet.App.141a; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). This is the same exemption that was the (quickly abandoned) template for the original religious exemption challenged in the federal contraception mandate litigation. *Compare* 76 Fed. Reg. 46,621 (Aug. 3, 2011) (original exemption) *with* 78 Fed. Reg. 39,870 (July 2, 2013) (later exemption).

The Superintendent abandoned the broader exemption after "request[s]" by "hundreds" of commenters. Pet.App.145a–46a. In the Superintendent's view, "[n]either State nor Federal law require[d]" any exemption. Pet.App.146a. And the exemption she chose was "analogous to existing state law." Pet.App.158a. The Superintendent stated that she rejected the initially proposed religious

exemption because "the interests of ensuring access to reproductive care, fostering equality between the sexes, providing women with better health care, and the disproportionate impact of a lack of access to reproductive health services on women in low income families weighs far more heavily than the interest of business corporations to assert religious beliefs." Pet.App.146a–47a.

C. Petitioners and Their Objections to the Mandate

A number of religious organizations with employee health plans challenged the Abortion Mandate in New York state court. The plaintiffs—Petitioners here—include religious orders, churches, and services organizations. They employ from dozens to hundreds of people, often of varied religious backgrounds, both for propagating their faith and for charitable service in their communities.

For instance, the Teresian Nursing Home Company is a non-profit run by the Carmelite Sisters for the Aged and Infirm, a Catholic religious order. Pet.App.60a–62a. The "Teresian House" provides the elderly with a "continuum of services to enhance [their] physical, spiritual and emotional well-being." Pet.App.61a. The Teresian House employs over 400 people; it provides healthcare coverage to over 200 full-time employees, because of its "moral" and "religious" obligations to "pay just wages." Pet.App.62a.

The other Petitioners are of a piece. The First Bible Baptist Church employs over "sixty people," has a congregation with "individuals of varied religious backgrounds," and engages in "human services

outreach," including "youth ministry, adult ministry, deaf ministry, education ministry, athletic activities, day care and pre-school and mission ministry." Pet.App.65a, 85a. The Sisterhood of St. Mary is an "Anglican/Episcopal Order" of religious sisters, who "live a traditional, contemplative expression of monastic life through a disciplined life of prayer set within a simple agrarian lifestyle and active ministries in their local communities." Pet.App.82a–83a. Other Petitioners, including two Catholic Dioceses (Albany and Ogdensburg), an Episcopal Diocese (Albany), and Our Savior's Lutheran Church, also engage in ministries and missions within New York or have "ecclesiastical authority" over the "religious, charitable and educational ministries" within their geographic territories. Pet.App.33a–35a; Pet.App.81a–85a.

Some of the Petitioners are service organizations. For instance, three subdivisions of Catholic Charities (Albany, Ogdensburg, and Brooklyn) provide "human service programs" including "adoptions, maternity services," and "programs covering the whole span of an individual's life," as part of the "charitable and social justice ministry" of the Catholic Church. Pet.App.83a–84a. And DePaul Management Corporation is a non-profit organization, associated with the Catholic Diocese of Albany, that manages senior living facilities. Pet.App.86a–87a.

All of these organizations are religiously opposed to abortion; no one has questioned the sincerity of those beliefs. The Catholic Church, for instance, teaches that abortion is an "unspeakable crime," because it ends the life of a "new human being." Pet.App.95a. The Church has taught and believes

that "modern genetic science offers clear confirmation," that from the moment of conception, a new living person exists. *Id.* The other Petitioners share similar beliefs. *E.g.*, Pet.App.57a ("The Episcopal Diocese of Albany resolutely affirms the sanctity of human life as a gift from God from conception until natural death"); Pet.App.66a (First Bible Baptist Church believes that "abortion constitutes the unjustified, unexcused taking of unborn human life"). Accordingly, to include "insurance coverage" for abortion "would provide the occasion for 'grave sin,'" which the Petitioners "cannot religiously or morally accept or sanction." Pet.App.97a.

Petitioners also share the belief that providing "fair, adequate and just employment benefits" is a "moral obligation." *Id.* And, in the absence of providing health insurance to their employees, they face the prospect of severe financial penalties. *E.g.*, Pet.App.36a; (Roman Catholic Diocese of Albany); Pet.App.62a (Teresian House); Pet.App.66a (First Bible Baptist Church). Indeed, for just the calendar year 2021, the federal fines for failing to provide health insurance would be $2,700 per employee.[1] Just as one example, for the Teresian House, which provides health coverage to over 200 employees, Pet.App.61a, those fines would reach over a half million dollars per year.

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[1] IRS, *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, Question 55 (Sept. 24, 2020), https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Calculation.

Accordingly, with no other options, Petitioners sued the Superintendent and New York State Department of Financial Services, seeking to enjoin the Abortion Mandate.

D. Procedural History

In their consolidated suit,[2] Petitioners challenged the Abortion Mandate as a violation of numerous federal and state laws. As relevant here, they argued that the Abortion Mandate violates the Free Exercise Clause because it substantially burdens and discriminates among and against certain religious entities without justification. The Abortion Mandate was "promulgated with the explicit intention of exempting some employers, while, at the same time, excluding other employers from the exemption." Pet.App.98a. And the exemption "treats similarly situated individuals and organizations differently based solely on religious viewpoint." Pet.App.125a. Petitioners also challenged the Abortion Mandate as interfering with religious autonomy under both Religion Clauses. Pet.App.117a, Pet.App.127a–31a.

The trial court granted summary judgment in favor of Respondents. Pet.App.15a–28a. The trial

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[2] Petitioners filed two suits that were consolidated by the trial court. In a 2016 suit, they challenged the Superintendent's promulgation of a "[m]odel [l]anguage" insurance policy, which covered "medically necessary abortions." Pet.App.3a–4a. In 2017, after the Superintendent promulgated the Abortion Mandate, Petitioners filed a second complaint that challenged that regulation directly. Pet.App.78a. The trial court consolidated the suits. Pet.App.4a. In their relevant holdings, neither the trial court nor the appellate division distinguished between Petitioners' First Amendment challenges. Pet.App.1a–28a.

court believed itself to be bound by a decision of the New York Court of Appeals that upheld a similar law respecting contraception coverage. *Cath. Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006). In *Serio*, a group of religious entities had challenged a New York statute mandating that health insurance plans must include contraceptives. That statute contained a religious exemption materially identical to the exemption in the Abortion Mandate. *Id.* at 519. The *Serio* court rejected both Free Exercise and Establishment Clause claims. With respect to the Free Exercise Clause, the court held that the mandate was "neutral and generally applicable," even though it provided exemptions for some organizations and not others, because it did not specifically "target religious beliefs as such." *Id.* at 522 (alteration omitted). And it rejected an Establishment Clause claim based on church autonomy because the mandate "merely regulates one aspect of the relationship between plaintiffs and their employees." *Id.* at 524. In the trial court's view, *Serio* involved the "same" claims, and so it barred Petitioners' challenges to the Abortion Mandate. Pet.App.22a.

The appellate division likewise believed itself to be bound by *Serio*. "The factual differences in these cases are immaterial to the relevant legal analyses that are identical in both cases." Pet.App.8a. Accordingly, it affirmed judgment in favor of the Respondents. Pet.App.14a.

The New York Court of Appeals then denied leave to appeal on November 24, 2020, with Judge Fahey dissenting. Pet.App.29a–30a.

REASONS FOR GRANTING THE PETITION

In the three decades since this Court decided *Smith*, lower courts have taken patently conflicting approaches to state impositions on religious liberty. In *Smith*, the Court held for the first time that "neutral and generally applicable laws" were not subject to strict scrutiny, even if they burdened religious practice. 494 U.S. 872. But the lower courts have been unable to agree on what those terms mean. Indeed, this case presents two distinct splits of authority on how to determine whether a law is "neutral and generally applicable." Some courts hold that exemptions undermine a law's general applicability, and thus strict scrutiny applies; some do not. Some courts hold that a law that discriminates among religious entities is subject to strict scrutiny; some do not.

This case provides an ideal opportunity for the Court to clarify the law. New York's Abortion Mandate explicitly exempts religious entities that focus on inculcating religious values among coreligionists, while imposing burdens on groups that view service to those outside their faith as a core part of their religious mission. If such a law is "neutral and generally applicable," nearly every law must be, but that is not right. As this Court has recently held, laws are not neutral and generally applicable when they treat certain "activity more favorably than religious exercise." *Tandon*, 2021 WL 1328507, at *1. Clearly, then, laws that provide exemptions for some—but not all—should not be held generally applicable either.

The consequences could hardly be more severe, should this Court not intervene. New York churches

and religious ministries will be forced to cooperate in what they consider to be grave evil—or stop operating. Before that happens, the Court should at least consider whether the Constitution allows it.

I. THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER NEW YORK'S ABORTION MANDATE VIOLATES THE FREE EXERCISE CLAUSE.

The appellate division's decision implicates two splits over how to determine whether a law is "neutral and of general applicability," for purposes of review under the Free Exercise Clause. *Lukumi*, 508 U.S. at 531. New York is on the wrong side of each split.

First, the appellate division's decision implicates a "deep and wide" split regarding whether exemptions undermine a law's "general applicability." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 15 (2016). In New York, California, and the Third and Ninth Circuits, granting exemptions to *some* entities but not *others* is insufficient to require strict scrutiny under *Lukumi*. By contrast, in at least in the Second, Sixth, Tenth, and Eleventh Circuits, and the Iowa Supreme Court, a law is ordinarily *not* "generally applicable" if it allows exemptions for some but not others.

Second, New York and California courts have held that even where a law specifically exempts some religious entities but not other religious entities (expressly on the basis of their religious views or status), it is still "neutral and generally applicable." This view conflicts with that of numerous courts, which have held that the Religion Clauses require "the

equal treatment of all religious faiths without discrimination or preference." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.).

The appellate division erred with respect to both of these splits. As this Court has clarified in its COVID-based, emergency application decisions, governments cannot selectively burden religious practice as compared to non-religious practice; thus, exemptions necessarily undermine a law's general applicability. Moreover, this Court has long held that governments cannot differentiate among religions in disbursing benefits or protections from burdensome laws. Either of these errors is sufficient to warrant this Court's review and to reverse the judgment below.

A. Courts Are Split on Whether Exemptions Preclude a Law From Being "Generally Applicable."

The appellate division held the Abortion Mandate to be "generally applicable," even in the face of its exemptions for some entities, because it concluded the mandate did not "target" religious practice. The Ninth Circuit, Third Circuit, and California Supreme Court would hold the same. But numerous other courts, including the Second Circuit, hold that exemptions undermine a law's "general applicability," regardless of whether the law "targets" religion. Petitioners' rights would thus not only be adjudicated differently throughout the country, they would be adjudicated differently *in New York*, had the Petitioners filed suit in federal court.

1. The appellate division believed itself bound by the New York Court of Appeals' prior decision in *Serio*,

Pet.App.8a. In that case, the court held that a similar law (mandating contraceptive services) was neutral and generally applicable even though "some … organizations … [were] exempt" while others were not. *Serio*, 7 N.Y.3d at 522. New York's courts will apply strict scrutiny only if a law specifically "target[s]" religious entities. *Id.*

The Supreme Court of California came to a similar conclusion when faced with a similar California law, under which "certain health and disability insurance contracts must cover prescription contraceptives." *Cath. Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67, 73 (Cal. 2004). That law included an exemption that was virtually identical to the exemption here. *See* Cal. Health & Safety Code § 1367.25. The California court held that the state's contraceptive mandate was neutral and generally applicable anyway, because of its tautological view that "nonexempt [religious] organizations are treated the same as all other" nonexempt organizations. *Cath. Charities of Sacramento*, 85 P.3d at 87. In other words, a law is "generally applicable" regardless of its exemptions for some entities but not others.

The Ninth Circuit signed onto this unduly narrow view of the Free Exercise Clause in *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015), a decision that three Members of this Court declared to be "an ominous sign." *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting from denial of certiorari). In *Stormans*, the Ninth Circuit reviewed a Washington law that required pharmacists to dispense all prescription drugs, regardless of any moral or religious objections. "The rules permit[ted] pharmacies to deny delivery for certain business

reasons. … But … the rules require[d] a pharmacy to deliver all prescription medications, even if the owner of the pharmacy ha[d] a religious objection." *Stormans*, 794 F.3d at 1071. The Ninth Circuit upheld this set of rules because they "ma[d]e no reference to any religious practice, conduct, belief, or motivation," and because, in the Ninth Circuit's view, the various secular exemptions were justified by secular reasons. *Id.* at 1076, 1080. Unless Washington specifically targeted religious "motivation[s]," strict scrutiny would not apply. *Id.* at 1078.

The Third Circuit, too, followed this approach in *Fulton v. City of Philadelphia*, 922 F.3d 140, 147 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020). In that case, the court held that laws are subject to strict scrutiny under *Smith* and *Lukumi* only if the government "targeted [a litigant] for its religious beliefs," regardless of whether laws had exemptions. *Id.* at 147.

2. By contrast, in other courts, a law is not "generally applicable" if it *exempts* some entities or similar conduct. *Lukumi*, 508 U.S. at 544–45. The Abortion Mandate, as applied to Petitioners, would *not* survive in these courts.

The Second Circuit, to start, has held that laws exempting certain entities are *not* "generally applicable," regardless of whether there is any targeted religious "animus." *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014). In *Agudath Israel of America v. Cuomo*, 983 F.3d 620, 632 (2d Cir. 2020), for example, the Second Circuit examined Governor Cuomo's emergency COVID-19 restrictions,

which included percentage capacity limits on various entities. These regulations exempted so-called "essential" businesses, "while imposing greater restrictions on 'non-essential' activities," including "religious worship." *Id.* The Second Circuit held that these limits "lack[ed]" "general applicability" and were "subject to strict scrutiny." *Id.* The Second Circuit did not find it necessary to hold that the order targeted religious conduct—the series of exemptions was sufficient. *See also, e.g.*, *Cent. Rabbinical Cong.*, 763 F.3d at 197 (holding that a law regulating a certain type of circumcision for the supposed purpose of reducing neonatal HSV infections was not generally applicable, even though it applied to "any" person, because the state had not regulated other conduct directed at reducing neonatal HSV infections).

The Sixth Circuit has held the same. For instance, a school cannot enforce an "exception-ridden policy" that generally allows counselors to refer patients to other counselors, except when the reason for refusal was religious. *Ward v. Polite*, 667 F.3d 727, 738–40 (6th Cir. 2012). And like the Second Circuit, the Sixth Circuit has held that a law is not "neutral and generally applicable" if it does not regulate activity that is "comparable" to the burdened religious activity. *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 482 (6th Cir. 2020).

The Tenth Circuit also recognizes that a law is not "neutral and generally applicable" where it uses individual exemptions or "systems that are designed

to make case-by-case determinations." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004).[3]

And the Eleventh Circuit has held that a "law is not neutral or generally applicable if it treats similarly situated … assemblies differently." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004). Thus, where a zoning law precluded churches but allowed private clubs, strict scrutiny applied. *Id.* at 1222, 1233. Although focusing on RLUIPA, the Court also held that the town "violated Free Exercise requirements of neutrality and general applicability," *id.* at 1232.

Finally, the Iowa Supreme Court has refused to enforce laws that contain exemptions. In *Mitchell County v. Zimmerman*, 810 N.W.2d 1, 16 (Iowa 2012), for instance, the Iowa Supreme Court examined a county "ordinance [that] forb[ade] driving" vehicles with "steel cleats" on the highways. *Id.* at 3. That ordinance was problematic for certain Mennonites, who were required by their faith to drive tractors only if their "wheels are equipped with steel cleats." *Id.* The Iowa Supreme Court held that the law was "not generally applicable" because it had exemptions (e.g.,

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[3] Although recognizing that individualized exemptions preclude a law from being generally applicable, the Tenth Circuit has also held that "statutes that … contain express exceptions for objectively defined categories of persons" are still "generally applicable." *Axson-Flynn*, 356 F.3d at 1298. No other court appears to ascribe to this counterintuitive separation of "case-by-case" and "categori[cal]" exemptions. *Id. Cf., e.g.*, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.) ("If anything," a "categorical exemption" is of greater "concern" than "individualized exemptions[.]"). And it is not clear how the Tenth Circuit would distinguish between these two concepts.

for school buses), and thus it was subject to strict scrutiny (which it failed to satisfy). *Id.* at 15–17.

B. Courts Are Split On Whether a Law That Differentiates Between Religions Is Subject to Strict Scrutiny.

The appellate division also stepped into another split. Both the New York Court of Appeals and the California Supreme Court have held that an exemption that discriminates *between* religious entities is "neutral and generally applicable," and thus not subject to strict scrutiny. *Serio*, 7 N.Y.3d at 522 (law is neutral and generally applicable even if "some religious organizations … [were] exempt" and others were not); *Cath. Charities of Sacramento*, 85 P.3d at 87. This is true even where the law demands an intrusive inquiry into whom an organization hires or serves. Other courts hold the opposite, applying strict scrutiny to such laws because the Religion Clauses demand "the equal treatment of all religious faiths without discrimination or preference." *Weaver*, 534 F.3d at 1257.

In *Weaver*, for instance, the Tenth Circuit rejected a Colorado prohibition on the use of public funds for "pervasively sectarian" universities. *Id.* at 1250. "By giving scholarship money to students who attend sectarian—but not 'pervasively' sectarian—universities, Colorado necessarily and explicitly discriminates among religious institutions." *Id.* at 1258 (footnote omitted).

Relying on the same principles, the D.C. Circuit has rejected the NLRB's attempts to "assert[] jurisdiction over [religious schools] and their teachers," because the NLRB's attempts to do so

privileged certain visions of religion over others. *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 828 (D.C. Cir. 2020). For instance, in attempting to assert jurisdiction over adjunct faculty at Duquesne University, the NLRB "impermissibly sided with a particular view of religious functions: Indoctrination is sufficiently religious, but supporting religious goals is not, and especially not when faculty enjoy academic freedom." *Id.* at 835. *See also*, *e.g.*, *A.H. ex rel. Hester v. French*, 985 F.3d 165, 186 (2d Cir. 2021) (Menashi, J., concurring) ("The exclusion of certain types of religious institutions … is discrimination on the basis of religious status.").

C. The Appellate Division's Decision Is Wrong.

The appellate division erred with respect to both of these issues. After correcting either error, the Abortion Mandate is not neutral and generally applicable, which means it must satisfy strict scrutiny, which it cannot.

1. Exemptions should be all but fatal to a holding of general applicability. Of course, "[i]n ordinary English, a generally applicable law is one that applies to everybody, in all similar situations—or at least to nearly everybody and nearly all similar situations." Laycock & Collis, *supra*, at 9. Indeed, in *Lukumi*, the Court treated exemptions as showing "underinclusive[ness] on [the law's] face." 508 U.S. at 545. When a state grants an exemption of some sort while denying a religious exemption, it "devalues religious" concerns "by judging them to be of lesser import than nonreligious" concerns. *Id.* at 537.

This Court's recent decision in *Tandon v. Newsom*, 2021 WL 1328507, reaffirms this view. In that case, California imposed a three-family limit on gatherings in homes—including gatherings for religious purposes—ostensibly to limit the spread of COVID-19. *Id.* at *2. But at the same time, California declined to impose a three-family limit on "salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." *Id.* The Court granted the petitioners' emergency application for injunctive relief, because "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at *1. California's COVID system "contain[ed] myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny." *Id.* at *2.

To be sure, *Tandon* was in an emergency posture, but the Court's holding is still telling: governments must treat religious entities and religious practice at least as well as they treat *all others*; otherwise, the law is not neutral and generally applicable. *Tandon*'s holding thus greatly undermines the view that generally applicable laws can include exemptions for some while denying them to religious entities. And at the very least, *Tandon* rejects the view that the Free Exercise Clause protects only against "targeting" of religion, which the Court did not rely on whatsoever.

Accordingly, the appellate division should have applied strict scrutiny to the Abortion Mandate here. The mandate exempts some religious entities but not others; it is, therefore, simply not generally applicable.

And that is especially so where, as here, New York's complicated scheme of mandated insurance coverage, *see supra* at 5–6, has "myriad exceptions," further undermining any claim it has to general applicability. *Tandon*, 2021 WL 1328507, at *2.

2. The appellate division also erred in another respect. In this case, the Abortion Mandate includes a discriminatory *religious* exemption. The exemption applies to those non-profits whose "purpose" is to inculcate "religious values," and who "primarily employ[and serve] persons who share the religious tenets of the entity." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). Regardless of one's view on whether exemptions ordinarily require strict scrutiny, they certainly do when they discriminate *between religions*.

This Court has held in the clearest terms that "[t]h[e] constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245–47 ; *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) ("[L]aws discriminating among religions are subject to strict scrutiny."). In *Larson*, the Court examined a "Minnesota statute[] [that] impos[ed] certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers." 456 U.S. at 230. The Court held the law invalid. The Court explained that "Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs." *Id.* at 245. But "such

equality would be impossible in an atmosphere of official denominational preference." *Id.* After all, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id.* at 245–46. And that was true even though the law at issue in *Larson* differentiated among religious entities by objective funding criteria, *id.* at 230, not religious doctrine.

New York has created the same problem here. By limiting the Abortion Mandate's exemption to religious non-profits that hire and serve coreligionists, New York has necessarily preferred certain types of religious entities: namely, religious entities that do not, as part of their religious missions, employ and serve individuals of other faiths or of no faith. For instance, the exemption does not apply to First Bible Baptist Church, a "family of faith which includes individuals of varied religious backgrounds." Pet.App.65a. Likewise, it does not apply to Catholic Charities, which aims to serve all those in need, regardless of their religion. By contrast, religious organizations that focus only on formal worship are more likely to satisfy the requirements, since they are more likely to hire and serve primarily coreligionists. New York has no "compelling reason" to make these distinctions. *Smith*, 494 U.S. at 884.

Moreover, an exemption scheme of this sort has another fatal constitutional flaw: it requires the state to engage in the "business of evaluating … differing religious claims." *Id.* at 887. That is, New York has to decide *which* entities "employ[]" or "serve[]" primarily coreligionists, and which have the "purpose" of

inculcating religious values. N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y). But a government inquiry into internal religious doctrine is "not only unnecessary but also offensive." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000). "It is well established … that courts should refrain from trolling through a person's or institution's religious beliefs." *Weaver*, 534 F.3d at 1261. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (governments may not "discriminat[e] in the distribution of public benefits based upon religious status"). That is because the "very process of inquiry" into religious questions can "impinge on rights guaranteed by the Religion Clauses." *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979); *see also Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 719 (1976) (it is "error" for courts to "intru[de]" into a "religious thicket").

For instance, the Tenth Circuit in *Weaver* noted that Colorado's "criteria" for identifying "pervasively sectarian" institutions were especially problematic because they asked whether a school included "students, faculty, trustees, or funding sources that are 'exclusively,' 'primarily,' or 'predominantly,' of 'one religious persuasion.'" 534 F.3d at 1261, 1264. That "requires government officials to decide which groups of believers count as 'a particular religion' or 'one religious persuasion,' and which groups do not," and that would require the government to impose its own "ecclesiology." *Id.* at 1264–65 (footnote omitted); *see also, e.g.*, *Duquesne*, 947 F.3d at 833–34 (rejecting NLRB's "substantial religious character" test because it required the government to make religious distinctions); *Spencer v. World Vision, Inc.*, 633 F.3d

723, 729 (9th Cir. 2011) (O'Scannlain, J., concurring) (rejecting view of religious exemption that would result in governmental preferences between religions).

New York's exemption for only privileged religious entities entails exactly these problems. What does it mean for a religious organization to have a "purpose" of inculcating "religious values"? Does "caring for orphans and widows" count? *James* 1:27. And how will New York decide who counts as a coreligionist? "Are Orthodox Jews and non-Orthodox Jews coreligionists? … Would Presbyterians and Baptists be similar enough? Southern Baptists and Primitive Baptists?" *Our Lady*, 140 S. Ct. at 2068–69. How many elderly residents must the Carmelite Sisters evict from their nursing homes to qualify? All non-Christians? All non-Catholics? If a Jewish organization serves non-practicing Jews, is it outside the exemption? "Deciding such questions would risk judicial entanglement in religious issues." *Id.* From *Smith* to *Larson* and everywhere in between, this Court's cases have reaffirmed that governmental "probing" into such questions is "profoundly troubling." *Mitchell*, 530 U.S. at 828. That is true here as well.

* * *

Because the mandate is not neutral and generally applicable, strict scrutiny applies, and New York could not hope to satisfy that standard. Even assuming some sort of compelling interest (which is not a given), New York could easily use a less restrictive means of achieving its interest: it could (among other things) simply pay for "medically necessary abortions" itself, rather than require religious entities to cover them.

See Hobby Lobby Stores, 573 U.S. at 728 (detailing less restrictive alternatives in a similar context). The Court should grant review and hold that the Abortion Mandate cannot be applied to health plans for objecting religious entities.

II. THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER NEW YORK'S ABORTION MANDATE IMPERMISSIBLY INTERFERES WITH THE INTERNAL OPERATIONS OF RELIGIOUS ENTITIES.

The appellate division's decision also merits review because it ignores this Court's foundational holding that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our Lady*, 140 S. Ct. at 2055 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). The Abortion Mandate is a pernicious form of "[s]tate interference" in internal religious governance and doctrine and therefore violates the Religion Clauses. *Id.* at 2060.

1. The Religion Clauses "radiate[]" a "spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. Thus, government action that interferes with "church administration, the operation of the churches[] [or] the appointment of clergy, … prohibits the free exercise of religion." *Id.* at 107–08. Likewise, when governments interfere in matters of church "governance," they also violate "the Establishment Clause, which prohibits government involvement" in "ecclesiastical decisions."

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012). Simply put, governments should not intrude upon questions of "church doctrine and practice." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 (1969).

Accordingly, "religious institutions" enjoy "autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady*, 140 S. Ct. at 2060. They are entitled to enforce their "own rules and regulations for internal discipline and government." *Milivojevich*, 426 U.S. at 724.

2. The Abortion Mandate conflicts with these principles. It interferes with internal religious organization and it attempts to influence religious doctrine. Either is fatal to the Abortion Mandate's legality, as applied to religious entities.

To start, the Abortion Mandate interferes with religious entities' relationships with their own employees, that is, their "internal management decisions." *Our Lady*, 140 S. Ct. at 2060. Religious groups may define their spiritual mission to include people who have diverse religious views. First Bible Baptist Church, for example, is a "family of faith which includes individuals of varied religious backgrounds." Pet.App.65a. But the Abortion Mandate forces such religious organizations to choose between narrowing its members to coreligionists or participating in "grave sin." Pet.App.97a. Thus, by coercing religious organizations to hire only coreligionists, the exemption effectively "displaces one church administrator with another." *Kedroff*, 344 U.S. at 119.

The Abortion Mandate's exemption for only certain kinds of religious groups also unduly attempts to "influence" religious doctrine. *Our Lady*, 140 S. Ct. at 2060. The exemption is essentially a prohibition on serving non-coreligionists, but that is a deeply problematic thumb on the scale of religious doctrine. The First Bible Baptist Church, for instance, believes its mission is "to proclaim and witness the Gospel of Jesus Christ through ministries of Christian love." Pet.App.65a. Catholic Charities of Albany, motivated by "Scriptural values," seeks "to address basic human need at all stages of life regardless of race, religious belief, ethnicity, or lifestyle."[4] Many Christian traditions hold service of others to be a religious *command*, not merely an option. *Cf. Luke* 10:27 ("You shall love … your neighbor as yourself."); Pope John Paul II, *Evangelium Vitae* § 87 (1995) ("As disciples of Jesus, we are called to become neighbours to everyone, and to show special favour to those who are poorest, most alone and most in need." (citation omitted)).

Churches and religious ministries cannot abide by those beliefs while serving only those who "share" their "religious tenets." N.Y. Comp. Codes R. & Regs. tit. 11, § 52.2(y)(3). The Abortion Mandate's exemption thus forces religious entities to choose between fundamentally altering basic church doctrine—by limiting their ministry to coreligionists—or violating basic religious beliefs. That is the type of "influence" that no government should be allowed to exert over religious doctrine. *Our Lady*, 140 S. Ct. at

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[4] Catholic Charities of the Diocese of Albany, *About Us*, http://www.ccrcda.org/about_us/ (last visited Apr. 21, 2021).

2060. The Court should grant review to confirm as much.

III. THE COURT SHOULD GRANT THE PETITION TO RECONSIDER *SMITH*.

If there is any chance that *Smith* allows New York to compel religious organizations to fund what, in their view, is a grave moral evil, the Court should reexamine *Smith*. Surely, such a world is not "a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019).

This Court has already determined that *Smith* should be reconsidered. *Fulton*, 140 S. Ct. 1104. But if the Court does not ultimately resolve that question in *Fulton*, it should do so here. The need is urgent, given the harm to religious entities in New York. And this is a clean vehicle with which to address the issue: New York has explicitly mandated that numerous religious entities cover a procedure that is undisputedly contrary to their religious beliefs.

IV. THE QUESTION OF WHETHER STATES CAN FORCE RELIGIOUS ENTITIES WHICH OPPOSE ABORTIONS TO FUND THEM IS IMMENSELY IMPORTANT.

It is hard to imagine a more critical legal question for Petitioners than whether New York can force them to cover abortions in their employee health plans. And although the impact on religious adherents in New York alone would support review, the importance of this issue travels well beyond New York's borders—this case presents critical questions about a fundamental constitutional right. Thomas Jefferson once declared that "[n]o provision in our Constitution ought to be dearer to man than that which protects the

rights of conscience against the enterprises of the civil authority."[5] Petitioners submit that no provision ought to be *clearer*, either.

1. It is undisputed that Petitioners have a sincere religious belief that abortion is wrong, but that hardly does justice to the gravity of the situation. In the view of the Petitioners, abortion is among the most significant of moral wrongs.

To take the Catholic Church as an example, it has, "[s]ince the first century[,] … affirmed" its view of "the moral evil of every procured abortion." Catechism of the Catholic Church § 2271. That is because it believes "[h]uman life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person - among which is the inviolable right of every innocent being to life." *Id.* § 2270. As Bishop Scharfenberger (Catholic Diocese of Albany) explained in this litigation, "'[t]he moral gravity of procured abortion is apparent in all its truth if we recognize that we are dealing with murder and, in particular, when we consider the specific elements involved. The one eliminated is a human being at the very beginning of life. No one more absolutely innocent could be imagined.'" Pet.App.38a (quoting Pope John Paul II, *Evangelium Vitae* §§ 57, 58).

The other Petitioners share similar beliefs. Bishop Love (Episcopal Diocese of Albany) explained that his

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[5] *Letter from Thomas Jefferson to Richard Douglas*, National Archives, Founders Online (Feb. 4, 1809) https://founders.archives.gov/documents/Jefferson/99-01-02-9714.

Diocese "resolutely affirms the sanctity of human life as a gift from God from conception until natural death." Pet.App.57a. Thus, "[c]oerced subsidization of abortion procedures … is in direct violation of religious and moral teachings and beliefs." *Id.* Kevin Pestke (Pastor of the First Bible Baptist Church), explained that his church's "Articles of Faith teach that … abortion constitutes the unjustified, unexcused taking of unborn human life." Pet.App.66a (citing *Job* 3:16; *Psalms* 51:5, 139:14–16; *Isaiah* 44:24; 49:1, 5; *Jeremiah* 1:5; 20:15–18; *Luke* 1:44). The "Baptist and Lutheran Churches explicitly teach that abortion is contrary to moral law and the Scriptures and violates those religious beliefs deeply rooted in the Scriptures." Pet.App.96a. Even the appellate division recognized the particular "religious fervency" respecting opposition to abortion, noting that "this particular 'medically necessary' procedure has been among the most divisive issues in our politics for several decades." Pet.App.6a.

If New York's mandate remains in place, Petitioners and like-minded religious organizations will be in an intolerable position. They will have to violate core beliefs, cease offering health insurance (a financially and morally fraught outcome), or shut down altogether. Surely, no one is better served in New York if the Teresian House stops serving the elderly, or Catholic Charities stops serving the poor. At the very least, before that happens, this Court should decide whether New York can put them to that choice without violating the First Amendment.

2. As this Court's numerous religious liberty decisions have established, the increasing reach of regulators and administrators means that

government demands and religious beliefs are increasingly likely to clash. These questions are thus not merely important to New Yorkers—they are important to everyone.

At the federal level, statutory protections have often obviated the need to further define the scope of the Free Exercise Clause. *See, e.g.*, *Hobby Lobby*, 573 U.S. 682; *Holt v. Hobbs*, 574 U.S. 352 (2015). But many states (New York included) do not have similar protections, and congressional religious protections are not set in stone.[6] Thus, the reach of the Religion Clauses is in urgent need of clarification.

Indeed, if this Court's COVID-related emergency cases have shown anything, it is that the lower courts are hopelessly divided on these issues, thus requiring repeated intervention by this Court in a series of emergency applications, on rushed schedules, often with factual and legal events changing by the day. This case provides an ideal vehicle to address these issues in a systematic manner, after full briefing and argument, and thus provide clear guidance to the lower courts. The Court should take that opportunity.[7]

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[6] Julie Zauzmer, *Top Senate Democrats introduce bill to amend Religious Freedom Restoration Act*, Washington Post (May 22, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/05/22/top-senate-democrats-introduce-bill-to-amend-religious-freedom-restoration-act/.

[7] Although this case warrants plenary review given the importance of the issues at stake, at the very least, the Court should grant, vacate, and remand, in light of *Fulton*, *Tandon*, or both. If the Court either overturns *Smith* or otherwise clarifies the scope of the Free Exercise Clause in *Fulton*, that would

CONCLUSION

The Court should grant the petition.

APRIL 23, 2021

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directly affect the issues presented here. Similarly, *Tandon* has clear application to the issues in this case.

133 S.Ct. 2612
Supreme Court of the United States

SHELBY COUNTY, ALABAMA, Petitioner
v.
Eric H. HOLDER, Jr., Attorney General, et al.

No. 12–96.
|
Argued Feb. 27, 2013.
|
Decided June 25, 2013.

Synopsis
Background: County brought declaratory judgment action against United States Attorney General, seeking determination that Voting Rights Act's coverage formula and preclearance requirement, under which covered jurisdictions were required to demonstrate that proposed voting law changes were not discriminatory, was unconstitutional. United States and civil rights organization intervened. After intervenors' motion for additional discovery was denied, 270 F.R.D. 16, parties cross-moved for summary judgment. The United States District Court for the District of Columbia, John D. Bates, J., 811 F.Supp.2d 424, entered summary judgment for Attorney General. County appealed. The United States Court of Appeals for the District of Columbia Circuit, Tatel, Circuit Judge, 679 F.3d 848, affirmed. Certiorari was granted.

The Supreme Court, Chief Justice Roberts, held that Voting Rights Act provision setting forth coverage formula was unconstitutional.

Reversed.

Justice Thomas filed concurring opinion.

Justice Ginsburg filed dissenting opinion in which Justices Breyer, Sotomayor, and Kagan joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Codenotes

Held Unconstitutional

42 U.S.C.A. § 1973b(b), transferred to 52 U.S.C.A. § 10303

****2615** *Syllabus* [*]

***529** The Voting Rights Act of 1965 was enacted to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769. Section 2 of the Act, which bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen ... to vote on account of race or color," 42 U.S.C. § 1973(a), applies nationwide, is permanent, and is not at issue in this case. Other sections apply only to some parts of the country. Section 4 of the Act provides the "coverage formula," defining the " covered jurisdictions" as States or political subdivisions that maintained tests or devices as prerequisites to voting, and had low voter registration or turnout, in the 1960s and early 1970s. § 1973b(b). In those covered jurisdictions, § 5 of the Act provides that no change in voting procedures can take effect until approved by specified federal authorities in Washington, D.C. § 1973c(a). Such approval is known as "preclearance."

The coverage formula and preclearance requirement were initially set to expire after five years, but the Act has been reauthorized several times. In 2006, the Act was reauthorized for an additional 25 years, but the coverage formula was not changed. Coverage still turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at that time. Shortly after the 2006 reauthorization, a Texas utility district sought to bail out from the Act's coverage and, in the alternative, challenged the Act's constitutionality. This Court resolved the challenge on statutory grounds, but expressed serious doubts about the Act's continued constitutionality. See *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 129 S.Ct. 2504, 174 L.Ed.2d 140.

Petitioner Shelby County, in the covered jurisdiction of Alabama, sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 are facially unconstitutional, as well as a permanent injunction against their enforcement. The District Court upheld the Act, finding that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing ***530** § 4(b)'s coverage formula. The D.C. Circuit affirmed. After surveying the evidence in the record, that court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority

voters, that § 5 was therefore still necessary, and that the coverage formula continued to pass constitutional muster.

Held : Section 4 of the Voting Rights Act is unconstitutional; its formula can no longer be used as a basis for subjecting jurisdictions to preclearance. Pp. 2622 – 2628.

(a) In *Northwest Austin*, this Court noted that the Voting Rights Act "imposes current burdens and must be justified by current needs" and concluded that "a departure ****2616** from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S., at 203, 129 S.Ct. 2504. These basic principles guide review of the question presented here. Pp. 2622 – 2627.

(1) State legislation may not contravene federal law. States retain broad autonomy, however, in structuring their governments and pursuing legislative objectives. Indeed, the Tenth Amendment reserves to the States all powers not specifically granted to the Federal Government, including "the power to regulate elections." *Gregory v. Ashcroft,* 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410. There is also a "fundamental principle of equal sovereignty" among the States, which is highly pertinent in assessing disparate treatment of States. *Northwest Austin, supra,* at 203, 129 S.Ct. 2504.

The Voting Rights Act sharply departs from these basic principles. It requires States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own. And despite the tradition of equal sovereignty, the Act applies to only nine States (and additional counties). That is why, in 1966, this Court described the Act as "stringent" and "potent," *Katzenbach,* 383 U.S., at 308, 315, 337, 86 S.Ct. 803. The Court nonetheless upheld the Act, concluding that such an "uncommon exercise of congressional power" could be justified by "exceptional conditions." *Id.,* at 334, 86 S.Ct. 803. Pp. 2622 – 2625.

(2) In 1966, these departures were justified by the "blight of racial discrimination in voting" that had "infected the electoral process in parts of our country for nearly a century," *Katzenbach,* 383 U.S., at 308, 86 S.Ct. 803. At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. The Act was limited to areas where Congress found "evidence of actual voting discrimination," and the covered jurisdictions shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points ***531** below the national average." *Id.,* at 330, 86 S.Ct. 803. The Court explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the

number of actual voters." *Ibid.* The Court therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* Pp. 2624 – 2625.

(3) Nearly 50 years later, things have changed dramatically. Largely because of the Voting Rights Act, "[v]oter turnout and registration rates" in covered jurisdictions "now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin, supra,* at 202, 129 S.Ct. 2504. The tests and devices that blocked ballot access have been forbidden nationwide for over 40 years**.** Yet the Act has not eased § 5's restrictions or narrowed the scope of § 4's coverage formula along the way. Instead those extraordinary and unprecedented features have been reauthorized as if nothing has changed, and they have grown even stronger. Because § 5 applies only to those jurisdictions singled out by § 4, the Court turns to consider that provision. Pp. 2625 – 2627.

(b) Section 4's formula is unconstitutional in light of current conditions. Pp. 2627 – 2631.

****2617** (1) In 1966, the coverage formula was "rational in both practice and theory." *Katzenbach, supra,* at 330, 86 S.Ct. 803. It looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both. By 2009, however, the "coverage formula raise[d] serious constitutional questions." *Northwest Austin, supra,* at 204, 129 S.Ct. 2504. Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned for over 40 years. And voter registration and turnout numbers in covered States have risen dramatically. In 1965, the States could be divided into those with a recent history of voting tests and low voter registration and turnout and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were. Pp. 2627 – 2628.

(2) The Government attempts to defend the formula on grounds that it is "reverse-engineered"—Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. *Katzenbach* did not sanction such an approach, reasoning instead that the coverage formula was rational because the "formula ... was relevant to the problem." 383 U.S., at 329, 330, 86 S.Ct. 803. The Government has a fallback ***532** argument—because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States identified in 1965. But this does not look to "current political conditions," *Northwest Austin, supra,* at 203, 129 S.Ct. 2504, instead relying on a comparison between the States in 1965. But history did not end in 1965. In assessing the "current need[ ]" for a preclearance system treating States differently from one another today, history since 1965 cannot be ignored. The Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress—if

it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. Pp. 2627 – 2629.

(3) Respondents also rely heavily on data from the record compiled by Congress before reauthorizing the Act. Regardless of how one looks at that record, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that clearly distinguished the covered jurisdictions from the rest of the Nation in 1965. *Katzenbach, supra,* at 308, 315, 331, 86 S.Ct. 803. But a more fundamental problem remains: Congress did not use that record to fashion a coverage formula grounded in current conditions. It instead re-enacted a formula based on 40–year–old facts having no logical relation to the present day. Pp. 2629 – 2630.

679 F.3d 848, reversed.

ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***534** The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 ***535** of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.,* at 334, 86 S.Ct. 803. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. See Voting Rights Act of 1965, § 4(a), 79 Stat. 438.

Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031. There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally ****2619** covered by § 5 than it [was] nationwide." *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 203–204, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). Since that time, Census Bureau data indicate that African–American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).

***536** At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

I

A

The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation."

"The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure." *Id.,* at 197, 129 S.Ct. 2504. In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African–Americans from voting. *Katzenbach,* 383 U.S., at 310, 86 S.Ct. 803. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African–Americans barely improved. *Id.,* at 313–314, 86 S.Ct. 803.

Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any "standard, practice, or procedure ... imposed or applied ... to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437. The current ***537** version forbids any " standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Both the Federal Government and individuals have sued to enforce § 2, see, *e.g., Johnson v. De Grandy,* 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994), and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U.S.C. § 1973j(d). Section 2 is permanent, applies nationwide, and is not at issue in this case.

Other sections targeted only some parts of the country. At the time of the Act's passage, these "covered" jurisdictions were those States or political subdivisions that had maintained a test or

device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election. § 4(b), 79 Stat. 438. Such tests or devices included literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters, and the like. § 4(c), *id.*, at 438–439. A ****2620** covered jurisdiction could "bail out" of coverage if it had not used a test or device in the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." § 4(a), *id.,* at 438. In 1965, the covered States included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. The additional covered subdivisions included 39 counties in North Carolina and one in Arizona. See 28 C.F.R. pt. 51, App. (2012).

In those jurisdictions, § 4 of the Act banned all such tests or devices. § 4(a), 79 Stat. 438. Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges. *Id.,* at 439. A jurisdiction could obtain such "preclearance" only by proving that the change had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color." *Ibid*.

***538** Sections 4 and 5 were intended to be temporary; they were set to expire after five years. See § 4(a), *id.,* at 438; *Northwest Austin, supra,* at 199, 129 S.Ct. 2504. In *South Carolina v. Katzenbach,* we upheld the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale." 383 U.S., at 308, 86 S.Ct. 803.

In 1970, Congress reauthorized the Act for another five years, and extended the coverage formula in § 4(b) to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1968. Voting Rights Act Amendments of 1970, §§ 3–4, 84 Stat. 315. That swept in several counties in California, New Hampshire, and New York. See 28 C.F.R. pt. 51, App. Congress also extended the ban in § 4(a) on tests and devices nationwide. § 6, 84 Stat. 315.

In 1975, Congress reauthorized the Act for seven more years, and extended its coverage to jurisdictions that had a voting test and less than 50 percent voter registration or turnout as of 1972. Voting Rights Act Amendments of 1975, §§ 101, 202, 89 Stat. 400, 401. Congress also amended the definition of "test or device" to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. § 203, *id.,* at 401–402. As a result of these amendments, the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota, became covered jurisdictions. See 28 C.F.R. pt. 51, App. Congress correspondingly amended sections 2 and 5 to forbid voting discrimination on the basis of membership in a language minority group, in addition to discrimination on the basis of race or color. §§ 203, 206, 89 Stat. 401, 402. Finally, Congress made the nationwide ban on tests and devices permanent. § 102, *id.*, at 400.

In 1982, Congress reauthorized the Act for 25 years, but did not alter its coverage formula. See Voting Rights Act ***539** Amendments, 96 Stat. 131. Congress did, however, amend the bailout provisions, allowing political subdivisions of covered jurisdictions to bail out. Among other prerequisites for bailout, jurisdictions and their subdivisions must not have used a forbidden test or device, failed to receive preclearance, or lost a § 2 suit, in the ten years prior to seeking bailout. § 2, *id.,* at 131–133.

We upheld each of these reauthorizations against constitutional challenge. See *Georgia v. United States,* 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); *City of* ****2621** *Rome v. United States,* 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980); *Lopez v. Monterey County,* 525 U.S. 266, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999).

In 2006, Congress again reauthorized the Voting Rights Act for 25 years, again without change to its coverage formula. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, 120 Stat. 577. Congress also amended § 5 to prohibit more conduct than before. § 5, *id.,* at 580–581; see *Reno v. Bossier Parish School Bd.,* 528 U.S. 320, 341, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (*Bossier II*); *Georgia v. Ashcroft,* 539 U.S. 461, 479, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003). Section 5 now forbids voting changes with "any discriminatory purpose" as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, "to elect their preferred candidates of choice." 42 U.S.C. §§ 1973c(b)-(d).

Shortly after this reauthorization, a Texas utility district brought suit, seeking to bail out from the Act's coverage and, in the alternative, challenging the Act's constitutionality. See *Northwest Austin,* 557 U.S., at 200–201, 129 S.Ct. 2504. A three-judge District Court explained that only a State or political subdivision was eligible to seek bailout under the statute, and concluded that the utility district was not a political subdivision, a term that encompassed only "counties, parishes, and voter-registering subunits." *Northwest Austin Municipal Util. Dist. No. One v. Mukasey,* 573 F.Supp.2d 221, 232 (D.D.C.2008). The District Court also rejected the constitutional challenge. *Id.,* at 283.

***540** We reversed. We explained that " 'normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.' " *Northwest Austin, supra,* at 205, 129 S.Ct. 2504 (quoting *Escambia County v. McMillan,* 466 U.S. 48, 51, 104 S.Ct. 1577, 80 L.Ed.2d 36 (1984) (*per curiam*)). Concluding that "underlying constitutional concerns," among other things, "compel[led] a broader reading of the bailout provision," we construed the statute to allow the utility district to seek bailout. *Northwest Austin,* 557 U.S., at 207, 129 S.Ct. 2504. In doing so we expressed serious doubts about the Act's continued constitutionality.

We explained that § 5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty." *Id.,* at 202, 203, 129 S.Ct. 2504 (internal quotation marks omitted). We also noted that "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Id.,* at 202, 129 S.Ct. 2504. Finally, we questioned whether the problems that § 5 meant to address were still "concentrated in the jurisdictions singled out for preclearance." *Id.,* at 203, 129 S.Ct. 2504.

Eight Members of the Court subscribed to these views, and the remaining Member would have held the Act unconstitutional. Ultimately, however, the Court's construction of the bailout provision left the constitutional issues for another day.

B

Shelby County is located in Alabama, a covered jurisdiction. It has not sought bailout, as the Attorney General has recently objected to voting changes proposed from within the county. See App. 87a–92a. Instead, in 2010, the county sued the Attorney General in Federal District Court in Washington, D.C., seeking a declaratory judgment that sections 4(b) and 5 ****2622** of the Voting Rights Act are facially unconstitutional, as well as a permanent injunction against their ***541** enforcement. The District Court ruled against the county and upheld the Act. 811 F.Supp.2d 424, 508 (2011). The court found that the evidence before Congress in 2006 was sufficient to justify reauthorizing § 5 and continuing the § 4(b) coverage formula.

The Court of Appeals for the D.C. Circuit affirmed. In assessing § 5, the D.C. Circuit considered six primary categories of evidence: Attorney General objections to voting changes, Attorney General requests for more information regarding voting changes, successful § 2 suits in covered jurisdictions, the dispatching of federal observers to monitor elections in covered jurisdictions, § 5 preclearance suits involving covered jurisdictions, and the deterrent effect of § 5. See 679 F.3d 848, 862–863 (2012). After extensive analysis of the record, the court accepted Congress's conclusion that § 2 litigation remained inadequate in the covered jurisdictions to protect the rights of minority voters, and that § 5 was therefore still necessary. *Id.,* at 873.

Turning to § 4, the D.C. Circuit noted that the evidence for singling out the covered jurisdictions was "less robust" and that the issue presented "a close question." *Id.,* at 879. But the court looked to data comparing the number of successful § 2 suits in the different parts of the country. Coupling that evidence with the deterrent effect of § 5, the court concluded that the statute continued "to

single out the jurisdictions in which discrimination is concentrated," and thus held that the coverage formula passed constitutional muster. *Id.,* at 883.

Judge Williams dissented. He found "no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout." *Id.,* at 891. Rather, to the extent there was any correlation, it actually went the other way: "condemnation under § 4(b) is a marker of *higher* black registration and turnout." *Ibid.* (emphasis added). Judge Williams also found that "[c]overed jurisdictions have *far more* black officeholders as a proportion of the black ***542** population than do uncovered ones." *Id.,* at 892. As to the evidence of successful § 2 suits, Judge Williams disaggregated the reported cases by State, and concluded that "[t]he five worst uncovered jurisdictions ... have worse records than eight of the covered jurisdictions." *Id.,* at 897. He also noted that two covered jurisdictions—Arizona and Alaska—had not had any successful reported § 2 suit brought against them during the entire 24 years covered by the data. *Ibid.* Judge Williams would have held the coverage formula of § 4(b) "irrational" and unconstitutional. *Id.,* at 885.

We granted certiorari. 568 U.S. ——, 133 S.Ct. 594, 184 L.Ed.2d 389 (2012).

II

In *Northwest Austin,* we stated that "the Act imposes current burdens and must be justified by current needs." 557 U.S., at 203, 129 S.Ct. 2504. And we concluded that "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Ibid.* These basic principles guide our review of the question before us. [1]

****2623** A

The Constitution and laws of the United States are "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. State legislation may not contravene federal law. The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect. A proposal to grant such authority to "negative" state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause. See 1 ***543** Records of the Federal Convention of 1787, pp. 21, 164–168 (M. Farrand ed. 1911); 2 *id.,* at 27–29, 390–392.

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States,* 564 U.S. ——, ——, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011). But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Ibid.* (internal quotation marks omitted).

More specifically, " 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.' " *Gregory v. Ashcroft,* 501 U.S. 452, 461–462, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (quoting *Sugarman v. Dougall,* 413 U.S. 634, 647, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); some internal quotation marks omitted). Of course, the Federal Government retains significant control over federal elections. For instance, the Constitution authorizes Congress to establish the time and manner for electing Senators and Representatives. Art. I, § 4, cl. 1; see also *Arizona v. Inter Tribal Council of Ariz., Inc.,* —— U.S., at —— – ——, 133 S.Ct., at 2253 – 2254. But States have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash,* 380 U.S. 89, 91, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) (internal quotation marks omitted); see also *Arizona, ante,* at —— U.S., at —— – ——, 133 S.Ct., at 2257 – 2259. And "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Nebraska ex rel. Thayer,* 143 U.S. 135, 161, 12 S.Ct. 375, 36 L.Ed. 103 (1892). Drawing lines for congressional districts is likewise "primarily the duty and responsibility of the State." *Perry v. Perez,* 565 U.S. ——, ——, 132 S.Ct. 934, 940, 181 L.Ed.2d 900 (2012) (*per curiam*) (internal quotation marks omitted).

***544** Not only do States retain sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. *Northwest Austin, supra,* at 203, 129 S.Ct. 2504 (citing *United States v. Louisiana,* 363 U.S. 1, 16, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960); *Lessee of Pollard v. Hagan,* 3 How. 212, 223, 11 L.Ed. 565 (1845); and *Texas v. White,* 7 Wall. 700, 725–726, 19 L.Ed. 227 (1869); emphasis added). Over a hundred years ago, this Court explained that our Nation "was and is a union of States, equal in power, dignity and authority." *Coyle v. Smith,* 221 U.S. 559, 567, 31 S.Ct. 688, 55 L.Ed. 853 (1911). Indeed, "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.,* at 580, 31 S.Ct. 688. *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle ****2624** operated as a *bar* on differential treatment outside that context. 383 U.S., at 328–329, 86 S.Ct. 803. At the same time, as we

made clear in *Northwest Austin,* the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States. 557 U.S., at 203, 129 S.Ct. 2504.

The Voting Rights Act sharply departs from these basic principles. It suspends "*all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C." *Id.,* at 202, 129 S.Ct. 2504. States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action. The Attorney General has 60 days to object to a preclearance request, longer if he requests more information. See 28 C.F.R. §§ 51.9, 51.37. If a State seeks preclearance from a three-judge court, the process can take years.

And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal ***545** legislative process. Even if a noncovered jurisdiction is sued, there are important differences between those proceedings and preclearance proceedings; the preclearance proceeding "not only switches the burden of proof to the supplicant jurisdiction, but also applies substantive standards quite different from those governing the rest of the nation." 679 F.3d, at 884 (Williams, J., dissenting) (case below).

All this explains why, when we first upheld the Act in 1966, we described it as "stringent" and "potent." *Katzenbach,* 383 U.S., at 308, 315, 337, 86 S.Ct. 803. We recognized that it "may have been an uncommon exercise of congressional power," but concluded that "legislative measures not otherwise appropriate" could be justified by "exceptional conditions." *Id.,* at 334, 86 S.Ct. 803. We have since noted that the Act "authorizes federal intrusion into sensitive areas of state and local policymaking," *Lopez,* 525 U.S., at 282, 119 S.Ct. 693, and represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government," *Presley v. Etowah County Comm'n,* 502 U.S. 491, 500–501, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992). As we reiterated in *Northwest Austin,* the Act constitutes "extraordinary legislation otherwise unfamiliar to our federal system." 557 U.S., at 211, 129 S.Ct. 2504.

B

In 1966, we found these departures from the basic features of our system of government justified. The "blight of racial discrimination in voting" had "infected the electoral process in parts of our country for nearly a century." *Katzenbach,* 383 U.S., at 308, 86 S.Ct. 803. Several States had enacted a variety of requirements and tests "specifically designed to prevent" African–Americans

from voting. *Id.,* at 310, 86 S.Ct. 803. Case-by-case litigation had proved inadequate to prevent such racial discrimination in voting, in part because States "merely switched to discriminatory devices not covered by the federal decrees," "enacted difficult new tests," or simply "defied and evaded court orders." *Id.,* at 314, 86 S.Ct. 803. Shortly before ***546** enactment of the Voting Rights Act, only 19.4 percent of African–Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. *Id.,* at 313, 86 S.Ct. 803. Those figures were roughly ****2625** 50 percentage points or more below the figures for whites. *Ibid.*

In short, we concluded that "[u]nder the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." *Id.,* at 334, 335, 86 S.Ct. 803. We also noted then and have emphasized since that this extraordinary legislation was intended to be temporary, set to expire after five years. *Id.,* at 333, 86 S.Ct. 803; *Northwest Austin, supra,* at 199, 129 S.Ct. 2504.

At the time, the coverage formula—the means of linking the exercise of the unprecedented authority with the problem that warranted it—made sense. We found that "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *Katzenbach,* 383 U.S., at 328, 86 S.Ct. 803. The areas where Congress found "evidence of actual voting discrimination" shared two characteristics: "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Id.,* at 330, 86 S.Ct. 803. We explained that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Ibid.* We therefore concluded that "the coverage formula [was] rational in both practice and theory." *Ibid.* It accurately reflected those jurisdictions uniquely characterized by voting discrimination "on a pervasive scale," linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement. *Id.,* at 308, 86 S.Ct. 803. The formula ensured that the "stringent remedies [were] aimed at areas where voting discrimination ha[d] been most flagrant." *Id.,* at 315, 86 S.Ct. 803.

***547** C

Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage, is now unconstitutional. Its arguments have a good deal of force. In the covered jurisdictions, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin,* 557 U.S., at

202, 129 S.Ct. 2504. The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years. See § 6, 84 Stat. 315; § 102, 89 Stat. 400.

Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." § 2(b)(1), 120 Stat. 577. The House Report elaborated that "the number of African–Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and noted that "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." H.R.Rep. 109–478, at 12 (2006), 2006 U.S.C.C.A.N. 618, 627. That Report also explained that there have been "significant increases in the number of African–Americans serving in elected offices"; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African–American elected officials in the six States originally covered by the Voting Rights Act. *Id.,* at 18.

****2626** The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These ***548** are the numbers that were before Congress when it reauthorized the Act in 2006:

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

See S.Rep. No. 109–295, p. 11 (2006)S.Rep. No. 109–295, p. 11 (2006); H.R.Rep. No. 109–478, at 12. The 2004 figures come from the Census Bureau. Census Bureau data from the most recent election indicate that African–American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Table 4b). The preclearance statistics are also illuminating. In the first decade after enactment of § 5, the Attorney General objected to 14.2 percent of proposed

voting changes. H. R Rep. No. 109–478, at 22. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent. S.Rep. No. 109–295, at 13S.Rep. No. 109–295, at 13. There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process. See § 2(b)(1), 120 Stat. 577. During the "Freedom Summer" of 1964, in Philadelphia, Mississippi, three men were murdered while working in the area to register African–American voters. See *United States v.* ***549** *Price,* 383 U.S. 787, 790, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). On "Bloody Sunday" in 1965, in Selma, Alabama, police beat and used tear gas against hundreds marching in support of African–American enfranchisement. See *Northwest Austin, supra,* at 220, n. 3, 129 S.Ct. 2504 (THOMAS, J., concurring in judgment in part and dissenting in part). Today both of those towns are governed by African–American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.

Yet the Act has not eased the restrictions in § 5 or narrowed the scope of the coverage formula in § 4(b) along the way. Those extraordinary and unprecedented features were reauthorized—as if nothing had changed. In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period. See 42 U.S.C. § 1973b(a)(8). Congress also expanded the prohibitions in § 5. We had previously interpreted § 5 to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups. See *Bossier II,* 528 U.S., at 324, 335–336, 120 S.Ct. 866. In 2006, Congress amended § 5 to prohibit laws that could have favored such groups ****2627** but did not do so because of a discriminatory purpose, see 42 U.S.C. § 1973c(c), even though we had stated that such broadening of § 5 coverage would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality," *Bossier II, supra,* at 336, 120 S.Ct. 866 (citation and internal quotation marks omitted). In addition, Congress expanded § 5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." § 1973c(b). In light of those two amendments, the bar that covered jurisdictions ***550** must clear has been raised even as the conditions justifying that requirement have dramatically improved.

We have also previously highlighted the concern that "the preclearance requirements in one State [might] be unconstitutional in another." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504; see *Georgia v. Ashcroft,* 539 U.S., at 491, 123 S.Ct. 2498 (KENNEDY, J., concurring) ("considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 [of the Voting Rights Act] seem to be what save it under § 5"). Nothing has happened since to alleviate this troubling concern about the current application of § 5.

Respondents do not deny that there have been improvements on the ground, but argue that much of this can be attributed to the deterrent effect of § 5, which dissuades covered jurisdictions from engaging in discrimination that they would resume should § 5 be struck down. Under this theory, however, § 5 would be effectively immune from scrutiny; no matter how "clean" the record of covered jurisdictions, the argument could always be made that it was deterrence that accounted for the good behavior.

The provisions of § 5 apply only to those jurisdictions singled out by § 4. We now consider whether that coverage formula is constitutional in light of current conditions.

III

A

When upholding the constitutionality of the coverage formula in 1966, we concluded that it was "rational in both practice and theory." *Katzenbach,* 383 U.S., at 330, 86 S.Ct. 803. The formula looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both.

By 2009, however, we concluded that the "coverage formula raise[d] serious constitutional questions." *Northwest Austin,* 557 U.S., at 204, 129 S.Ct. 2504. As we explained, a statute's "current burdens" must be justified by "current needs," and ***551** any "disparate geographic coverage" must be " sufficiently related to the problem that it targets." *Id.,* at 203, 129 S.Ct. 2504. The coverage formula met that test in 1965, but no longer does so.

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. § 6, 84 Stat. 315; § 102, 89 Stat. 400. And voter registration and turnout numbers in the covered States have risen dramatically in the years since. H.R.Rep. No. 109–478, at 12. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. See, *e.g.,* ****2628** *Katzenbach, supra,* at 313, 329–330, 86 S.Ct. 803. There is no longer such a disparity.

In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.

B

The Government's defense of the formula is limited. First, the Government contends that the formula is "reverse-engineered": Congress identified the jurisdictions to be covered and *then* came up with criteria to describe them. Brief for Federal Respondent 48–49. Under that reasoning, there need not be any logical relationship between the criteria in the formula and the reason for coverage; all that is necessary is that the formula happen to capture the jurisdictions Congress wanted to single out.

The Government suggests that *Katzenbach* sanctioned such an approach, but the analysis in *Katzenbach* was quite different. *Katzenbach* reasoned that the coverage formula was rational because the "formula ... was relevant to the ***552** problem": "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." 383 U.S., at 329, 330, 86 S.Ct. 803.

Here, by contrast, the Government's reverse-engineering argument does not even attempt to demonstrate the continued relevance of the formula to the problem it targets. And in the context of a decision as significant as this one—subjecting a disfavored subset of States to "extraordinary legislation otherwise unfamiliar to our federal system," *Northwest Austin, supra,* at 211, 129 S.Ct. 2504—that failure to establish even relevance is fatal.

The Government falls back to the argument that because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States Congress identified back then—regardless of how that discrimination compares to discrimination in States unburdened by coverage. Brief for Federal Respondent 49–50. This argument does not look to "current political conditions," *Northwest Austin, supra,* at 203, 129 S.Ct. 2504, but instead relies on a comparison between the States in 1965. That comparison reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African–Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. The Court invoked that history—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966. See *Katzenbach, supra,* at 308, 86 S.Ct. 803 ("The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.").

But history did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need [ ]" for a preclearance system ***553** that treats States differently from one another today, that history cannot be ignored. During that time, largely

because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African–Americans attained political office in record numbers. And yet the coverage formula that Congress **2629 reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.

The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command. The Amendment is not designed to punish for the past; its purpose is to ensure a better future. See *Rice v. Cayetano,* 528 U.S. 495, 512, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) ("Consistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment."). To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in *Northwest Austin,* and we make it clear again today.

C

In defending the coverage formula, the Government, the intervenors, and the dissent also rely heavily on data from the record that they claim justify disparate coverage. Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act. The court below and the parties have debated what that record shows—they have gone back and forth about whether to compare covered to noncovered jurisdictions as blocks, how to disaggregate the data State by State, how to weigh § 2 cases as evidence of ongoing discrimination, and whether to consider evidence not before Congress, among other issues. Compare, *e.g.,* *554 679 F.3d, at 873–883 (case below), with *id.,* at 889–902 (Williams, J., dissenting). Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time. *Katzenbach, supra,* at 308, 315, 331, 86 S.Ct. 803; *Northwest Austin,* 557 U.S., at 201, 129 S.Ct. 2504.

But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40–year–old facts having no logical relation to the present day. The dissent relies on "second-generation barriers," which are not impediments to the casting of ballots, but rather electoral arrangements that affect the weight of minority votes. That does not cure the problem. Viewing the preclearance requirements as targeting such efforts simply highlights the irrationality of continued reliance on

the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, see *post,* at 2644, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.

The dissent also turns to the record to argue that, in light of voting discrimination in Shelby County, the county cannot complain about the provisions that subject it to preclearance. *Post,* at 2644 – 2648. But that is like saying that a driver pulled over pursuant to a policy of stopping all redheads cannot complain about that policy, if it turns out his license has expired. Shelby ****2630** County's claim is that the coverage formula here is unconstitutional in all its applications, because of how it selects the jurisdictions subjected to preclearance. The ***555** county was selected based on that formula, and may challenge it in court.

D

The dissent proceeds from a flawed premise. It quotes the famous sentence from *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819), with the following emphasis: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Post,* at 2637 (emphasis in dissent). But this case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is "consist[ent] with the letter and spirit of the constitution." The dissent states that "[i]t cannot tenably be maintained" that this is an issue with regard to the Voting Rights Act, *post,* at 2637, but four years ago, in an opinion joined by two of today's dissenters, the Court expressly stated that "[t]he Act's preclearance requirement and its coverage formula raise serious constitutional questions." *Northwest Austin, supra,* at 204, 129 S.Ct. 2504. The dissent does not explain how those "serious constitutional questions" became untenable in four short years.

The dissent treats the Act as if it were just like any other piece of legislation, but this Court has made clear from the beginning that the Voting Rights Act is far from ordinary. At the risk of repetition, *Katzenbach* indicated that the Act was "uncommon" and "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions. 383 U.S., at 334, 335, 86 S.Ct. 803. Multiple decisions since have reaffirmed the Act's "extraordinary" nature. See, *e.g., Northwest Austin, supra,* at 211, 129 S.Ct. 2504. Yet the dissent goes so far as to suggest instead that the preclearance requirement and disparate treatment of the States should be upheld into the future "unless there [is] no or almost no evidence of unconstitutional action by States." *Post,* at 2650.

***556** In other ways as well, the dissent analyzes the question presented as if our decision in *Northwest Austin* never happened. For example, the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin* 's emphasis on its significance. *Northwest Austin* also emphasized the "dramatic" progress since 1965, 557 U.S., at 201, 129 S.Ct. 2504, but the dissent describes current levels of discrimination as " flagrant," "widespread," and "pervasive," *post,* at 2636, 2641 (internal quotation marks omitted). Despite the fact that *Northwest Austin* requires an Act's "disparate geographic coverage" to be "sufficiently related" to its targeted problems, 557 U.S., at 203, 129 S.Ct. 2504, the dissent maintains that an Act's limited coverage actually eases Congress's burdens, and suggests that a fortuitous relationship should suffice. Although *Northwest Austin* stated definitively that "current burdens" must be justified by "current needs," *ibid.*, the dissent argues that the coverage formula can be justified by history, and that the required showing can be weaker on reenactment than when the law was first passed.

There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish ****2631** between States in such a fundamental way based on 40–year–old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

* * *

Striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden,* 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the ***557** Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley,* 502 U.S., at 500–501, 112 S.Ct. 820. Our country has changed, and while any racial discrimination

in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

The judgment of the Court of Appeals is reversed.

It is so ordered.

Justice THOMAS, concurring.
I join the Court's opinion in full but write separately to explain that I would find § 5 of the Voting Rights Act unconstitutional as well. The Court's opinion sets forth the reasons.

"The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem." *Ante,* at 2618. In the face of "unremitting and ingenious defiance" of citizens' constitutionally protected right to vote, § 5 was necessary to give effect to the Fifteenth Amendment in particular regions of the country. *South Carolina v. Katzenbach,* 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Though § 5's preclearance ***558** requirement represented a "shar[p] depart[ure]" from "basic principles" of federalism and the equal sovereignty of the States, *ante,* at 2622, 2623, the Court upheld the measure against early constitutional challenges because it was necessary at the time to address "voting discrimination where it persist[ed] on a pervasive scale." *Katzenbach, supra,* at 308, 86 S.Ct. 803.

Today, our Nation has changed. "[T]he conditions that originally justified [§ 5] no longer characterize voting in the covered jurisdictions." *Ante,* at 2618. As the Court explains: " '[V]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.' " *Ante,* at 2625 (quoting ****2632** *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 202, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009)).

In spite of these improvements, however, Congress *increased* the already significant burdens of § 5. Following its reenactment in 2006, the Voting Rights Act was amended to "prohibit more conduct than before." *Ante,* at 2621. "Section 5 now forbids voting changes with 'any discriminatory purpose' as well as voting changes that diminish the ability of citizens, on account of race, color, or language minority status, 'to elect their preferred candidates of choice.' " *Ante,* at 2621. While the pre–2006 version of the Act went well beyond protection guaranteed under the Constitution, see *Reno v. Bossier Parish School Bd.,* 520 U.S. 471, 480–482, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997), it now goes even further.

It is, thus, quite fitting that the Court repeatedly points out that this legislation is "extraordinary" and "unprecedented" and recognizes the significant constitutional problems created by Congress'

decision to raise "the bar that covered jurisdictions must clear," even as "the conditions justifying that requirement have dramatically improved." *Ante,* at 2627. However one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by § 5. As the Court aptly notes: "[N]o one can fairly say that [the record] shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination ***559** that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time." *Ante,* at 2629. Indeed, circumstances in the covered jurisdictions can no longer be characterized as "exceptional" or "unique." "The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists." *Northwest Austin, supra,* at 226, 129 S.Ct. 2504 (THOMAS, J., concurring in judgment in part and dissenting in part). Section 5 is, thus, unconstitutional.

While the Court claims to "issue no holding on § 5 itself," *ante,* at 2631, its own opinion compellingly demonstrates that Congress has failed to justify " 'current burdens' " with a record demonstrating " 'current needs.' " See *ante,* at 2622 (quoting *Northwest Austin, supra,* at 203, 129 S.Ct. 2504). By leaving the inevitable conclusion unstated, the Court needlessly prolongs the demise of that provision. For the reasons stated in the Court's opinion, I would find § 5 unconstitutional.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In the Court's view, the very success of § 5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, § 5 remains justifiable,[1] this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments "by appropriate legislation." With overwhelming support in both Houses, Congress concluded that, for two prime reasons, § 5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would ***560** guard against backsliding. Those assessments were well within Congress' province to make and ****2633** should elicit this Court's unstinting approbation.

I

"[V]oting discrimination still exists; no one doubts that." *Ante,* at 2619. But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been

tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

A century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the "blight of racial discrimination in voting" continued to "infec[t] the electoral process in parts of our country." *South Carolina v. Katzenbach,* 383 U.S. 301, 308, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable "variety and persistence" of laws disenfranchising minority citizens. *Id.,* at 311, 86 S.Ct. 803. To take just one example, the Court, in 1927, held unconstitutional a Texas law barring black voters from participating in primary elections, *Nixon v. Herndon,* 273 U.S. 536, 541, 47 S.Ct. 446, 71 L.Ed. 759; in 1944, the Court struck down a "reenacted" and slightly altered version of the same law, *Smith v. Allwright,* 321 U.S. 649, 658, 64 S.Ct. 757, 88 L.Ed. 987; and in 1953, the Court once again confronted an attempt by Texas to "circumven[t]" the Fifteenth Amendment by adopting yet another variant of the all-white primary, *Terry v. Adams,* 345 U.S. 461, 469, 73 S.Ct. 809, 97 L.Ed. 1152.

***561** During this era, the Court recognized that discrimination against minority voters was a quintessentially political problem requiring a political solution. As Justice Holmes explained: If "the great mass of the white population intends to keep the blacks from voting," "relief from [that] great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." *Giles v. Harris,* 189 U.S. 475, 488, 23 S.Ct. 639, 47 L.Ed. 909 (1903).

Congress learned from experience that laws targeting particular electoral practices or enabling case-by-case litigation were inadequate to the task. In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of "the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds." *Katzenbach,* 383 U.S., at 313, 86 S.Ct. 803. But circumstances reduced the ameliorative potential of these legislative Acts:

> "Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the

existing disparity between white and Negro registration. Alternatively, certain local officials have defied ****2634** and evaded court orders or have simply closed their registration offices to freeze the voting rolls." *Id.,* at 314, 86 S.Ct. 803 (footnote omitted).

Patently, a new approach was needed.

***562** Answering that need, the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history. Requiring federal preclearance of changes in voting laws in the covered jurisdictions—those States and localities where opposition to the Constitution's commands were most virulent—the VRA provided a fit solution for minority voters as well as for States. Under the preclearance regime established by § 5 of the VRA, covered jurisdictions must submit proposed changes in voting laws or procedures to the Department of Justice (DOJ), which has 60 days to respond to the changes. 79 Stat. 439, codified at 42 U.S.C. § 1973c(a). A change will be approved unless DOJ finds it has "the purpose [or] ... the effect of denying or abridging the right to vote on account of race or color." *Ibid.* In the alternative, the covered jurisdiction may seek approval by a three-judge District Court in the District of Columbia.

After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal improvement on this front. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965." Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting 7, 21 (B. Grofman & C. Davidson eds. 1992). And in assessing the overall effects of the VRA in 2006, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and ***563** Amendments Act of 2006 (hereinafter 2006 Reauthorization), § 2(b) (1), 120 Stat. 577. On that matter of cause and effects there can be no genuine doubt.

Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens. Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated. *City of Rome v. United States,* 446 U.S. 156, 181, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980). Congress also found that as "registration and voting of minority citizens increas[ed], other measures may be resorted to which would dilute increasing minority voting

strength." *Ibid.* (quoting H.R.Rep. No. 94–196, p. 10 (1975)H.R.Rep. No. 94–196, p. 10 (1975)). See also *Shaw v. Reno,* 509 U.S. 630, 640, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) ("[I]t soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices" such as voting dilution). Efforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot, are aptly described as "second-generation barriers" to minority voting.

**2635 Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an "effort to segregate the races for purposes of voting." *Id.,* at 642, 113 S.Ct. 2816. Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the minority's votes. Grofman & Davidson, The Effect of Municipal Election Structure on Black Representation in Eight Southern States, in Quiet Revolution in the *564 South 301, 319 (C. Davidson & B. Grofman eds. 1994) (hereinafter Quiet Revolution). A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits, thereby decreasing the effect of VRA-occasioned increases in black voting. Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot. *Shaw,* 509 U.S., at 640–641, 113 S.Ct. 2816; *Allen v. State Bd. of Elections,* 393 U.S. 544, 569, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969); *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). See also H.R.Rep. No. 109–478, p. 6 (2006) (although "[d]iscrimination today is more subtle than the visible methods used in 1965," "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates").

In response to evidence of these substituted barriers, Congress reauthorized the VRA for five years in 1970, for seven years in 1975, and for 25 years in 1982. *Ante,* at 2620 – 2621. Each time, this Court upheld the reauthorization as a valid exercise of congressional power. *Ante,* at 2620. As the 1982 reauthorization approached its 2007 expiration date, Congress again considered whether the VRA's preclearance mechanism remained an appropriate response to the problem of voting discrimination in covered jurisdictions.

Congress did not take this task lightly. Quite the opposite. The 109th Congress that took responsibility for the renewal started early and conscientiously. In October 2005, the House began extensive hearings, which continued into November and resumed in March 2006. S.Rep. No. 109–295, p. 2 (2006)S.Rep. No. 109–295, p. 2 (2006). In April 2006, the Senate followed suit, with hearings of its own. *Ibid.* In May 2006, the bills that became the VRA's reauthorization were introduced in both Houses. *Ibid.* The House held further hearings of considerable length, as did

the Senate, which continued to hold hearings into June and July. H.R. Rep. 109–478, at 5; ***565** S. Rep. 109–295, at 3–4S. Rep. 109–295, at 3–4. In mid-July, the House considered and rejected four amendments, then passed the reauthorization by a vote of 390 yeas to 33 nays. 152 Cong. Rec. H5207 (July 13, 2006); Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 182–183 (2007) (hereinafter Persily). The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. 152 Cong. Rec. S8012 (July 20, 2006). President Bush signed it a week later, on July 27, 2006, recognizing the need for "further work ... in the fight against injustice," and calling the reauthorization "an example of our continued commitment to a united America where every person is valued and treated with dignity and respect." 152 Cong. Rec. S8781 (Aug. 3, 2006).

In the long course of the legislative process, Congress "amassed a sizable record." ****2636** *Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 205, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). See also 679 F.3d 848, 865–873 (C.A.D.C.2012) (describing the "extensive record" supporting Congress' determination that "serious and widespread intentional discrimination persisted in covered jurisdictions"). The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. H.R. Rep. 109–478, at 5, 11–12; S. Rep. 109–295, at 2–4, 15S. Rep. 109–295, at 2–4, 15. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed." 679 F.3d, at 866.

After considering the full legislative record, Congress made the following findings: The VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority ***566** voter registration and turnout and the number of minority elected officials. 2006 Reauthorization § 2(b)(1). But despite this progress, "second generation barriers constructed to prevent minority voters from fully participating in the electoral process" continued to exist, as well as racially polarized voting in the covered jurisdictions, which increased the political vulnerability of racial and language minorities in those jurisdictions. §§ 2(b)(2)-(3), 120 Stat. 577. Extensive "[e]vidence of continued discrimination," Congress concluded, "clearly show[ed] the continued need for Federal oversight" in covered jurisdictions. §§ 2(b)(4)-(5), *id.,* at 577–578. The overall record demonstrated to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." § 2(b)(9), *id.,* at 578.

Based on these findings, Congress reauthorized preclearance for another 25 years, while also undertaking to reconsider the extension after 15 years to ensure that the provision was still

necessary and effective. 42 U.S.C. § 1973b(a)(7), (8) (2006 ed., Supp. V). The question before the Court is whether Congress had the authority under the Constitution to act as it did.

II

In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference. The VRA addresses the combination of race discrimination and the right to vote, which is "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height.

***567** The basis for this deference is firmly rooted in both constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, "Congress shall have power to enforce this article by appropriate legislation."[2] In choosing this language, the ****2637** Amendment's framers invoked Chief Justice Marshall's formulation of the scope of Congress' powers under the Necessary and Proper Clause:

> "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819) (emphasis added).

It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today's opinion, or in *Northwest Austin,*[3] is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve. Notably, "the Founders' first successful amendment told Congress that it could 'make no law' over a ***568** certain domain"; in contrast, the Civil War Amendments used " language [that] authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality" and provided "sweeping enforcement powers ... to enact 'appropriate' legislation targeting state abuses." A. Amar, America's Constitution: A Biography 361, 363, 399 (2005). See also McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores,* 111 Harv. L.Rev. 153, 182 (1997) (quoting Civil War-era framer that "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative.").

The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use "all means which are appropriate, which are plainly adapted" to the constitutional ends declared by these Amendments. *McCulloch,* 4 Wheat., at 421. So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. "It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach v. Morgan,* 384 U.S. 641, 653, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966).

Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its ****2638** judgments in this domain should garner. *South Carolina v. Katzenbach* supplies the standard of review: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." 383 U.S., at 324, 86 S.Ct. 803. Faced with subsequent reauthorizations of the VRA, the ***569** Court has reaffirmed this standard. *E.g., City of Rome,* 446 U.S., at 178, 100 S.Ct. 1548. Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed "rational means."

For three reasons, legislation *re*authorizing an existing statute is especially likely to satisfy the minimal requirements of the rational-basis test. First, when reauthorization is at issue, Congress has already assembled a legislative record justifying the initial legislation. Congress is entitled to consider that preexisting record as well as the record before it at the time of the vote on reauthorization. This is especially true where, as here, the Court has repeatedly affirmed the statute's constitutionality and Congress has adhered to the very model the Court has upheld. See *id.,* at 174, 100 S.Ct. 1548 ("The appellants are asking us to do nothing less than overrule our decision in *South Carolina v. Katzenbach* ..., in which we upheld the constitutionality of the Act."); *Lopez v. Monterey County,* 525 U.S. 266, 283, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999) (similar).

Second, the very fact that reauthorization is necessary arises because Congress has built a temporal limitation into the Act. It has pledged to review, after a span of years (first 15, then 25) and in light of contemporary evidence, the continued need for the VRA. Cf. *Grutter v. Bollinger,* 539 U.S. 306, 343, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (anticipating, but not guaranteeing, that, in 25 years, "the use of racial preferences [in higher education] will no longer be necessary").

Third, a reviewing court should expect the record supporting reauthorization to be less stark than the record originally made. Demand for a record of violations equivalent to the one earlier made would expose Congress to a catch–22. If the statute was working, there would be less evidence of

discrimination, so opponents might argue that Congress should not be allowed to renew the statute. In contrast, if the statute was not working, there would be plenty of evidence of discrimination, but scant reason to renew a failed regulatory regime. See Persily 193–194.

***570** This is not to suggest that congressional power in this area is limitless. It is this Court's responsibility to ensure that Congress has used appropriate means. The question meet for judicial review is whether the chosen means are "adapted to carry out the objects the amendments have in view." *Ex parte Virginia,* 100 U.S. 339, 346, 25 L.Ed. 676 (1880). The Court's role, then, is not to substitute its judgment for that of Congress, but to determine whether the legislative record sufficed to show that "Congress could rationally have determined that [its chosen] provisions were appropriate methods." *City of Rome,* 446 U.S., at 176–177, 100 S.Ct. 1548.

In summary, the Constitution vests broad power in Congress to protect the right to vote, and in particular to combat racial discrimination in voting. This Court has repeatedly reaffirmed Congress' prerogative to use any rational means in exercise of its power in this area. And both precedent and logic dictate that the rational-means test should be easier to satisfy, and the burden on the statute's challenger should be higher, when what is at issue is the reauthorization of a remedy that the Court has previously affirmed, and that Congress found, from contemporary evidence, ****2639** to be working to advance the legislature's legitimate objective.

III

The 2006 reauthorization of the Voting Rights Act fully satisfies the standard stated in *McCulloch,* 4 Wheat., at 421: Congress may choose any means "appropriate" and "plainly adapted to" a legitimate constitutional end. As we shall see, it is implausible to suggest otherwise.

A

I begin with the evidence on which Congress based its decision to continue the preclearance remedy. The surest way to evaluate whether that remedy remains in order is to see if preclearance is still effectively preventing discriminatory changes to voting laws. See *City of Rome,* 446 U.S., at 181, 100 S.Ct. 1548 (identifying "information on the number and types of ***571** submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General" as a primary basis for upholding the 1975 reauthorization). On that score, the record before Congress was huge. In fact, Congress found there were *more* DOJ objections between 1982 and 2004 (626) than there were between 1965 and the 1982 reauthorization (490). 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the

House Committee on the Judiciary, 109th Cong., 2d Sess., p. 172 (2006) (hereinafter Evidence of Continued Need).

All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory. H.R.Rep. No. 109–478, at 21. Congress found that the majority of DOJ objections included findings of discriminatory intent, see 679 F.3d, at 867, and that the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process." H.R. Rep. 109–478, at 21 (2006), 2006 U.S.C.C.A.N. 618, 631. On top of that, over the same time period the DOJ and private plaintiffs succeeded in more than 100 actions to enforce the § 5 preclearance requirements. 1 Evidence of Continued Need 186, 250.

In addition to blocking proposed voting changes through preclearance, DOJ may request more information from a jurisdiction proposing a change. In turn, the jurisdiction may modify or withdraw the proposed change. The number of such modifications or withdrawals provides an indication of how many discriminatory proposals are deterred without need for formal objection. Congress received evidence that more than 800 proposed changes were altered or withdrawn since the last reauthorization in 1982. H.R.Rep. No. 109–478, at 40–41.[4] Congress also received empirical studies ***572** finding that DOJ's requests for more information had a significant effect on the degree to which covered ****2640** jurisdictions "compl[ied] with their obligatio[n]" to protect minority voting rights. 2 Evidence of Continued Need 2555.

Congress also received evidence that litigation under § 2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. 1 Evidence of Continued Need 97. An illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it. 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005) (hereinafter Section 5 Hearing). And litigation places a heavy financial burden on minority voters. See *id.,* at 84. Congress also received evidence that preclearance lessened the litigation burden on covered jurisdictions themselves, because the preclearance process is far less costly than defending against a § 2 claim, and clearance by DOJ substantially reduces the likelihood that a § 2 claim will be mounted. Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views From the Field: Hearing before the Subcommittee on the Constitution, Civil Rights and Property Rights of the Senate Committee on the Judiciary, 109th Cong., 2d Sess., ***573** pp. 13, 120–121 (2006). See also Brief for States of New York, California, Mississippi, and North Carolina as *Amici Curiae* 8–9 (Section 5 "reduc[es] the likelihood that a jurisdiction will face costly and protracted Section 2 litigation").

The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy. Surveying the type of changes stopped by the preclearance procedure conveys a sense of the extent to which § 5 continues to protect minority voting rights. Set out below are characteristic examples of changes blocked in the years leading up to the 2006 reauthorization:

- In 1995, Mississippi sought to reenact a dual voter registration system, "which was initially enacted in 1892 to disenfranchise Black voters," and for that reason, was struck down by a federal court in 1987. H.R.Rep. No. 109–478, at 39.

- Following the 2000 census, the City of Albany, Georgia, proposed a redistricting plan that DOJ found to be "designed with the purpose to limit and retrogress the increased black voting strength ... in the city as a whole." *Id.,* at 37 (internal quotation marks omitted).

- In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town's election after "an unprecedented number" of African–American candidates announced they were running for office. DOJ required an election, and the town elected its first black mayor and three black aldermen. *Id.,* at 36–37.

- In 2006, this Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore "the mark of intentional discrimination that could give rise to an equal protection violation," and ordered the district redrawn in compliance with the VRA. ***574** *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 440 [126 S.Ct. 2594, 165 L.Ed.2d 609] (2006). In response, ****2641** Texas sought to undermine this Court's order by curtailing early voting in the district, but was blocked by an action to enforce the § 5 preclearance requirement. See Order in *League of United Latin American Citizens v. Texas,* No. 06–cv–1046 (WD Tex.), Doc. 8.

- In 2003, after African–Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African–American members of the school board, was found to be an " 'exact replica' " of an earlier voting scheme that, a federal court had determined, violated the VRA. 811 F.Supp.2d 424, 483 (D.D.C.2011). See also S.Rep. No. 109–295S.Rep. No. 109–295, at 309. DOJ invoked § 5 to block the proposal.

- In 1993, the City of Millen, Georgia, proposed to delay the election in a majority-black district by two years, leaving that district without representation on the city council while the neighboring majority-white district would have three representatives. 1 Section 5 Hearing 744. DOJ blocked the proposal. The county then sought to move a polling place from a predominantly black neighborhood in the city to an inaccessible location in a predominantly white neighborhood outside city limits. *Id.,* at 816.

- In 2004, Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office. The county then attempted to reduce the availability of early voting in that election at polling places near a historically black university. 679 F.3d, at 865–866.

- In 1990, Dallas County, Alabama, whose county seat is the City of Selma, sought to purge its voter rolls of many black voters. DOJ rejected the purge as discriminatory, ***575** noting that it would have disqualified many citizens from voting "simply because they failed to pick up or return a voter update form, when there was no valid requirement that they do so." 1 Section 5 Hearing 356.

These examples, and scores more like them, fill the pages of the legislative record. The evidence was indeed sufficient to support Congress' conclusion that "racial discrimination in voting in covered jurisdictions [remained] serious and pervasive." 679 F.3d, at 865. [5]

Congress further received evidence indicating that formal requests of the kind set out above represented only the tip of the iceberg. There was what one commentator described as an "avalanche of case studies of voting rights violations in the covered jurisdictions," ranging from "outright intimidation and violence against minority voters" to "more subtle forms of voting rights deprivations." Persily 202 ****2642** (footnote omitted). This evidence gave Congress ever more reason to conclude that the time had not yet come for relaxed vigilance against the scourge of race discrimination in voting.

True, conditions in the South have impressively improved since passage of the Voting Rights Act. Congress noted this improvement and found that the VRA was the driving force behind it. 2006 Reauthorization § 2(b)(1). But Congress also found that voting discrimination had evolved into ***576** subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made. §§ 2(b)(2), (9). Concerns of this order, the Court previously found, gave Congress adequate cause to reauthorize the VRA. *City of Rome,* 446 U.S., at 180–182, 100 S.Ct. 1548 (congressional reauthorization of the preclearance requirement was justified based on "the number and nature of objections interposed by the Attorney General" since the prior reauthorization; extension was "necessary to preserve the limited and fragile achievements of the Act and to promote further amelioration of voting discrimination") (internal quotation marks omitted). Facing such evidence then, the Court expressly rejected the argument that disparities in voter turnout and number of elected officials were the only metrics capable of justifying reauthorization of the VRA. *Ibid.*

B

I turn next to the evidence on which Congress based its decision to reauthorize the coverage formula in § 4(b). Because Congress did not alter the coverage formula, the same jurisdictions previously subject to preclearance continue to be covered by this remedy. The evidence just described, of preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions, itself grounded Congress' conclusion that the remedy should be retained for those jurisdictions.

There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting. *Ante,* at 2624 – 2625. Consideration of this long history, still in living memory, was altogether appropriate. The Court criticizes Congress for failing to recognize that "history did not end in 1965." *Ante,* at 2628. But the Court ignores that "what's past is prologue." W. Shakespeare, The Tempest, act 2, sc. 1. And "[t]hose who cannot remember the past are condemned to repeat it." 1 G. Santayana, The Life of Reason 284 (1905). Congress was ***577** especially mindful of the need to reinforce the gains already made and to prevent backsliding. 2006 Reauthorization § 2(b)(9).

Of particular importance, even after 40 years and thousands of discriminatory changes blocked by preclearance, conditions in the covered jurisdictions demonstrated that the formula was still justified by "current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

Congress learned of these conditions through a report, known as the Katz study, that looked at § 2 suits between 1982 and 2004. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., pp. 964–1124 (2005) (hereinafter Impact and Effectiveness). Because the private right of action authorized by § 2 of the VRA applies nationwide, a comparison of § 2 lawsuits in covered and noncovered jurisdictions provides an appropriate yardstick for measuring differences between covered and noncovered jurisdictions. If differences in the risk of voting discrimination between covered and noncovered jurisdictions had disappeared, one would ****2643** expect that the rate of successful § 2 lawsuits would be roughly the same in both areas. [6] The study's findings, however, indicated that racial discrimination in voting remains "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504.

Although covered jurisdictions account for less than 25 percent of the country's population, the Katz study revealed that they accounted for 56 percent of successful § 2 litigation since 1982. Impact and Effectiveness 974. Controlling for population, there were nearly *four* times as many successful § 2 cases in covered jurisdictions as there were in noncovered ***578** jurisdictions. 679

F.3d, at 874. The Katz study further found that § 2 lawsuits are more likely to succeed when they are filed in covered jurisdictions than in noncovered jurisdictions. Impact and Effectiveness 974. From these findings—ignored by the Court—Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.

The evidence before Congress, furthermore, indicated that voting in the covered jurisdictions was more racially polarized than elsewhere in the country. H.R.Rep. No. 109–478, at 34–35. While racially polarized voting alone does not signal a constitutional violation, it is a factor that increases the vulnerability of racial minorities to discriminatory changes in voting law. The reason is twofold. First, racial polarization means that racial minorities are at risk of being systematically outvoted and having their interests underrepresented in legislatures. Second, "when political preferences fall along racial lines, the natural inclinations of incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages." Ansolabehere, Persily, & Stewart, Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act, 126 Harv. L.Rev. Forum 205, 209 (2013).

In other words, a governing political coalition has an incentive to prevent changes in the existing balance of voting power. When voting is racially polarized, efforts by the ruling party to pursue that incentive "will inevitably discriminate against a racial group." *Ibid.* Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination. This point was understood by Congress and is well recognized in the academic ***579** literature. See 2006 Reauthorization § 2(b)(3), 120 Stat. 577 ("The continued evidence of racially polarized voting in each of the jurisdictions covered by the [preclearance requirement] demonstrates that racial and language minorities remain politically vulnerable"); H.R.Rep. No. 109–478, at 35 (2006), 2006 U.S.C.C.A.N. 618; Davidson, The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution 21, 22.

The case for retaining a coverage formula that met needs on the ground was therefore solid. Congress might have been charged with rigidity had it afforded covered ****2644** jurisdictions no way out or ignored jurisdictions that needed superintendence. Congress, however, responded to this concern. Critical components of the congressional design are the statutory provisions allowing jurisdictions to "bail out" of preclearance, and for court-ordered "bail ins." See *Northwest Austin,* 557 U.S., at 199, 129 S.Ct. 2504. The VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters. 42 U.S.C. § 1973b(a) (2006 ed. and Supp. V). It also authorizes a court to subject a noncovered jurisdiction to federal preclearance upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there. § 1973a(c) (2006 ed.).

Congress was satisfied that the VRA's bailout mechanism provided an effective means of adjusting the VRA's coverage over time. H.R.Rep. No. 109–478, at 25 (the success of bailout "illustrates that: (1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so"). Nearly 200 jurisdictions have successfully bailed out of the preclearance requirement, and DOJ has consented to every bailout application filed by an eligible jurisdiction since the current bailout procedure became effective in 1984. Brief for Federal Respondent 54. The bail-in mechanism has also ***580** worked. Several jurisdictions have been subject to federal preclearance by court orders, including the States of New Mexico and Arkansas. App. to Brief for Federal Respondent 1a–3a.

This experience exposes the inaccuracy of the Court's portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions. True, many covered jurisdictions have not been able to bail out due to recent acts of noncompliance with the VRA, but that truth reinforces the congressional judgment that these jurisdictions were rightfully subject to preclearance, and ought to remain under that regime.

IV

Congress approached the 2006 reauthorization of the VRA with great care and seriousness. The same cannot be said of the Court's opinion today. The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story. See *supra,* at 2641 – 2642. Without even identifying a standard of review, the Court dismissively brushes off arguments based on "data from the record," and declines to enter the "debat [e about] what [the] record shows." *Ante,* at 2629. One would expect more from an opinion striking at the heart of the Nation's signal piece of civil-rights legislation.

I note the most disturbing lapses. First, by what right, given its usual restraint, does the Court even address Shelby County's facial challenge to the VRA? Second, the Court veers away from controlling precedent regarding the "equal sovereignty" doctrine without even acknowledging that it is doing so. Third, hardly showing the respect ordinarily paid when Congress acts to implement the Civil War Amendments, and as just stressed, the Court does not even deign to grapple with the legislative record.

***581** A

Shelby County launched a purely facial challenge to the VRA's 2006 reauthorization. **2645 "A facial challenge to a legislative Act," the Court has other times said, "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

"[U]nder our constitutional system[,] courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma,* 413 U.S. 601, 610–611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Instead, the "judicial Power" is limited to deciding particular "Cases" and "Controversies." U.S. Const., Art. III, § 2. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick,* 413 U.S., at 610, 93 S.Ct. 2908. Yet the Court's opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit—Shelby County, Alabama. The reason for the Court's silence is apparent, for as applied to Shelby County, the VRA's preclearance requirement is hardly contestable.

Alabama is home to Selma, site of the "Bloody Sunday" beatings of civil-rights demonstrators that served as the catalyst for the VRA's enactment. Following those events, Martin Luther King, Jr., led a march from Selma to Montgomery, Alabama's capital, where he called for passage of the VRA. If the Act passed, he foresaw, progress could be made even in Alabama, but there had to be a steadfast national commitment to see the task through to completion. In King's words, "the arc of the moral universe is long, but it bends toward justice." G. May, Bending Toward Justice: *582 The Voting Rights Act and the Transformation of American Democracy 144 (2013).

History has proved King right. Although circumstances in Alabama have changed, serious concerns remain. Between 1982 and 2005, Alabama had one of the highest rates of successful § 2 suits, second only to its VRA-covered neighbor Mississippi. 679 F.3d, at 897 (Williams, J., dissenting). In other words, even while subject to the restraining effect of § 5, Alabama was found to have "deni[ed] or abridge[d]" voting rights "on account of race or color" more frequently than nearly all other States in the Union. 42 U.S.C. § 1973(a). This fact prompted the dissenting judge below to concede that "a more narrowly tailored coverage formula" capturing Alabama and a handful of other jurisdictions with an established track record of racial discrimination in voting "might be defensible." 679 F.3d, at 897 (opinion of Williams, J.). That is an understatement. Alabama's sorry history of § 2 violations alone provides sufficient justification for Congress' determination in 2006 that the State should remain subject to § 5's preclearance requirement. [7]

**2646 A few examples suffice to demonstrate that, at least in Alabama, the "current burdens" imposed by § 5's preclearance requirement are "justified by current needs." *Northwest Austin,* 557 U.S., at 203, 129 S.Ct. 2504. In the interim between the VRA's 1982 and 2006 reauthorizations, this Court twice confronted purposeful racial discrimination in Alabama. In *Pleasant Grove v. United States,* 479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987), the Court held that Pleasant Grove—a city in Jefferson County, Shelby County's neighbor—engaged in purposeful *583 discrimination by annexing all-white areas while rejecting the annexation request of an adjacent black neighborhood. The city had "shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws," and its strategic annexations appeared to be an attempt "to provide for the growth of a monolithic white voting block" for "the impermissible purpose of minimizing future black voting strength." *Id.,* at 465, 471–472, 107 S.Ct. 794.

Two years before *Pleasant Grove,* the Court in *Hunter v. Underwood,* 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985), struck down a provision of the Alabama Constitution that prohibited individuals convicted of misdemeanor offenses "involving moral turpitude" from voting. *Id.,* at 223, 105 S.Ct. 1916 (internal quotation marks omitted). The provision violated the Fourteenth Amendment's Equal Protection Clause, the Court unanimously concluded, because "its original enactment was motivated by a desire to discriminate against blacks on account of race[,] and the [provision] continues to this day to have that effect." *Id.,* at 233, 105 S.Ct. 1916.

Pleasant Grove and *Hunter* were not anomalies. In 1986, a Federal District Judge concluded that the at-large election systems in several Alabama counties violated § 2. *Dillard v. Crenshaw Cty.,* 640 F.Supp. 1347, 1354–1363 (M.D.Ala.1986). Summarizing its findings, the court stated that "[f]rom the late 1800's through the present, [Alabama] has consistently erected barriers to keep black persons from full and equal participation in the social, economic, and political life of the state." *Id.,* at 1360.

The *Dillard* litigation ultimately expanded to include 183 cities, counties, and school boards employing discriminatory at-large election systems. *Dillard v. Baldwin Cty. Bd. of Ed.,* 686 F.Supp. 1459, 1461 (M.D.Ala.1988). One of those defendants was Shelby County, which eventually signed a consent decree to resolve the claims against it. See *Dillard v. Crenshaw Cty.,* 748 F.Supp. 819 (M.D.Ala.1990).

Although the *Dillard* litigation resulted in overhauls of numerous electoral systems tainted by racial discrimination, concerns about backsliding persist. In 2008, for example, *584 the city of Calera, located in Shelby County, requested preclearance of a redistricting plan that "would have eliminated the city's sole majority-black district, which had been created pursuant to the consent

decree in *Dillard*." 811 F.Supp.2d 424, 443 (D.D.C.2011). Although DOJ objected to the plan, Calera forged ahead with elections based on the unprecleared voting changes, resulting in the defeat of the incumbent African–American councilman who represented the former majority-black district. *Ibid.* The city's defiance required DOJ to bring a § 5 enforcement action that ultimately yielded appropriate redress, including restoration of the majority-black district. *Ibid.*; Brief for Respondent–Intervenors Earl Cunningham et al. 20.

A recent FBI investigation provides a further window into the persistence of racial discrimination in state politics. See ****2647** *United States v. McGregor,* 824 F.Supp.2d 1339, 1344–1348 (M.D.Ala.2011). Recording devices worn by state legislators cooperating with the FBI's investigation captured conversations between members of the state legislature and their political allies. The recorded conversations are shocking. Members of the state Senate derisively refer to African–Americans as "Aborigines" and talk openly of their aim to quash a particular gambling-related referendum because the referendum, if placed on the ballot, might increase African–American voter turnout. *Id.,* at 1345–1346 (internal quotation marks omitted). See also *id.,* at 1345 (legislators and their allies expressed concern that if the referendum were placed on the ballot, " '[e]very black, every illiterate' would be 'bused [to the polls] on HUD financed buses' "). These conversations occurred not in the 1870's, or even in the 1960's, they took place in 2010. *Id.,* at 1344–1345. The District Judge presiding over the criminal trial at which the recorded conversations were introduced commented that the "recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem" in Alabama. ***585** *Id.,* at 1347. Racist sentiments, the judge observed, "remain regrettably entrenched in the high echelons of state government." *Ibid.*

These recent episodes forcefully demonstrate that § 5's preclearance requirement is constitutional as applied to Alabama and its political subdivisions.[8] And under our case law, that conclusion should suffice to resolve this case. See *United States v. Raines,* 362 U.S. 17, 24–25, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) ("[I]f the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality."). See also *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721, 743, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (SCALIA, J., dissenting) (where, as here, a state or local government raises a facial challenge to a federal statute on the ground that it exceeds Congress' enforcement powers under the Civil War Amendments, the challenge fails if the opposing party is able to show that the statute "could constitutionally be applied to *some* jurisdictions").

This Court has consistently rejected constitutional challenges to legislation enacted pursuant to Congress' enforcement powers under the Civil War Amendments upon finding that the legislation was constitutional as applied to the particular set of circumstances before the Court. See *United States v. Georgia,* 546 U.S. 151, 159, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006) (Title II of the

Americans with Disabilities Act of 1990 (ADA) validly abrogates state sovereign immunity "insofar as [it] creates a private cause of action ... for conduct that *actually* violates the Fourteenth Amendment"); *Tennessee v. Lane,* 541 U.S. 509, 530–534, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (Title II of the ADA is constitutional "as it applies to the class of cases implicating the fundamental right of access to the courts"); ***586** *Raines,* 362 U.S., at 24–26, 80 S.Ct. 519 (federal statute proscribing deprivations of the right to vote based on race was constitutional as applied to the state officials before the Court, even if it could not constitutionally be applied to other parties). A similar approach is warranted here. [9]

****2648** The VRA's exceptionally broad severability provision makes it particularly inappropriate for the Court to allow Shelby County to mount a facial challenge to §§ 4(b) and 5 of the VRA, even though application of those provisions to the county falls well within the bounds of Congress' legislative authority. The severability provision states:

> "If any provision of [this Act] or the application thereof to any person or circumstances is held invalid, the remainder of [the Act] and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby." 42 U.S.C. § 1973p.

In other words, even if the VRA could not constitutionally be applied to certain States—*e.g.,* Arizona and Alaska, see *ante,* at 2622 —§ 1973p calls for those unconstitutional applications to be severed, leaving the Act in place for juris-dictions as to which its application does not transgress constitutional limits.

Nevertheless, the Court suggests that limiting the jurisdictional scope of the VRA in an appropriate case would be "to try our hand at updating the statute." *Ante,* at 2629. ***587** Just last Term, however, the Court rejected this very argument when addressing a materially identical severability provision, explaining that such a provision is "Congress' explicit textual instruction to leave unaffected the remainder of [the Act]" if any particular " application is unconstitutional." *National Federation of Independent Business v. Sebelius,* 567 U.S. ——, ——, 132 S.Ct. 2566, 2639, 183 L.Ed.2d 450 (2012) (plurality opinion) (internal quotation marks omitted); *id.,* at ——, 132 S.Ct., at 2641–2642 (GINSBURG, J., concurring in part, concurring in judgment in part, and dissenting in part) (slip op., at 60) (agreeing with the plurality's severability analysis). See also *Raines,* 362 U.S., at 23, 80 S.Ct. 519 (a statute capable of some constitutional applications may nonetheless be susceptible to a facial challenge only in "that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application"). Leaping to resolve Shelby County's facial challenge without considering whether application of the VRA to Shelby County is constitutional, or even addressing the VRA's severability provision, the Court's opinion

can hardly be described as an exemplar of restrained and moderate decisionmaking. Quite the opposite. Hubris is a fit word for today's demolition of the VRA.

B

The Court stops any application of § 5 by holding that § 4(b)'s coverage formula is unconstitutional. It pins this result, in large measure, to "the fundamental principle of equal sovereignty." *Ante,* at 2623 – 2624, 2630. In *Katzenbach,* however, the Court held, in no uncertain terms, that the principle "*applies only to the terms upon which States are admitted to the Union,* and not to the remedies for local evils which have subsequently appeared." 383 U.S., at 328–329, 86 S.Ct. 803 (emphasis added).

****2649** *Katzenbach,* the Court acknowledges, "rejected the notion that the [equal sovereignty] principle operate[s] as a bar on ***588** differential treatment outside [the] context [of the admission of new States]." *Ante,* at 2623 – 2624 (citing 383 U.S., at 328–329, 86 S.Ct. 803) (emphasis omitted). But the Court clouds that once clear understanding by citing dictum from *Northwest Austin* to convey that the principle of equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." *Ante,* at 2624 (citing 557 U.S., at 203, 129 S.Ct. 2504). See also *ante,* at 2630 (relying on *Northwest Austin* 's "emphasis on [the] significance" of the equal-sovereignty principle). If the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach* 's limitation of the equal sovereignty doctrine to "the admission of new States," the suggestion is untenable. *Northwest Austin* cited *Katzenbach* 's holding in the course of *declining to decide* whether the VRA was constitutional or even what standard of review applied to the question. 557 U.S., at 203–204, 129 S.Ct. 2504. In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin,* attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach* 's ruling on the limited "significance" of the equal sovereignty principle.

Today's unprecedented extension of the equal sovereignty principle outside its proper domain —the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties. See, *e.g.,* 28 U.S.C. § 3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme "at any time during the period beginning January 1, 1976, and ending August 31, 1990"); 26 U.S.C. § 142(*l*) (EPA required to locate green building project in a State meeting specified population criteria); 42 U.S.C. § 3796bb (at least 50 percent of rural drug enforcement assistance funding must be allocated

to States with "a population density of fifty-two or fewer persons per ***589** square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997"); §§ 13925, 13971 (similar population criteria for funding to combat rural domestic violence); § 10136 (specifying rules applicable to Nevada's Yucca Mountain nuclear waste site, and providing that " [n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987"). Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?

Of gravest concern, Congress relied on our pathmarking *Katzenbach* decision in each reauthorization of the VRA. It had every reason to believe that the Act's limited geographical scope would weigh in favor of, not against, the Act's constitutionality. See, *e.g.,* *United States v. Morrison,* 529 U.S. 598, 626–627, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (confining preclearance regime to States with a record of discrimination bolstered the VRA's constitutionality). Congress could hardly have foreseen that the VRA's limited geographic reach would render the Act constitutionally suspect. See Persily 195 ("[S]upporters of the Act sought to develop an evidentiary record for the principal purpose of explaining why the covered jurisdictions should remain covered, rather than justifying the coverage of certain jurisdictions but not others.").

In the Court's conception, it appears, defenders of the VRA could not prevail ****2650** upon showing what the record overwhelmingly bears out, *i.e.,* that there is a need for continuing the preclearance regime in covered States. In addition, the defenders would have to disprove the existence of a comparable need elsewhere. See Tr. of Oral Arg. 61–62 (suggesting that proof of egregious episodes of racial discrimination in covered jurisdictions would not suffice to carry the day for the VRA, unless such episodes are shown to be absent elsewhere). I am aware of no precedent for imposing such a double burden on defenders of legislation.

***590** C

The Court has time and again declined to upset legislation of this genre unless there was no or almost no evidence of unconstitutional action by States. See, *e.g.,* *City of Boerne v. Flores,* 521 U.S. 507, 530, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (legislative record "mention[ed] no episodes [of the kind the legislation aimed to check] occurring in the past 40 years"). No such claim can be made about the congressional record for the 2006 VRA reauthorization. Given a record replete with examples of denial or abridgment of a paramount federal right, the Court should have left the matter where it belongs: in Congress' bailiwick.

Instead, the Court strikes § 4(b)'s coverage provision because, in its view, the provision is not based on "current conditions." *Ante,* at 2627. It discounts, however, that one such condition was the preclearance remedy in place in the covered jurisdictions, a remedy Congress designed both

to catch discrimination before it causes harm, and to guard against return to old ways. 2006 Reauthorization § 2(b)(3), (9). Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

But, the Court insists, the coverage formula is no good; it is based on "decades-old data and eradicated practices." *Ante,* at 2627. Even if the legislative record shows, as engaging with it would reveal, that the formula accurately identifies the jurisdictions with the worst conditions of voting discrimination, that is of no moment, as the Court sees it. Congress, the Court decrees, must "star[t] from scratch." *Ante,* at 2630. I do not see why that should be so.

Congress' chore was different in 1965 than it was in 2006. In 1965, there were a "small number of States ... which in most instances were familiar to Congress by name," on which Congress fixed its attention. ***591** *Katzenbach,* 383 U.S., at 328, 86 S.Ct. 803. In drafting the coverage formula, " Congress began work with reliable evidence of actual voting discrimination in a great majority of the States" it sought to target. *Id.,* at 329, 86 S.Ct. 803. "The formula [Congress] eventually evolved to describe these areas" also captured a few States that had not been the subject of congressional factfinding. *Ibid.* Nevertheless, the Court upheld the formula in its entirety, finding it fair "to infer a significant danger of the evil" in all places the formula covered. *Ibid.*

The situation Congress faced in 2006, when it took up *re* authorization of the coverage formula, was not the same. By then, the formula had been in effect for many years, and *all* of the jurisdictions covered by it were "familiar to Congress by name." *Id.,* at 328, 86 S.Ct. 803. The question before Congress: Was there still a sufficient basis to support continued application of the preclearance remedy in each of those already-identified places? There was at that point no chance that the ****2651** formula might inadvertently sweep in new areas that were not the subject of congressional findings. And Congress could determine from the record whether the jurisdictions captured by the coverage formula still belonged under the preclearance regime. If they did, there was no need to alter the formula. That is why the Court, in addressing prior reauthorizations of the VRA, did not question the continuing "relevance" of the formula.

Consider once again the components of the record before Congress in 2006. The coverage provision identified a known list of places with an undisputed history of serious problems with racial discrimination in voting. Recent evidence relating to Alabama and its counties was there for all to see. Multiple Supreme Court decisions had upheld the coverage provision, most recently in 1999. There was extensive evidence that, due to the preclearance mechanism, conditions in the covered jurisdictions had notably improved. And there was evidence that preclearance was still having a substantial real-world effect, having stopped hundreds of ***592** discriminatory voting

changes in the covered jurisdictions since the last reauthorization. In addition, there was evidence that racial polarization in voting was higher in covered jurisdictions than elsewhere, increasing the vulnerability of minority citizens in those jurisdictions. And countless witnesses, reports, and case studies documented continuing problems with voting discrimination in those jurisdictions. In light of this record, Congress had more than a reasonable basis to conclude that the existing coverage formula was not out of sync with conditions on the ground in covered areas. And certainly Shelby County was no candidate for release through the mechanism Congress provided. See *supra,* at 2643 – 2645, 2646 – 2647.

The Court holds § 4(b) invalid on the ground that it is "irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time." *Ante,* at 2631. But the Court disregards what Congress set about to do in enacting the VRA. That extraordinary legislation scarcely stopped at the particular tests and devices that happened to exist in 1965. The grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race. As the record for the 2006 reauthorization makes abundantly clear, second-generation barriers to minority voting rights have emerged in the covered jurisdictions as attempted *substitutes* for the first-generation barriers that originally triggered preclearance in those jurisdictions. See *supra,* at 2634 – 2635, 2636, 2640 – 2641.

The sad irony of today's decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA's success in eliminating the specific devices extant in 1965 means that preclearance is no longer needed. *Ante,* at 2629 – 2630, 2630 – 2631. With that belief, and the argument derived from it, history repeats itself. The same assumption—that the problem could be solved when particular methods of voting discrimination are ***593** identified and eliminated—was indulged and proved wrong repeatedly prior to the VRA's enactment. Unlike prior statutes, which singled out particular tests or devices, the VRA is grounded in Congress' recognition of the "variety and persistence" of measures designed to impair minority voting rights. *Katzenbach,* 383 U.S., at 311, 86 S.Ct. 803; *supra,* at 2633. In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding.

Beyond question, the VRA is no ordinary legislation. It is extraordinary because ****2652** Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment. For a half century, a concerted effort has been made to end racial discrimination in voting. Thanks to the Voting Rights Act, progress once the subject of a dream has been achieved and continues to be made.

The record supporting the 2006 reauthorization of the VRA is also extraordinary. It was described by the Chairman of the House Judiciary Committee as "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 & half; years" he

had served in the House. 152 Cong. Rec. H5143 (July 13, 2006) (statement of Rep. Sensenbrenner). After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support. It was the judgment of Congress that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution." 2006 Reauthorization § 2(b)(7), 120 Stat. 577. That determination of the body empowered to enforce the Civil War Amendments "by appropriate legislation" merits this Court's ***594** utmost respect. In my judgment, the Court errs egregiously by overriding Congress' decision.

* * *

For the reasons stated, I would affirm the judgment of the Court of Appeals.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Both the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin,* see Juris. Statement i, and Brief for Federal Appellee 29–30, in *Northwest Austin Municipal Util. Dist. No. One v. Holder,* O.T. 2008, No. 08–322, and accordingly *Northwest Austin* guides our review under both Amendments in this case.

1 The Court purports to declare unconstitutional only the coverage formula set out in § 4(b). See *ante,* at 2631. But without that formula, § 5 is immobilized.

2 The Constitution uses the words "right to vote" in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty–Fourth, and Twenty–Sixth Amendments. Each of these Amendments contains the same broad empowerment of Congress to enact "appropriate legislation" to enforce the protected right. The implication is unmistakable: Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens. These Amendments are in line with the special role assigned to Congress in protecting the integrity of the democratic process in federal elections. U.S. Const., Art. I, § 4 ("[T]he Congress may at any time by Law make or alter" regulations concerning

the "Times, Places and Manner of holding Elections for Senators and Representatives."); *Arizona v. Inter Tribal Council of Ariz., Inc.*, ––– U.S. ––––, ––––, 133 S.Ct. 2247, ––––, 186L.Ed.2d 239 (2013).

3 Acknowledging the existence of "serious constitutional questions," see *ante,* at 2630 (internal quotation marks omitted), does not suggest how those questions should be answered.

4 This number includes only changes actually proposed. Congress also received evidence that many covered jurisdictions engaged in an "informal consultation process" with DOJ before formally submitting a proposal, so that the deterrent effect of preclearance was far broader than the formal submissions alone suggest. The Continuing Need for Section 5 Pre–Clearance: Hearing before the Senate Committee on the Judiciary, 109th Cong., 2d Sess., pp. 53–54 (2006). All agree that an unsupported assertion about "deterrence" would not be sufficient to justify keeping a remedy in place in perpetuity. See *ante,* at 2627. But it was certainly reasonable for Congress to consider the testimony of witnesses who had worked with officials in covered jurisdictions and observed a real-world deterrent effect.

5 For an illustration postdating the 2006 reauthorization, see *South Carolina v. United States,* 898 F.Supp.2d 30 (D.D.C.2012), which involved a South Carolina voter-identification law enacted in 2011. Concerned that the law would burden minority voters, DOJ brought a § 5 enforcement action to block the law's implementation. In the course of the litigation, South Carolina officials agreed to binding interpretations that made it "far easier than some might have expected or feared" for South Carolina citizens to vote. *Id.,* at 37. A three-judge panel precleared the law after adopting both interpretations as an express "condition of preclearance." *Id.,* at 37–38. Two of the judges commented that the case demonstrated "the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws." *Id.,* at 54 (opinion of Bates, J.).

6 Because preclearance occurs only in covered jurisdictions and can be expected to stop the most obviously objectionable measures, one would expect a *lower* rate of successful § 2 lawsuits in those jurisdictions if the risk of voting discrimination there were the same as elsewhere in the country.

7 This lawsuit was filed by Shelby County, a political subdivision of Alabama, rather than by the State itself. Nevertheless, it is appropriate to judge Shelby County's constitutional challenge in light of instances of discrimination statewide because Shelby County is subject to § 5's preclearance requirement by virtue of *Alabama's* designation as a covered jurisdiction under § 4(b) of the VRA. See *ante,* at 2621 – 2622. In any event, Shelby County's recent record of employing an at-large electoral system tainted by intentional racial discrimination is by itself sufficient to justify subjecting the county to § 5's preclearance mandate. See *infra,* at 2646.

8 Congress continued preclearance over Alabama, including Shelby County, *after* considering evidence of current barriers there to minority voting clout. Shelby County, thus, is no "redhead" caught up in an arbitrary scheme. See *ante,* at 2629.

9 The Court does not contest that Alabama's history of racial discrimination provides a sufficient basis for Congress to require Alabama and its political subdivisions to preclear electoral changes. Nevertheless, the Court asserts that Shelby County may prevail on its facial challenge to § 4's coverage formula because it is subject to § 5's preclearance requirement by virtue of that formula. See *ante,* at 2630 ("The county was selected [for preclearance] based on th[e] [coverage] formula."). This misses the reality that Congress decided to subject Alabama to preclearance based on evidence of continuing constitutional violations in that State. See *supra,* at 2647, n. 8.

The Evolution of Chief Justice John Roberts

15 FEB 2022 | MICHAEL C. DORF

POSTED IN: COURTS AND PROCEDURE

The two most influential liberal Justices of the U.S. Supreme Court—Chief Justice Earl Warren and Justice William Brennan—were Republicans appointed by President Dwight D. Eisenhower, who reportedly called them his two worst mistakes. The story of Ike's statement may be apocryphal, but the phenomenon of Republican appointees disappointing their erstwhile sponsors is real. Nixon appointee Harry Blackmun, Ford's John Paul Stevens, Reagan's Sandra Day O'Connor and Anthony Kennedy, and George H.W. Bush's David Souter all proved less reliably

conservative than advertised.

Then the phenomenon apparently stopped. Shortly after his 1991 confirmation, Justice Clarence Thomas famously quipped "I ain't evolving." He wasn't and he hasn't. With one exception, neither have any of the Justices appointed by Republican Presidents in the years since. Why not?

In a 2007 article in the *Harvard Law & Policy Review*, I hypothesized that as Supreme Court decisions became more politically salient to their constituents, Republican Presidents got better at screening out potential evolvers by nominating people they knew to be reliable conservatives because the nominees were familiar to the Republican legal establishment based on service in the executive branch of the federal government. Looking at the twelve Republican appointees from the Nixon administration onward, I observed that the six Justices who had not previously served in the executive branch of the federal government evolved—that is, proved to be liberal or moderate—whereas the six who had served in the federal executive did not evolve. Noting that it was far too early in their tenure to draw any conclusions about Chief Justice John Roberts and Justice Samuel Alito, I nonetheless predicted that based on their prior experience, they would both remain reliable conservatives.

I was right about Alito but wrong about Roberts.

To be sure, no one would mistake John Roberts for a liberal. He joined the leading decisions finding gun rights in the Constitution, dissented from the Court's decision establishing marriage equality, wrote the Court's

opinion rejecting judicial review of political gerrymandering, and has, more broadly, steered the Court in roughly the same direction as his conservative predecessor, Chief Justice William Rehnquist (for whom Roberts clerked as a young lawyer).

Yet lately Chief Justice Roberts has been as likely to join his Democratic-appointed colleagues in high-profile cases as he is to join his fellow Republicans. In the summer of 2020 and thereafter, Roberts joined the Democratic appointees in rejecting challenges to public health regulations, even bringing along Justice Brett Kavanaugh to create a 5-4 majority for upholding the Biden administration's vaccine mandate for workers in federally funded health-care facilities last month. Despite previously dissenting from the Court's abortion rights rulings, Roberts cast the fifth and decisive vote to strike down a Louisiana abortion restriction in a 2020 case, concluding that the challenged law was indistinguishable from a Texas law the Court had only recently invalidated, even though Roberts had dissented in the Texas case.

Does It Matter?

While Roberts has sometimes played a pivotal role, since Justice Ruth Bader Ginsburg's death and her replacement by the very conservative Justice Amy Coney Barrett, the Chief's evolution has had little impact on the outcomes of cases, as there are now five Justices to his right. Thus, although Roberts joined his Democratic colleagues in voting to allow lawsuits against the Texas attorney general to block the Lone Star State's notorious SB8—which replaces public enforcement of an abortion ban with large private bounties—they were outvoted by the other Republican

appointees, who permitted only a very narrow challenge and then sent the case back to the conservative U.S. Court of Appeals for the Fifth Circuit despite the Chief's statement that the district court should have been permitted to resolve the case for the abortion providers quickly. Instead, the appeals court has slow-walked the litigation while abortion after six weeks remains essentially illegal in Texas.

Perhaps most dramatically, last week the Chief Justice joined the Democratic appointees in dissenting from the majority's decision to block a lower court ruling that had invalidated Alabama's racially biased electoral map. Roberts, the author of the notorious 2013 ruling in *Shelby County v. Holder*—which invalidated a key provision of the Voting Rights Act—thought that this time the Court had gone too far.

Does the surprising evolution of Chief Justice Roberts matter? Perhaps not. The five Justices to his right seem intent on rolling back abortion rights, promoting gun rights, weakening the separation of church and state, and invalidating all race-based affirmative action. Roberts might even join them in some of these projects.

Still, if Roberts is becoming a moderate or a liberal, that could make a difference. It is much harder to find two unexpected votes for a liberal outcome—as one must on a 6-3 Court—than to find just one. Kavanaugh's vote in the vaccine mandate case—like Justice Neil Gorsuch's 2020 majority opinion finding that a 1964 civil rights law forbids discrimination based on sexual orientation or gender identity (which Roberts but not the other Republican appointees joined)—illustrates that shifting the Chief from a presumptively conservative vote to a potential moderate or liberal

vote changes the dynamic on the Court.

The Roots of the Chief's Evolution

Whatever the ultimate impact of the Chief's evolution, we might wonder what is causing it.

To begin, we might identify a backlash effect. Even as a judge on the Eighth Circuit, Harry Blackmun was substantially more liberal than President Nixon realized, but it was not until after he wrote the majority opinion in *Roe v. Wade* that Blackmun—who was vilified by the right for it—became reliably liberal. Being attacked by the right played a role in what Linda Greenhouse's elegant biography aptly called "Harry Blackmun's Supreme Court Journey."

(So far as I am aware) Roberts has not had to endure the picketing, hate mail, death threats, or assassination attempt that were aimed at Blackmun, but for nearly a decade he has been cursed by Republicans as an apostate for joining with his Democratic colleagues in 2012 in upholding the Affordable Care Act. That experience may well have had a moderating effect on him, especially given his commitment to a view of the Court as above politics. Roberts may have been genuinely taken aback by the suggestion that as the appointee of a Republican president, he owed the party his vote in opposition to the signature legislative achievement of a Democratic president.

As a nominee appearing before the Senate, John Roberts likened the judicial role to that of an umpire calling balls and strikes. In one sense,

that is simply the kind of formalistic cant that all Supreme Court nominees feel compelled to recite. Even though everyone knows that presidents select nominees based on their values and views, to win confirmation, nominees must swear fealty to a disembodied law, as though its application in contested cases did not call upon value judgments.

For Roberts, however, the commitment to at least the appearance of an impartial judiciary is not mere confirmation fibbing, but foundational to his self-conception. Writing in *The Atlantic* in 2019 to review Joan Biskupic's insightful biography of Roberts, Michael O'Donnell described a war within Roberts between, on one hand, his love for the Supreme Court and the federal judiciary as institutions, and, on the other hand, the conservative commitments Roberts formed during his youth and strengthened during the Reagan administration. The backlash against the Obamacare decision led Roberts to realize that he could not always be both an institutionalist and a conservative ideologue. Roberts chose institutionalism.

We might also understand the Roberts journey as a sign of the times. Blackmun used to complain that pundits who described his evolution were wrong. He did not move left, he said; the Court moved right, and thus he only appeared to move by contrast. As Greenhouse shows, that is not entirely accurate. Neither would such an account be entirely accurate with respect to Roberts. But it would contain more than a kernel of truth.

In the 2020 Louisiana abortion case, Roberts seemed genuinely puzzled that his fellow conservatives could claim to be applying rather than

overruling the recent ruling involving an identical Texas statute. In the SB8 litigation, he took much the same view: so long as the abortion right remains on the books, states should not be rewarded for circumventing it. And that was his position again last week in the Alabama Voting Rights Act case: maybe the Court should re-examine its precedents, but until it does, a lower court shouldn't be reversed for applying them faithfully.

In these and other cases, Roberts has hardly been staking out a strongly liberal or progressive position. Rather, he is simply insisting on what have hitherto been principles that liberals, moderates, and conservatives all agreed upon: apply the law on the books while it remains there. Or, more boldly, *don't lie about the law*.

Seen in this light, the evolution of John Roberts does look a fair bit like a man standing still while the landscape moves past him (and to the right). It also makes Roberts look a fair bit like another prominent Republican, Mike Pence. Despite sterling conservative credentials and four years spent demeaning himself as Donald Trump's Vice President, when push came to shove there was a line Pence would not cross—and it was much the same line that Roberts has been unwilling to cross. Neither man would brazenly lie about the law to further partisan ends.

It takes nothing away from the personal courage and integrity of John Roberts or Mike Pence to observe that the remarkable fact is not that they have stood up for previously uncontroversial principles but that so many of their fellow Republicans—including elite conservative lawyers who surely know better—have not.

With apologies for the ableist metaphor, *on a Court of the blind, the one-eyed man is Chief.*

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POLITICS

The Supreme Court's Conservatives May Be Set To Kneecap Federal Regulations

The increasing invocation of the "major questions doctrine" could imperil a wide swath of federal government regulatory actions.

By Paul Blumenthal

02/27/2022 08:00am EST

The Supreme Court will hear arguments Monday in West Virginia v. Environmental Protection Agency that have broad implications for the federal government's regulatory authority. SAMUEL CORUM VIA GETTY IMAGES

With the Senate stalled on passing President Joe Biden's Build Back Better legislation — and as Congress is poised to fall under Republican control again — the only medium-term hope for action to combat climate change may rest with the federal government. But in a matter of days, the Supreme Court will hear arguments in a case challenging the Biden administration's yet-to-be announced carbon emission regulations for power plants. The outcome will determine not only the fate of those specific regulations but also whether the federal government can implement any rules or regulations covering a wide array of economic activity beyond just climate.

In West Virginia v. Environmental Protection Agency, a coterie of coal companies and the state of West Virginia are asking the court to preemptively prevent the EPA from reviving carbon emission regulations first proposed in the Obama administration. Those regulations were shelved after Donald Trump took office in 2017, but the Biden administration has begun the process of bringing them back.

The case presents the court's conservative supermajority with the opportunity to crush the ability of the federal administrative state to enact regulations over economic activity even if Congress had delegated that power to it.

Congressional "delegations" come in legislation authorizing an agency to write rules covering a specific activity as the need arises. One such delegation is the authority Congress granted to the EPA in the 1970 Clean Air Act to regulate polluting emissions. The EPA's yet-to-be proposed regulation of carbon emissions at power plants is an example of the agency adopting new regulations based on an updated understanding of what is a polluting emission.

Instead of overturning judicial precedent on congressional delegations to federal agencies, the conservative bloc is expected to turn to a doctrine preempting the normal delegation review process.

If the court takes this path, it will benefit both anti-regulation business interests and the court itself, as it will seize power from the other two branches to judge all regulatory actions going forward.

At issue is the so-called “major questions doctrine,” which states that agency regulations of “vast economic and political significance” must be authorized by explicit congressional delegation of authority. This doctrine has been fleshed out by conservative justices over the past decade to become a means to preempt the existing process judges use to approve or deny congressional transfers of authority and block agency regulations opposed by the conservative majority.

It now stands as the likely tool conservatives will use to prevent the federal government from taking regulatory action to fight climate change, among many other vital issues. But legal scholarship shows that the “major questions doctrine” is based on an invented history of U.S. government.

Major Questions

The major questions doctrine made its first appearance at the U.S. Supreme Court in a 1994 case regarding Federal Communication Commission regulations of telecommunications companies. It appeared with a citation to a 1986 law review article written by Stephen Breyer a decade prior to his appointment to the high court.

“Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration,” Breyer postulated.

Supreme Court Justice Neil Gorsuch is the court's biggest opponent of congressional delegation of rule-writing authority to executive branch agencies. ERIN SCHAFF-POOL/GETTY IMAGES

This meant Congress was most likely to explicitly direct agencies on "major questions" while delegating to the agencies the broader authority to write new regulations on lesser matters.

The court has since turned Breyer's law review postulation into a new doctrine that acts as an extension of the "non-delegation doctrine." Non-delegation holds that Congress's assigning of regulatory authority to executive branch agencies is a perversion of constitutional government that took hold during the New Deal. The non-delegation doctrine was raised only to strike down legislative delegations during the early New Deal actions of Franklin Roosevelt's first term.

After the creation of new agencies with broad assignments of regulatory authority in the 1970s, like the EPA, the court created a process to approve or deny congressional delegations in the 1984 case of Chevron v. Natural Resources Defense Council, which challenged the loosening of environmental regulations by Anne Gorsuch, the EPA administrator under President Ronald Reagan, who resigned amid a scandal over politically biased decisions on

Superfund sites.

The resulting “Chevron deference” provided a general judicial deference to agency delegations while creating a multi-step system for the court to judge whether a specific regulation was enacted without a proper legislative delegation. The court in Chevron determined that judges were not in the position of greater policy knowledge than executive branch administrators to overrule them but created a process by which to judge regulatory actions.

“Chevron deference does not give agencies a blank check,” constitutional law scholar Cass Sunstein wrote in a 2005 article. “It remains the case that agency decisions must not violate clearly expressed legislative will, must represent reasonable interpretations of statutes, and must not be arbitrary in any way.”

Conservative jurists have since turned hard against Chevron deference and, with that, the idea that judges are not in a position to know better than Congress or the agency administrators.

Chief Justice John Roberts declared that his “disagreement” with the current Chevron deference “is fundamental” in a 2013 dissent joined by Justice Samuel Alito and then-Justice Anthony Kennedy. Justice Neil Gorsuch, the son of Reagan’s former EPA chief, holds himself up as the foremost opponent of Chevron deference.

It was notable, then, that Gorsuch’s concurrence in the recent Supreme Court decision striking down the Biden administration’s vaccine-or-test mandate for large employers focused on the

argument that the mandate violated the major questions doctrine because it was of “vast economic and political significance” that, he argued, Congress had not expressly authorized.

“The major questions doctrine serves a similar function” as the non-delegation doctrine, Gorsuch wrote, “by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power.”

What the major questions doctrine provides is a tool to short-circuit the multi-step Chevron deference system. Justices may now determine that a regulatory action is sufficiently “major” prior to beginning a review under the multi-step Chevron deference process.

Such a doctrine “aggrandize[s] the courts at the expense of Congress and the executive,” Georgetown law professor Lisa Heinzerling wrote in a 2017 law review article. “They change the ground rules of statutory interpretation after the other branches have acted, upsetting the reliance the other branches may have placed in the preexisting interpretive regime and yet not replacing that regime with stable and predictable rules that could foster reliance moving forward.”

Blaming Congress

The court’s conservatives present their opposition to congressional delegations of authority to these agencies not on arguments that they provide too much power to the executive branch but that they represent a corruption of Congress.

Potential EPA regulations of power plant emissions are being challenged in the West Virginia v. EPA case. GEORGE FREY VIA GETTY IMAGES

"The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch," Gorsuch wrote in his dissent in a 2019 case related to the non-delegation doctrine.

"Sometimes lawmakers may be tempted to delegate power to agencies to reduce the degree to which they will be held accountable for unpopular actions," Gorsuch continued in his 2022 concurrence in the vaccine-or-test mandate case.

In other words, Congress hands off its sole intended role under the Constitution of legislating by delegating that authority to agencies to write regulations as they become necessary. These "unconstitutional" delegations have increased as political polarization has left Congress gridlocked and incapable of legislating, conservatives assert. Therefore, the court must step in to force Congress to maintain its virtue and not shift authority on regulations to the executive branch.

This conception of Congress, however, is at odds with congressional history. First, Congress began delegating authority to the executive branch from the very beginning of the nation, as University of Michigan law professors Julian Davis Mortensen and Nicholas Bagley have written. Such history shows that the non-delegation doctrine, and therefore the major questions doctrine, are not based in the kind of originalist argument favored by most of the court's conservatives.

"The nondelegation doctrine has nothing to do with the Constitution as it was originally understood," Mortensen and Bagley write. "You can be an originalist or you can be committed to the nondelegation doctrine. But you can't be both."

Second, the notion of Congress as solely a body dedicated to the production of legislation is not borne out by Congress's history, early to modern. The "virtuous Congress" that jurists like Gorsuch wish to restore never existed. To read about the Congress in the conservative jurist's mind is similar to taking a stroll down Main Street, U.S.A., in Disneyland. It is a kitsch imagination of a gloried past that exists only in the hallucinations of the nostalgic.

This Americana vision of Congress hypes “cynical and declinist notions of Congress to justify judicial self-empowerment,” trial lawyer Beau Baumann wrote in a February law paper detailing what he calls “Americana Administrative Law.”

“The literature and the law are increasingly preoccupied with a Congress that never existed as cleanly as some nondelegationists suppose,” Baumann writes.

Conservative lawyers and jurists argue that Congress’s sole function is to pass legislation, ignoring both its powers of investigation, appropriation and censure, and that under conditions of hyper-partisanship, Congress chooses delegation over legislation by pointing to the reduction in bills passed, which ignores studies of Congress showing that congressional legislative activity has been condensed into fewer bills but is not less than prior Congresses.

“The effect of this approach is something like congressional gaslighting,” Baumann writes.

Judicial Supremacy

Based on an ahistorical notion of agency delegation and a mythological conception of Congress, the Supreme Court conservatives assert themselves above the legislative process as both its critic and protector. The ultimate outcome of this pose when used to justify the use of the major questions doctrine to strike down agency regulations is the assertion of supremacy by the judicial

branch over the legislative branch in the realm of legislating.

The major questions doctrine provides even greater control of political decisions for the justices as opposed to a full-scale reanimination of the non-delegation doctrine. Now conservative judges throughout the judiciary can invoke the major questions doctrine for any regulation they deem sufficiently "major."

It goes without saying that the major questions doctrine would not implicate deregulatory or non-regulatory actions taken by agencies in the same way as actions increasing or adjusting regulation.

But the new posture of judicial supremacy poses its own problems when its arrogant application leads to unforeseen results.

For example, a U.S. District Court judge in Louisiana issued an injunction on Feb. 11 preventing the Biden administration from studying the cost of carbon emissions in federal regulations and other projects because it implicates the major questions doctrine. The Biden administration, in response, halted the issuing of all new oil and gas leases on federal lands.

This may not be what the judge had in mind, but it reveals what is happening with the major questions doctrine: a power struggle among the branches of government. If the court preemptively strikes down the Biden administration's yet-to-be proposed carbon emission regulations on such grounds, it will be clear which branch thinks it stands supreme.

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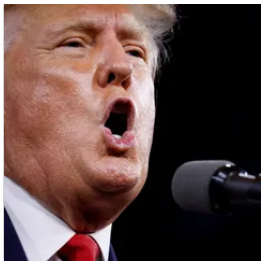

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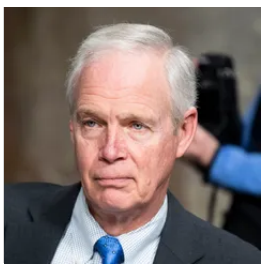

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2021 WL 4197213 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Thomas E. DOBBS, M.D., M.P.H., State Health Officer,
Mississippi Department of Health, et al., Petitioners,
v.
JACKSON WOMEN'S HEALTH ORGANIZATION, et al., Respondents.

No. 19-1392.
September 13, 2021.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Respondents

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Robert B. McDuff, Mississippi Center for Justice, 767 North Congress Street, Jackson, MS 39202.

*i QUESTION PRESENTED

Whether all pre-viability prohibitions on elective abortion are unconstitutional.

*ii PARTIES TO THE PROCEEDINGS

Petitioners are Thomas E. Dobbs, M.D., M.P.H., in his official capacity as State Health Officer of the Mississippi Department of Health, and Kenneth Cleveland, M.D., in his official capacity as Executive Director of the Mississippi State Board of Medical Licensure.

Respondents are Jackson Women's Health Organization, on behalf of itself and its patients, and Sa-cheen Carr-Ellis, M.D., M.P.H., on behalf of herself and her patients.

*iii TABLE OF CONTENTS

*V TABLE OF AUTHORITIES

CASES

*1 OPINIONS BELOW

The court of appeals' opinion (Petition Appendix ("Pet. App.") la-37a) is reported at 945 F.3d 265. The court of appeals' order denying rehearing en banc, Pet. App. 38a-39a, is unpublished. The district court's decision declaring Mississippi's ban on abortion after 15 weeks of pregnancy unconstitutional and granting summary judgment to Respondents, Pet. App. 40a-55a, is reported at 349 F. Supp. 3d 536.

JURISDICTION

The court of appeals' judgment was entered on December 13, 2019. The court of appeals denied rehearing en banc on January 17, 2020. On March 19, 2020, Justice Alito extended the time to file a petition for a writ of certiorari to and including June 15, 2020. The petition was filed on June 15, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment provides: "No State shall... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Mississippi's ban on abortions after 15 weeks of pregnancy, Miss. Code Ann. § 41-41-191, is reproduced at Pet. App. 65a-74a.

*2 INTRODUCTION

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), the Court was asked to overrule *Roe v. Wade,* 410 U.S. 113 (1973). After a searching examination, the Court concluded that "the essential holding of Roe should be reaffirmed." *Casey,* 505 U.S. at 871. It further explained in no uncertain terms: "The woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law and a component of liberty we cannot renounce." *Id.* [1]

Mississippi now asks the Court to reconsider this decision, and to overrule Casey and Roe in their entirety, or "at least" to discard the viability line. Petrs. Br. 48. It does so by turning a footnote in its petition for certiorari into an entire merits brief. See Pet. Cert. 5-6 n.1. If the Court considers the State's new arguments, it should reject the invitation to jettison a half-century of settled precedent and to abandon a rule of law that this Court has said uniquely implicates the country's "confidence in the Judiciary." Casey, 505 U.S. at 867.

In reaffirming the "essential holding" of Roe, Casey struck a careful balance. The Court held that, before viability, a state may regulate abortion, but it cannot resolve the personal, family, and medical implications of ending a pregnancy "in such a definitive way that a woman lacks all choice in the matter." Id. at 850. Because pregnancy so intensely impacts a woman's bodily integrity, her liberty interests are ***3** categorically stronger than any state interest until viability. Id. at 852-53.

Mississippi does not come close to making the showing required to upend this balance, and to disregard entirely the vital liberty and equality interests of those who would be affected by the radical change in the law it requests - the nearly one in four women who decide to end a pregnancy during their lives, and the tens of thousands each year who need abortions after 15 weeks. Mississippi criticizes the viability line as insufficiently protective of its interests. But the very same argument was raised in Casey, and the Court gave careful regard to the state's asserted interests, including in fetal life. Having considered each of the state's arguments, the Court reaffirmed that the viability line strikes a principled and workable balance between individual liberty and any countervailing government interests. Id. at 870.

The State additionally faults Casey for failing to "bring[] peace to the controversy over abortion," Petrs. Br. 3, pointing primarily to laws that it and others continue to enact in the teeth of this Court's precedent. Id. at 24, 27. But Casey foresaw this too. The Court understood that there would be "inevitable efforts to overturn [its decision] and to thwart its implementation." Casey, 505 U.S. at 867; accord id. at 869. That reality, the Court cautioned, could not undermine the "precedential force" of the viability rule, id. at 867, lest the Court implicitly encourage states and private parties to obstruct its other major contested decisions. Some, for example, may disagree whether the First Amendment guarantees a right to make financial donations to political campaigns, see ***4** *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010), or whether the Second Amendment protects an individual right to own a handgun, *see* *District of Columbia v. Heller,* 554 U.S. 570 (2008). Unless the Court is to be perceived as representing nothing more than the preferences of its current membership, it is critical that judicial protection hold firm absent the most dramatic and unexpected changes in law or fact. See Casey, 505 U.S. at 866; accord id. at

864. All the more so where, as here, the Court has already thoroughly reconsidered and reaffirmed the right at issue.

Finally, the Casey Court stressed that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Id. at 856. In 1992, "[a]n entire generation ha[d] come of age" under "Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." Id. at 860. "[P]eople ha[d] organized intimate relationships and made choices... in reliance on the availability of abortion." Id. at 856.

Nothing in the years since *Casey* was decided has rendered individuals' rights to make basic decisions about their bodies and their lives any less worthy of constitutional protection. To the contrary, two generations - spanning almost five decades - have come to depend on the availability of legal abortion, and the right to make this decision has been further cemented as critical to gender equality.

For all the reasons the Court so deliberately set forth in *Casey,* that decision must be taken to have ***5** settled the question presented. The judgment of the Fifth Circuit should be affirmed.

STATEMENT OF THE CASE

A. Factual and Statutory Background

Despite the Court's clear precedent, several states have recently enacted pre-viability abortion bans. These laws would prohibit abortion completely, or at virtually every pre-viability stage of pregnancy from 6 weeks to 20 weeks.

This case involves one such law, Mississippi House Bill 1510 ("the 15-week ban" or "the Ban"). The Ban was enacted on March 19, 2018, with an immediate effective date. Pet. App. 65a. It states that "a person shall not intentionally or knowingly perform, induce, or attempt to perform or induce an abortion," if "the probable gestational age" of the fetus, which the physician is required to determine and document prior to performing the abortion, is "greater than fifteen (15) weeks." Pet. App. 70a. The Ban defines "gestational age" or "probable gestational age" as "calculated from the first day of the last menstrual period of the pregnant woman." Pet. App. 69a.

The only exceptions are for a "medical emergency" or a "severe fetal abnormality." Pet. App. 70a. The Ban defines "medical emergency" as a physical condition or illness that makes it necessary to perform an abortion to save a person's life or to prevent "a serious risk of substantial and irreversible impairment of a major bodily function." Pet. App. 69a. It defines a "severe fetal abnormality" as "a life-threatening physical condition that, in reasonable medical judgment,

regardless of the provision of life-saving medical ***6** treatment, is incompatible with life outside the womb." *Id.*

"A physician who intentionally or knowingly violates" the Ban "commits an act of unprofessional conduct and his or her license to practice medicine in the State of Mississippi shall be suspended or revoked pursuant to action by the Mississippi State Board of Medical Licensure." Pet. App. 71a-72a.

Just four months after the district court declared the 15-week ban unconstitutional, Mississippi enacted an even more restrictive ban - prohibiting abortion once embryonic cardiac activity can be detected, as early as 6 weeks from the first day of the person's last menstrual period ("lmp"). Miss. Code Ann. § 41-41-34.1(2)(a). The Senate sponsor of the 6-week ban noted that the composition of the Court was "absolutely... a factor" in proposing that law. Suppl. Amend. Compl. at 18, D. Ct. Dkt. 119 (citations omitted). Additionally, a decade-old Mississippi statute is designed to ban abortion completely if and when *Roe* is overruled. Miss. Code Ann. § 41-41-45.[2]

B. Procedural History

1. Respondents are Jackson Women's Health Organization - the only licensed abortion clinic in Mississippi - and Sacheen Carr-Ellis, M.D., M.P.H., the clinic's medical director and a board-certified obstetrician/gynecologist licensed to practice medicine in ***7** Mississippi (collectively "the Providers"). The Providers offer abortion care up to 16 weeks 0 days lmp. JA17. Approximately 100 patients per year obtain an abortion after 15 weeks from the Providers. Id.

The day Mississippi enacted the 15-week ban, the Providers sought a temporary restraining order against its enforcement. JA1. The district court granted that request, and the parties extended the order on consent. Pet. App. 62a-64a; JA2-3.

The district court recognized that under Casey, "the ban's lawfulness hinges on a single question: whether the 15-week mark is before or after viability." Pet. App. 60a. The district court thus limited discovery to the issue of viability. Pet. App. 58a-61a. But it allowed the State to proffer evidence on any other issues the State wanted to raise, including evidence related to its interests in prohibiting abortion after 15 weeks and any changed circumstances that would support the Ban. Pet. App. 56a-57a.

Mississippi proffered some evidence related to its asserted interests. It submitted a declaration from Dr. Maureen Condic, which contended that fetal pain may be possible after 15 weeks. Pet. App. 76a-77a. The State also submitted a medical article that concludes that abortion-related deaths

are exceedingly rare, and that abortion has become safer at all stages of pregnancy since Roe and Casey. Linda Bartlett, et al., Risk Factors for Legal Induced Abortion-Related Mortality in the United States, 103 Obstetrics & Gynecology 729, 733-34, 736 (2004), D. Ct. Dkt. 85-6.

***8** After discovery concluded, the Providers moved for summary judgment. JA7. Mississippi did not rebut the Providers' evidence that viability is not possible before at least 23-24 weeks of pregnancy. Mem. in Opp'n to Pls.' Mot. for Summ. J. at 1-2, D. Ct. Dkt. 85. Indeed, the district court noted that Mississippi "concede [d] established medical fact and acknowledge[d] it ha[d] been 'unable to identify any medical research or data that shows a fetus has reached the "point of viability" at 15 weeks LMP."' Pet. App. 45a.

Applying *Casey*'s viability rule to the undisputed facts, the district court held the 15-week ban unconstitutional and entered a permanent injunction against its enforcement. Pet. App. 40a-55a.

2. A panel of the Fifth Circuit unanimously affirmed. "In an unbroken line dating to *Roe v. Wade,*" the court of appeals explained, "the Supreme Court's abortion cases have established (and affirmed, and re-affirmed) a woman's right to choose an abortion before viability." Pet. App. la-2a. In concurrence, Judge Ho agreed that a "good faith reading" of *Roe* and *Casey* required the Fifth Circuit to affirm the judgment of the district court, and that any other outcome would require overturning *Casey*'s central holding. Pet. App. 20a, 26a (Ho, Circuit J., concurring). The Fifth Circuit denied the State's petition for rehearing en banc. Pet. App. 38a-39a.

3. In the summer of 2020, Mississippi sought certiorari, asking the Court "merely... to reconcile" supposed conflicts "in its own precedents" regarding "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. Cert. i, 5. The ***9** State stressed that "the questions presented in [its] petition do not require the Court to overturn *Roe* or *Casey.*" *Id.* at 5. The State added in a footnote, however, that if its Ban could not be upheld under Casey and Roe, "the Court should not retain erroneous precedent." *Id.* at 5-6, n.1. In the spring of 2021, the Court granted certiorari limited to the State's question regarding pre-viability prohibitions on abortion. JA60.

SUMMARY OF ARGUMENT

Every version of the State's argument amounts to the same thing: a request that the Court scuttle a half-century of precedent and invite states to ban abortion entirely. Insofar as the Court considers this argument, the Court should reject it.

I. In Casey, this Court carefully considered every argument Mississippi makes here for overruling Roe. After doing so, the Court reaffirmed the "most central principle" of its abortion jurisprudence: that states cannot prohibit abortion until viability. Casey, 505 U.S at 871. After balancing individuals' liberty interests and countervailing state interests, the Court reasoned that, until fetal

life can be sustained outside the woman's body, the decision whether to continue or end the pregnancy must remain hers. See id. at 870.

Thirty years later, stare decisis presents an even higher bar to upending this "rule of law and [] component of liberty." See id. at 871. Casey is precedent on top of precedent - that is, precedent not just on the issue of whether the viability line is correct, but also on the issue of whether it should be abandoned. And ***10** time and again, the Court has reaffirmed that it is "imperative" to retain a "woman's right to terminate her pregnancy before viability." Id. at 869, 871; see also June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment).

There is no special justification for a different outcome now. Mississippi does not meaningfully engage with the personal autonomy and bodily integrity interests that underpin constitutional protection for the right to decide whether to continue a pregnancy. And once one recognizes that there is a liberty interest here that demands heightened protection, it is clear that the viability line safeguards that interest in a principled and workable way. Nor has any legal or factual change occurred that justifies giving any less protection for that liberty interest today. To the contrary, the years since Casey have only reinforced the importance of access to legal abortion for gender equality.

II. Mississippi is forced into its extreme position because it has nothing serious to offer in place of the viability line. Instead, the impractical and unstable alternatives the State proposes confirm that the Court was right in Casey to retain the viability line. There is no heightened scrutiny framework (stripped of the viability rule) that lower courts could administer against the inevitable cascade of state abortion bans that would follow if the Court does anything here other than affirm. Nor could the Court apply the State's version of an "undue burden" approach without gutting Casey and Roe. The very essence of those decisions is the right of every individual to decide ***11** whether to continue a pre-viability pregnancy to term. The only way, therefore, to avoid inflicting profound damage to individual autonomy and women's equal status in society is to adhere to the considered judgment of the Court's prior decisions.

ARGUMENT

Mississippi asks the Court to take the grave step of overruling a rule of law it has repeatedly reaffirmed, having mentioned the notion only in a threadbare footnote in its petition for certiorari. See Pet. Cert. 5-6 n.1. There is a serious question whether the State's request to overrule Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), and Roe v. Wade, 410 U.S. 113 (1973), is even properly before this Court. The Court has sometimes dismissed petitions

as improvidently granted where parties, after "[h]aving persuaded [it] to grant certiorari on [an] issue,... chose to rely on a different argument in their merits briefing." *Visa Inc. v. Osborn,* 137 S. Ct. 289, 289-90 (2016) (mem.) (internal quotation marks and citation omitted; first alteration in original). It has similarly declined to consider arguments where, as here, those arguments were mentioned "[o]nly in a brief footnote of [the] petition." Fry v. Pliler, 551 U.S. 112, 120-21 (2007); *see also* *Decker v. Nw. Env'tl. Def. Ctr., 568 U.S.* 597, 615-16 (2013) (Roberts, J., concurring) (noting that majority correctly declined to reconsider important precedent when respondent suggested reconsideration only "in one sentence in a footnote, with no argument").

Under these circumstances, it would be appropriate to dismiss this case. Alternatively, the Court ***12** could simply do what the State requested in its petition: "clarify," under this Court's existing precedents, "whether abortion prohibitions before viability are always unconstitutional." Pet. Cert. 14. The answer to that question is undoubtedly "yes," as this Court has repeatedly held.

If the Court nevertheless considers the State's merits brief on its own terms, the Court should affirm.

I. There is No Justification for Overruling Casey and Roe.

Mississippi seeks to overrule *Casey* and *Roe* so that states can ban abortion at any stage of pregnancy. "At minimum," Mississippi asks the Court to discard the central principle of those decisions: the viability line. Petrs. Br. 11; *see also* Petrs. Br. 38-45. The Court should refuse to do so.

A. The Viability Line is the "Central Principle" of *Casey* and *Roe.*

In an "unbroken" line of cases spanning five decades, this Court has consistently held that the Constitution guarantees "the right of the woman to choose to have an abortion before viability." *Casey,* 505 U.S. at 846, 870.

In *Roe,* the Court considered the point at which state interests, including the interest in fetal life, were sufficient to "override the rights of the pregnant woman." 410 U.S. at 162. After painstakingly evaluating the "medical and medical-legal history" of abortion and the "logical and biological justifications" of viability, the Court settled on the viability line. ***13** *Id.* at 117, 162-63; *see also* *id.* at 129-52, 160-61. Before that point, the Court concluded, no state interest is strong enough to outweigh the woman's liberty interest in deciding whether to carry her pregnancy to term. *See* *id.* at 164-65. In the 1980s, the Court "twice reaffirmed [the viability line] in the face of great opposition." *Casey,* 505 U.S. at 870 (discussing *Thornburgh v. Am. Coll.*

of Obstetricians & Gynecologists, 476 U.S. 747, 759 (1986); *Akron v. Akron Ctr. for Reprod. Health, Inc.,* 462 U.S. 416, 419-20 (1983)); *see also* *Webster v. Reprod. Health Servs.,* 492 U.S. 490, 529 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("[V]iability remains the 'critical point.'")).

In *Casey,* the Court again reaffirmed this "essential holding." 505 U.S. at 846, 870-71. Viability, the Court explained, 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." *Id.* at 870. Because survival outside the woman's body is not possible until then, "viability marks *the earliest point* at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860 (emphasis added). [3]

***14** The centrality of the viability line to *Casey* is reflected in the Court's own elaboration of its three-part holding: *First,* the Court recognized the woman's right to decide "to have an abortion *before viability* and to obtain it without undue interference from the State," because "[b]efore 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." *Id.* at 846 (emphasis added). *Second,* the Court confirmed "the State's power to restrict abortions *after fetal viability*" if the law contains a health and life exception. *Id.* (emphasis added). Third, it held "that the State has legitimate interests from the outset of the pregnancy" in maternal health and fetal life, and thus can regulate abortion in a manner that does not impose an undue burden on the woman's right. *Id.* The Court emphasized that "[t]hese principles do not contradict each other; and we adhere to each." *Id.* Indeed, Roe's "central" holding - that, until viability, the individual's right to determine whether to continue a pregnancy categorically outweighs the state's interests, including in fetal life - is mentioned in Casey's plurality opinion no fewer than 19 times.

Treating the issue as settled, the Court has reiterated the viability line many times since. *See* *June Med. Servs.,* 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) ("*Casey* reaffirmed 'the most central principle of *Roe v. Wade,*' 'a woman's right to terminate her pregnancy before viability.'" (quoting *Casey,* 505 U.S. at 871)); *Gonzales v. Carhart,* 550 U.S. 124, 146 (2007) ("Before viability, a State 'may not prohibit any woman from making the ultimate ***15** decision to terminate her pregnancy.'" (quoting *Casey,* 505 U.S. at 879)); *Stenberg v. Carhart,* 530 U.S. 914, 921 (2000) ("[B]efore 'viability... the woman has a right to choose to terminate her pregnancy.'" (quoting *Casey,* 505 U.S. at 870)).

B. None of the State's Arguments Provides a Basis for Overruling the Viability Line.

"*Stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Gamble v. United States,* 139 S. Ct. 1960, 1969 (2019) (internal quotation marks and citation omitted). Adherence to precedent not only "avoids the instability and unfairness that accompany disruption of settled legal expectations," *Randall v. Sorrell,* 548 U.S. 230, 244 (2006) (plurality), but instills public confidence that court decisions are "founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact," *Vasquez v. Hillery,* 474 U.S. 254, 265-66 (1986). For those reasons, "stare decisis is a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 798 (2014).

***16** Stare decisis presents an even higher bar for upending precedent in this case. In the years leading up to and including *Casey,* this Court was repeatedly asked to overrule *Roe* and, in particular, to abandon the viability line. [4] But the Court consistently refused to do so. *See* *Casey,* 505 U.S. at 844, 853, 857-58. After carefully considering every argument for overruling *Roe* - including criticisms of its constitutional analysis and substantive due process in general and claims related to advances in science and medicine - the Court decided to preserve *Roe*'s central holding that "the woman has a right to choose to terminate her pregnancy" up until viability. *Id.* at 870. Accordingly, Casey is controlling precedent not only on the substantive liberty right at stake but also on the question of whether to overrule *Roe* and abandon the viability line. The issue now before the Court is whether Casey's analysis of the constitutional and institutional considerations was "egregiously wrong" on both counts. *Ramos v. Louisiana,* 140 S. Ct. 1390, 1414-15 (2020) (Kavanaugh, J., concurring in part).

The State falls far short of making any such showing. "[T]he vitality of [] constitutional principles... cannot be allowed to yield simply because of disagreement with them." *Casey,* 505 U.S. at 867 (quoting *Brown v. Bd. of Educ.,* 349 U.S. 294, 300 (1955)). All the more when the Court expressly foresaw the "inevitable efforts to overturn [Roe's essential holding] and to thwart its implementation," id. at 868, and stressed that "the Court could not pretend to [] ***17** reexamin[e] the prior law with any justification beyond a present doctrinal disposition to come out differently," *id.* at 864.

1. *The Viability Line Is Well Grounded in the Constitution and the Court's Broader Jurisprudence.*

a. Mississippi's principal submission is that the Court should return the individual right to end a pregnancy to the same legal status as, for example, the right to practice as an optician: subject to

any restriction or prohibition that can be viewed as rationally related to any legitimate state interest. Petrs. Br. 1-2, 5, 36-38; *see* *Williamson v. Lee Optical of Okla. Inc.,* 348 U.S. 483, 491 (1955). According to Mississippi, "nothing" in constitutional text or tradition supports any individual right - ever - to obtain an abortion. Petrs. Br. 1. Every argument Mississippi now reprises was presented in *Casey. See* Resp'ts. Br., Casey, 1992 WL 12006423, at *108-14. And as this Court has explained so many times before, none is correct.

The right to decide whether to continue a pregnancy is grounded in the Fourteenth Amendment's protection against deprivation of a person's liberty without due process of law. U.S. Const. amend. XIV, § 1. As the Court has explained, "[t]he controlling word in the cases before us is 'liberty,'" - and liberty includes "the right to make family decisions and the right to physical autonomy." *Casey,* 505 U.S. at 884; *see also, e.g.,* *Riggins v. Nevada,* 504 U.S. 127, 135 (1992); *Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 278 (1990); *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972); ***18** *Rochin v. California,* 342 U.S. 165, 172-73 (1952); *Jacobson v. Massachusetts,* 197 U.S. 11, 25-31 (1905). Thus, for example, the Court has recognized that the right to liberty protects against state-forced intrusions into the body, *Rochin,* 342 U.S. at 172-73, as well as the ability to decide whether to accept medical treatment, *Riggins,* 504 U.S. at 135; *Cruzan,* 479 U.S. at 279. Similarly, the Court has held that liberty includes the individual's right to use contraception. *See* *Eisenstadt,* 405 U.S. at 453; *Carey v. Population Servs. Int'l,* 431 U.S. 678, 687 (1977).

In recent years, multiple decisions have reinforced the principle that "physical autonomy" and "bodily integrity" are integral components of liberty. *Casey,* 505 U.S. at 857, 884; *see* *Sell v. United States,* 539 U.S. 166, 178-79, 183 (2003); *Ferguson v. City of Charleston,* 532 U.S. 67, 78 & 78 n.14 (2001) (citing *Whalen v. Roe,* 429 U.S. 589, 599-600 (1977)); *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). The Court has also extended Casey's analysis of "constitutional protection [for] personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas,* 539 U.S. 558, 573-74 (2003) (citing *Casey,* 505 U.S. at 851); *see also, e.g.,* *Obergefell v. Hodges,* 576 U.S. 644, 665-66, 675 (2015); *United States v. Windsor,* 570 U.S. 744, 772 (2013); *Troxel v. Granville,* 530 U.S. 57, 65-67 (2000); *M.L.B. v. S.L.J.,* 519 U.S. 102, 116 (1996).

In light of these precedents, that the specific words "pregnancy" or "abortion" do not appear in the Constitution's text is of no moment. The constitutional question here is whether general principles ***19** grounded in the Constitution apply to the specific situation at hand. They do. As the Court explained in Casey, recognizing a fundamental liberty interest in ending a pregnancy logically follows from cases recognizing a liberty right in bodily integrity and in making decisions related

to "intimate relationships, the family, and... whether or not to beget or bear a child." 505 U.S. at 857; *see also generally* Constitutional Law Scholars Br.; Am. Civil Liberties Union Br.

Indeed, the word "contraception" does not appear in the Fourteenth Amendment either. Yet Mississippi concedes that "*Griswold*... finds grounding in text and tradition." Petrs. Br. 15.

The State argues that *Griswold* vindicated only "the textually and historically grounded Fourth Amendment protection against government invasion of the home" and "our history and tradition of safeguarding 'the marriage relationship.'" Petrs. Br. 15-16. But *Griswold* involved no home invasion, and *Ei-senstadt* subsequently held that the same protection is not limited to married couples. *See* *Eisenstadt,* 405 U.S. at 453. Moreover, this Court long ago rejected Mississippi's narrow interpretation of *Griswold,* stating that *Griswold* cannot "be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Carey,* 431 U.S. at 687.

***20** Mississippi also protests that the right to abortion is "different in kind from" other liberty interests because it implicates a state interest in fetal life. Petrs. Br. 16-17. But *Roe* already took any such difference into account. *See* 410 U.S. at 159. *Casey,* too, considered the argument that "abortion, which involves the purposeful destruction of the fetus, is different from all other medical procedures." Resp'ts. Br., *Casey,* 1992 WL 12006423, at *31. And the Court held that although the state's interests may support regulation of abortion, the state cannot "resolve the[] philosophic questions in such a definitive way that a woman lacks all choice in the matter." *Casey,* 505 U.S. at 850. Simply put, there can be no error in "the recognition afforded by the Constitution to the woman's liberty" to decide whether to end a pregnancy, because the "State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." *Id.* at 857-58.

Nor does it matter that some states prohibited abortion at the time Roe was decided or when the Fourteenth Amendment was adopted. Petrs. Br. 13. If that were a basis for overruling precedent, then *Brown v. Board of Education,* 347 U.S. 483 (1954), would have to go, for the same Congress that enacted the Fourteenth Amendment also segregated the D.C. public school system. So would *Gideon v. Wain-wright,* 372 U.S. 335 (1963), and *Loving v. Virginia,* 388 U.S. 1 (1967). Some believe *Heller* similarly lacks any historical foundation. *See* 554 U.S. at 683-87 (Breyer, J., dissenting). The list could go on and on.

At any rate, history and tradition provide ample support for the conclusion that "liberty" encompasses ***21** an individual's right to end a pre-viability pregnancy. The Court has long

recognized that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person." *Union Pacific Ry. Co. v. Botsford,* 141 U.S. 250, 251-52 (1891). Further, the common law permitted abortion up to a certain point in pregnancy, and many states maintained that common law tradition as of the late 1850s. See Roe, 410 U.S. at 140 (concluding that, for much of history and particularly during nineteenth century, "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today"); *see also generally* Historians Br.

In short, the key insight of *Casey* and *Roe* is that the decision whether to end a pregnancy has deep constitutional roots in the fundamental rights to bodily integrity and personal autonomy in matters of family, medical care, and faith. *Casey,* 505 U.S. at 857-59. Resolving now to allow the government to control this intimate personal decision to the same extent as ordinary economic and social regulation would result in a radical displacement of personal liberty in favor of the power of the state.

b. Once it is determined that deciding whether to continue a pregnancy implicates constitutional interests in bodily integrity and personal autonomy above and beyond ordinary economic and social matters, some line must be drawn to balance the individual's interests against the state's valid interests. Casey properly recognized that viability is a principled point at which to strike that balance.

***22** Before viability, there is no "realistic possibility of maintaining and nourishing a life outside the womb, so that" a state's interest in fetal life could then "override[] the rights of the woman." *Id.* at 870. If a state could ban abortion during this period, it would "extinguish[]" "the urgent claims of the woman to retain the ultimate control over her destiny and her body. *Id.* at 869. Thus, before viability, states may *regulate* abortion to advance their interest in fetal life, even early in pregnancy, by enacting laws designed to persuade people to carry a pregnancy to term. *Id.* at 872, 882. But viability is "the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860 (emphases added). [5]

2. *The Viability Line Is Clear and Has Proven Enduringly Workable.*

As *Casey* recognized, the viability line "has in no sense proven 'unworkable,' representing as it does a simple limitation beyond which a state law is unenforceable." 505 U.S. at 855. Indeed, federal courts ***23** have applied the viability rule with remarkable uniformity and predictability for five decades, finding pre-viability bans on abortion invalid regardless of whether those bans operated at 6, 12, or 20 weeks and regardless of the reasons states alleged to justify them. *See, e.g.,*

MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 773 (8th Cir. 2015) (invalidating 6-week ban under "Supreme Court precedent holding that states may not prohibit pre-viability abortions"); *Edwards v. Beck,* 786 F.3d 1113, 1117 (8th Cir. 2015) (similar, invalidating 12-week abortion ban); *Isaacson v. Horne,* 716 F.3d 1213, 1231 (9th Cir. 2013) (similar, invalidating 20-week abortion ban); *see also infra* p. 41.n.26.

Mississippi nevertheless contends that *Roe* and *Casey* are "hopelessly unworkable." Petrs. Br. 14, 19. But, in truth, Mississippi's arguments aim at the application of *Roe* and *Casey* to abortion *regulations* - not bans. *See* Petrs. Br. 19-21, 24-25. In particular, the State claims that Casey's undue burden test suffers from "administrability problems." Petrs. Br. 22. This case, however, involves an abortion ban and thus does not require the Court to apply the undue burden test.

3. *No Factual Changes Support Abandoning the Viability Line.*

Every factual argument Mississippi and its amici raise has been made to the Court before - indeed, more than once - including as part of requests to discard the viability line. Further, the State's own data and evidence establish that, to the extent there have been any factual changes since *Casey,* those changes ***24** reinforce the Court's previous decisions and the importance of access to legal abortion for women's health, lives, and equal status in society.

(a) *Viability as a Meaningful Line*

The State and its amici criticize viability as "arbitrary" and dependent on medical and scientific advancements that could move it earlier. *See* Petrs. Br. 43. These arguments are neither new, nor do they demonstrate any changed facts that would warrant overruling *Casey.*

First, the State's argument that viability may move earlier was considered and properly rejected in *Casey.* When Pennsylvania made the same argument in that case, the Court agreed that viability at 28 weeks was "usual at the time of Roe," that a fetus is "sometimes" viable at 23 or 24 weeks "today," and that viability may move to "some moment even slightly earlier in pregnancy... if fetal respiratory capacity can somehow be enhanced in the future." *Casey,* 505 U.S. at 860. But the Court concluded that these facts "have no bearing" on the viability rule it-self, as it "in no sense turns on" when viability may occur. *Id.* "*Whenever* it may occur," viability "marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on" abortion. *Id.* (emphasis added). As such, the Court explained, viability is "a rule of law and a component of liberty we cannot renounce." *Id.* at 871; *see also id.* at 860, 869-70.

Second, no changed factual circumstances related to viability exist on this record in any event. Medical ***25** consensus and the undisputed facts in this case establish that viability occurs no earlier than 23-24 weeks of pregnancy, JA18-20, 31, 34-35 (Carr-Ellis Decl. ¶¶ 11-15; Badell Decl. ¶¶ 4, 14) - precisely the time identified thirty years ago in *Casey.* 505 U.S. at 860. Further, those facts establish that life-sustaining treatment is generally not even possible for babies born before 22 weeks because of physiological limitations. JA33 (Badell Decl. ¶ 11). The record thus squarely refutes any claims that the viability line constantly moves, or that it is on the cusp of shifting significantly earlier.

Indeed, Mississippi affirmatively conceded below that the Ban prohibits abortion months before viability. JA58; *see also* Pet. App. 45a. The State's concession was undoubtedly a reflection of the medical consensus - including statements by its own health department. JA58. But it was also strategic: Mississippi argued in its petition for certiorari that the Ban was "an ideal case for examining a state's pre-viability interests" *because* 15 weeks is not even "close to the viability line." Pet. Cert. 34. The State's own litigation position forecloses its assertion that the viability line is arbitrary and unknowable.

(b) *Women's Health*

Mississippi raises nothing about women's health that this Court has not addressed before. Nor are there any changed facts since *Casey* relevant to women's health that could favor the State. If anything, legal abortion has become safer, including after 15 weeks, while childbirth, which always carries ***26** significant risks, has unfortunately grown comparatively more dangerous in the United States in recent years.

First, in Casey, this Court rejected the claim that a state should be able to *prohibit* abortion before viability because a woman needs protection and cannot herself weigh the risks of ending versus continuing a pregnancy. *See* 505 U.S. at 846. There is simply "no authority for making an exception to th [e] general liberty [to make decisions] regarding one's own health for abortion." *Isaacson,* 716 F.3d at 1235 (Kleinfeld, J., concurring in the judgment) (invalidating 20-week abortion ban). Accordingly, though the State "may enact *regulations* to further the health or safety of a woman seeking an abortion" - as it may with any medical care - it is up to the woman herself to weigh the risks of pre-viability abortion as compared to continued pregnancy and childbirth. *Casey,* 505 U.S. at 878 (emphasis added); *see also Sessions v. Morales-Santana,* 137 S. Ct. 1678, 1692 (2017) (statutory "objective itself is illegitimate" if its "objective is to exclude or '*protect*' members of one gender in reliance on fixed notions concerning [that gender's] roles and abilities") (internal quotation marks and citation omitted) (emphasis added).

***27** *Second,* the State presents no facts this Court has not seen before. Mississippi relies on statistics showing that, although legal abortion remains exceedingly safe throughout pregnancy, including in the second trimester, the risks increase as compared to the first trimester; and that the relative risk of death increases with each week of pregnancy. *See, e.g.,* Petrs. Br. 8; Bartlett, D. Ct. Dkt. 85-6. But, as far back as Roe, the Court has been aware that risk "increases as [] pregnancy continues." 410 U.S. at 150, 163. Similarly, in Casey, the Court acknowledged the legitimate interest of the state in protecting women's health throughout pregnancy, 505 U.S. at 846, considered the safety of legal abortion as pregnancy progresses, *id.* at 860, and nevertheless rejected an explicit request to abandon the viability line, *see id.; see also id.* at 870-71; Resp'ts. Br., *Casey,* 1992 WL 551421, at **16-17 (citing incremental increase in abortion risk with weeks of pregnancy). And the claims of the State's amici about the alleged health harms of legal abortion have all been made to this Court before, *see, e.g., Whole Woman's Health v. Hel-lerstedt,* 136 S. Ct. 2292, 2316-17 (2016), and are roundly rejected by overwhelming medical consensus, *see generally* Am. Coll. of Obstetricians & Gynecologists ("ACOG") and Leading Med. Orgs. Br. [6]

Third, Mississippi's own evidence shows that abortion has only become *safer* since *Roe* and *Casey.* Specifically: (1) "[i]n the 25 years following the legalization of abortion in 1973, the risk of death from legal abortion declined dramatically by 85%," Bartlett at 733, D. Ct. Dkt. 85-6; (2) when comparing the relative risk of dying from legal abortion in the time periods 1972-1979 and 1988-1997, "the risk of death ***28** declined *at all gestational ages*" in the later time-period, id. at 731 (emphasis added); and (3) "[l]egal induced abortion-related deaths occur only rarely," with a rate of 0.7 per 100,000 legally induced abortions for all women obtaining abortions, *id.* at 729, 736.

Finally, permitting states to prohibit abortion before viability would harm the health of people who need to end a pregnancy. The only alternative to abortion is continued pregnancy and childbirth - which carries substantial risks. At the time of Casey, the risk of death during childbirth was roughly ten times greater than that of legal abortion. ACOG Br., *Casey,* 1992 WL 12006402, at *2 (Mar. 6, 1992). "[C]hildbirth is [now] 14 times more likely than abortion to result in death." *Whole Woman's Health,* 136 S. Ct. at 2315; *see also generally* ACOG Br. The comparative risk is even higher in Mississippi, where it is about *75 times* more dangerous to carry a pregnancy to term than to have an abortion. [7] As in the United States generally, Black women in Mississippi disproportionately bear that risk. *See generally* ACOG Br.; Birth Equity Orgs. Br. [8]

***29** Mortality aside, forcing a person to continue a pregnancy would impose well-documented and substantial physical health risks and emotional harms. *See* ACOG Br. For instance, approximately one-third of all deliveries in the United States today involve a caesarean-section, a major abdominal surgery with serious risks of complications. *See id.*

Banning abortion would also result in forcing some people to attempt to end their own pregnancies. *See generally* ACOG Br. Those without the resources to end a pregnancy safely would be exposed to increased health risks and deterred from seeking aftercare for fear of investigation or even arrest and prosecution. *See id.*

And make no mistake: there will *inevitably* be individuals who are unable to access abortion before 15 weeks or before any particular pre-viability point in pregnancy. A moment's reflection shows why this is so.

***30** To begin, a person who is considering ending a pregnancy has every incentive to access abortion before 15 weeks. Delay means a person remains pregnant and continues to experience the symptoms of pregnancy. *See generally* ACOG Br. Abortion also generally becomes more complex and more expensive as pregnancy progresses. *See generally id.* For these reasons and others, nearly every person who obtains an abortion in the second trimester would have preferred to access an abortion earlier. [9]

***31** For most of the tens of thousands of people each year who obtain an abortion after 15 weeks, however, accessing abortion care earlier is not possible. [10] More than half of second-trimester abortion patients miss the window for a first-trimester abortion simply because of delays in recognizing or suspecting they are pregnant. [11] Late recognition of pregnancy is especially common for young people, people using contraceptives, or people who are pregnant for the first time. [12] Others who seek abortion in the second trimester do so because health conditions develop or worsen as the pregnancy progresses, or because of significant changes in their life over the course of their pregnancy. *See generally, e.g.,* ACOG Br. Second-trimester patients may also not seek abortion care earlier because they are taking time to consult with family or a health professional before making this deeply personal decision. [13]

(c) *Fetal Development*

The State also contends that scientific advancements related to fetal development, including claims regarding fetal pain, require the Court to discard the viability line. *See* Petrs. Br. 30. Viability should be abandoned, Mississippi argues, so that courts can consider its claims that the fetus has "taken on the human form" by 12 weeks of pregnancy and that a fetus can experience pain prior to viability. Petrs. Br. 30. But as with the State's other claims, these arguments have been considered and rejected before. Further, the assertions about fetal pain are contrary to the overwhelming medical consensus that fetal pain is not possible until at least viability.

First, Mississippi's factual claims about fetal development, including fetal pain, have been brought to the Court many times. Texas's brief in Roe discussed fetal development in detail, at every stage

of pregnancy, and claimed that conscious experience and sensitivity to touch was possible in the first trimester. Appellee Br., Roe, 1971 WL 134281, at *44 (Oct. 19, 1971). So too in *Webster,* in which the Court was asked to overrule Roe and abandon viability and did not. *See* 492 U.S. at 569 (Stevens, J., concurring ***32** in part and dissenting in part) (discussing potential for fetal pain).

Arguments about fetal development were also presented in *Casey,* where several amici made the claims made here that, because of ultrasonography and other medical advances, "[w]hat we know now... has dramatically increased our understanding of the humanity of the unborn child." *See* Am. Ass'n of Pro-Life Obstetricians & Gynecologists Br., Casey, 1992 WL 12006428, at *5 (Apr. 6, 1992). And arguments about fetal pain have been raised in more recent cases. *See* *Gonzales,* 550 U.S. at 159-160; see also Petrs. Br., Gonzales, 2006 WL 1436690, at **9a-10a (May 22, 2006) (discussing fetal pain); U.S. Rep. Charles T. Canady & Other Members of Congress Br., Stenberg, 2000 WL 228464, at *16 (Feb. 28, 2000) (claiming fetus can perceive pain by 13 weeks (citation omitted)). The Court has never accepted that any interest in fetal life can override a woman's fundamental liberty interest, pre-viability, to decide to end her pregnancy. And there is no basis for reprising those arguments yet again.

Second, the argument that conscious awareness, including the experience of pain, is possible before viability is even less supportable today than it was at the time of *Casey.* In the last decade, numerous major medical organizations have rejected this claim for multiple reasons, including because the experience of pain requires a functioning cortex, and the requisite function and connections to the cortex do not exist until at least 24 weeks. See generally Soc'y for Maternal-Fetal Med. Br. This medical consensus reflects ***33** the conclusions of a multi-disciplinary team of physicians and scientists from all relevant fields after a years-long examination of all peer-reviewed data relevant to the issue. See Royal College of Obstetricians and Gynaecologists, Fetal Awareness: Review of Research and Recommendations for Practice, at viii - x, 1-2 (Mar. 2010). Hundreds of brain imaging studies published in peer-reviewed journals in recent decades have further cemented this consensus. *See generally* Soc'y for Maternal-Fetal Med. Br.

Accordingly, in the thirty years since *Casey,* no major medical organization has accepted the views of the State and its amici about pre-viability fetal pain. That is because Mississippi relies on a definition of pain that international consensus rejects, and because it relies on the scientifically untenable position that the cortex is not necessary for conscious awareness of pain. *See id.; see also e.g.,* *Whole Woman's Health All. v. Rokita,* 2021 WL 3508211, at *64 (S.D. Ind. Aug. 10, 2021) (describing opinion about fetal pain offered by Dr. Condic - the same expert the State proffered here - as a "'fringe view' within the medical community"); *EMW Women's Surg. Ctr. v. Meier,* 373 F. Supp.3d 807, 823 (W.D. Ky. 2019) (rejecting contention that fetal pain is possible before 24 weeks as contrary to consensus of medical community), *aff'd* 960 F.3d 785 (6th Cir. 2020). [14]

***34** *Third,* assertions about fetal development and fetal pain are, in truth, rooted in philosophic arguments that abortion is "inhumane" and can be banned entirely. *See, e.g.,* Appellants Br., Jackson Women's Health Org., 2019 WL 1208918, at *26 (5th Cir. Mar. 6, 2019). But as the Court explained in Casey, because pregnancy so intensely impacts a woman's bodily integrity, these philosophic arguments cannot be resolved in such a "way that a woman lacks all choice in the matter," 505 U.S. at 850, and her liberty interests are categorically stronger than any state interest before viability, *id.* at 852-53.

(d) ***Availability of Contraception and Other Policy Changes.***

Mississippi claims that modern contraception and policy changes have "dulled concerns" about women's equal status in society, rendering abortion unnecessary. Petrs. Br. 29. These claims are both false and paternalistic.

***35** *First,* the State misunderstands the nature of the right at issue, which is the ability to decide if, when, and how many children to have. No policy change has, or even could, render such decisions unnecessary for the millions who make them each year. Indeed, one in four women have made the decision to end a pregnancy in their lifetimes. [15]

Second, Mississippi is wrong on the facts. Contraception is not universally accessible or affordable in the United States, particularly for young people and people who are poor or living with low incomes. *See generally* Nat'l Women's Law Ctr. ("NWLC") Br.; Economists Br. Nor is contraception ever fail-safe. *See generally* NWLC Br.

Further, many indicators of gender equality continue to lag behind the ideal Mississippi imagines. Pregnancy and caregiver discrimination persist and remain difficult to root out. *See Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 731, 736 (2003); *see also generally* NWLC Br. Women - whether they be lawyers or other professionals or blue-collar workers - still bear the disproportionate share of child-raising duties. *See generally* NWLC Br. Women are more likely to be poor than men, they continue to be underpaid compared to men, their lifetime earnings (unlike men's) decrease after having children, and they remain underrepresented at the highest levels of power, including in Congress, on the judiciary, in private law firms, and in the boardroom. *See generally id.;* Organizations of Women Lawyers Br.

***36** *Third,* the State's suggestion that gains in women's status somehow support taking away their right to make basic decisions about their lives and their bodies is nonsensical. Even if the claim that the United States had achieved full gender equality were true (it is not), those gains were made while the Court has steadfastly reaffirmed the right to abortion. *See generally, e.g.,* Economists Br. Further, that policy changes may have decreased discrimination against pregnant people and

provided limited support to parents through unpaid leave and a modest tax credit, see Petrs. Br. 35, is no justification for overriding an individual's decision to end a pre-viability pregnancy.

4. *The Right to Decide Whether to Continue a Pregnancy Before Viability Remains Critical to Women's Equal Participation in Society.*

Even if contested, constitutional rights that have "become embedded" in "our national culture" are entitled to heightened *stare decisis* effect. *Dickerson v. United States,* 530 U.S. 428, 443 (2000); *see also* *South Carolina v. Gathers,* 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) ("[T]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised upon their validity."); *Gamble,* 139 S. Ct. at 1969 (similar). Indeed, it is critical that such precedent hold firm in the face of efforts to "thwart [the] implementation" of a longstanding right. *Casey,* 505 U.S. at 867.

Such is the case here. Casey recognized that "for two decades of economic and social developments, ***37** people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." *Id.* at 856. That is even truer today, as women's own experiences, social science research, and federal jurisprudence have further cemented that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id.*

In particular, young women (of all socioeconomic backgrounds), women of color, and women who are poor or living with low incomes are more likely to experience unplanned pregnancies and accordingly are more likely to need abortion care. [16] In fact, more than half of people who obtain abortion care are in their twenties; most are already parents. [17] The most common reasons for ending a pregnancy include concerns about economic security, the desire to finish an education, and responsibilities to current children or other family members. *See generally* Social Science Experts Br. [18]

***38** Consider just one person's reflection in a brief to the Court: "Becoming a first-generation professional would have been impossible without access to safe and legal abortion services." Michelle Coleman Mayes, et al., & 350 Other Legal Professionals Br., June Med. Servs., 2019 WL 6650222, at **8-9 (Dec. 2, 2019). "The ability to make my own choice, to even have a choice" made college available "as a path to being able to provide a better life for... future children." *Id.; see also generally* Abortion Stories Br.

***39** That the right guaranteed by *Casey* and *Roe* is critical to women's equality is clear from the impact on those who make the decision to end a pregnancy but are denied the ability to do so. Women who are denied an abortion:

● must endure the comparatively greater risks to their health of continued pregnancy and childbirth; [19]

● may lose educational opportunities; [20]

● face decreased opportunities to pursue their full career potential and take an active role in civic life; [21]

● are more likely to experience violence from the man involved in the pregnancy; [22]

● are more likely to experience economic insecurity and raise their existing children in poverty; [23]

***40** ● are more likely, as pregnant women and mothers, to experience economic harms, despite modest changes to workers' protections. [24]

***41** In response to these well-documented facts, the law has increasingly recognized that women's ability to control if, when, and how many children they have is critical to gender equality. *See, e.g.,* *Morales-Santana,* 137 S. Ct. at 1692-93 (laws based on "[s]tereotypes about women's domestic roles" and other "generalizations about the different talents, capacities, or preferences of males and females" are "anachronistic"); *Hibbs,* 538 U.S. at 731, 736 ("the pervasive sex-role stereotype that caring for family members is women's work" undergirds "subtle discrimination" against women as "mothers [and] mothers-to-be" "that may be difficult to detect on a case-by-case basis," and which damages women's professional opportunities); *United States v. Virginia,* 518 U.S. 515, 533-34 (1996) ("Physical differences" between sexes may not be relied upon "to create or perpetuate the legal, social, and economic inferiority of women"); *cf. Nat'l Coal. for Men v. Selective Serv. Sys.,* 141 S. Ct. 1815 (June 7, 2021) (Sotomayor, J., joined by Breyer and Kavanaugh, J.J., concurring). These understandings have been essential to the incremental advancements the Nation has made since Casey towards gender equity. [25]

***42** Accepting Mississippi's request to abandon the viability line would turn back the clock for generations who have never known what it means to be without the fundamental right to make the decision whether to continue a pregnancy. Any answer to the question presented other than a categorical "yes" would shatter the understanding women have held close for decades about their bodies, their futures, and their equal right to liberty.

II. The State Offers No Alternative to the Viability Line that Could Sustain a Stable Right to Abortion.

***43** A party asking this Court to take the grave step of overruling a rule of law - one that has been repeatedly reaffirmed - should at least propose and seriously develop an alternative legal framework. *Cf.* *Fulton v. City of Phila.,* 141 S. Ct. 1868, 1882-83 (2021) (Barrett, J., concurring). All the more so here. In recent years, several states have enacted laws banning abortion at every pre-viability stage of pregnancy, from 6 weeks to 20 weeks - asserting a variety of alleged justifications for those bans.[26] *See, e.g.,* Texas et al. Br. at 32 n.2 (citing over 20 states' previability bans); *see also, e.g., Whole Woman's Health v. Jackson,* No. 21A24, 594 U.S. ___ (Sept. 1, 2021) (considering six-week ban from Texas). Missouri, for example, has enacted a cascading ban that prohibits abortion at or after 8, 14, 18, and 20 weeks of pregnancy.[27] *See* *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Parson,* 1 F.4th 552, 557 (8th Cir. 2021) (affirming preliminary injunction), *rehearing en banc granted, op. vacated* (July 13, 2021). Some states have gone further and already enacted complete bans on abortion.[28] At least a dozen, including Mississippi itself, have in place laws that are intended to spring into effect and ban abortion immediately when and if this Court overrules Roe and Casey.[29]

Yet Mississippi devotes just a few pages at the end of its brief to purported "alternatives" to the viability line. Its barebones discussion of its proposed alternatives highlights that any abandonment of viability would be no different than overruling Casey and Roe entirely.

A. "Any Level of Scrutiny"

Mississippi first proposes the Court hold that the Ban satisfies "any level of scrutiny" and "leave for another day" a decision of what level of scrutiny actually applies to pre-viability bans. Petrs. Br. 46. In place of the stable rule prohibiting pre-viability bans that courts have uniformly applied for a half-century, this proposal would leave women, state officials, and the lower courts at sea.

1. The states that have enacted abortion bans defend them on the same grounds that Mississippi puts ***44** forward here. In fact, Mississippi itself makes similar arguments to this Court as it made to the lower courts in support of its 6-week ban. See Appellants Br., Jackson Women's Health Org., 2019 WL 4238421, at **23-27 (5th Cir. Aug. 28, 2019). And Mississippi likely would make similar arguments in defense of a ban on abortion at virtually any point in pregnancy. For example, it urges the Court to hold that its interests in prohibiting pre-viability abortion are compelling at 15 weeks, because that is "when risks to women have increased considerably." Petrs. Br. 46. Yet its legislative findings state that "[a]fter 8 weeks' gestation, abortion's risks 'escalate exponentially."' Petrs. Br.

8. Mississippi also claims its interest in "unborn life" is compelling at 15 weeks because that is when "basic physiological functions [of the fetus] are all present." Petrs. Br. 46. But according to its legislative findings, "[a]t 9 weeks, 'all basic physiological functions are present."' Petrs. Br. 7; compare also, e.g., Petrs. Br. 46 (asserting a compelling interest at 15 weeks because that is when "vital organs are functioning"), *with Petrs. Br. 7* (stating "[a]t 10 weeks, 'vital organs begin to function"').

2. Stripped of the viability line, how would federal courts evaluate these arguments on a case-by-case basis? What state interests would count as compelling or otherwise sufficiently strong to categorically outweigh the individual liberty interest at stake? As Casey emphasized: "State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution." 505 U.S. at 845. Adopting the State's proposal would provide none.

***45** The State's "strict scrutiny" argument here illustrates the point. It says that the Court should uphold laws prohibiting abortion before viability as the least restrictive means of serving states' interests. See Petrs. Br. 46. But, under any accepted understanding of strict scrutiny, the Ban cannot be a narrowly tailored means of advancing the State's interest in reducing abortion after 15 weeks - particularly when it coexists with other Mississippi laws that impede access to earlier abortion. Indeed, the State's own evidence highlights that reducing barriers to earlier abortion would be a less restrictive measure by which it could pursue its asserted interests. See Bartlett at 736, D. Ct. Dkt. 85-6. [30] So any decision from this Court upholding the 15-week ban under means-ends scrutiny would signal that anything goes - or at least that any ban would have a chance of surviving in court.

The fallout would be swift and certain. As abortion bans are enforced - or the threat of enforcement looms - large swaths of the South and Midwest would likely be without access to legal abortion. Some people with the means to travel may be able to access legal abortion - but only after crossing multiple state lines. (Mississippians, for example, would have to travel at least two states away to reach the closest ***46** place abortion would likely remain legal. See generally e.g., Economists Br.) Others would end their own pregnancies outside the medical system, which could expose them and anyone who helps them to criminal investigation and prosecution. See generally Current & Former Prosecutors Br. Some would attempt abortion by unsafe or ineffective methods. See generally ACOG Br. Fear of arrest or prosecution could deter those who then need medical help from seeking it, endangering their health and safety. See id. For many, the barriers will simply be too high, and they will be forced to endure the substantial risks of continued pregnancy and childbirth. See id.

People would be harmed, and chaos would ensue, even in states that claim not to be prohibiting abortion directly. For example, Texas now has a law that exposes anyone who "aids or abets" an abortion as early as 6 weeks to the risk of being dragged into court to defend against massive

fines. See, e.g., S.B. 8 § 3 (codified at Tex. Health & Safety Code § 171.208(a)). Other states, including Mississippi, intend to follow suit, attempting to bring abortion care to a halt. [31]

Even broader upheaval would follow. State attempts to advance an interest in protecting fetal life by policing its residents' access to abortion beyond their borders would no doubt arise. So too would efforts to restrict certain forms of contraception, in pursuit of an interest in protecting potential life. Cf. e.g., ***47** Casey, 505 U.S. at 859 (some "forms of contraception" may implicate "postconception potential life").

B. "Undue Burden"

The State's proposal to uphold the 15-week ban under an "undue burden" analysis is equally unprincipled and unworkable. Mississippi suggests that states may prohibit abortion before viability if doing so does not prevent a "significant number" of people from obtaining abortion. Petrs. Br. 47. And the State maintains that the Ban meets this rights-by-num-bers test because "4.5% of the women who obtained abortions [from the Providers in 2017] did so after 15 weeks." Id. This reasoning is incompatible with continuing to recognize an individual constitutional right to decide whether to continue a pregnancy and irreconcilable with this Court's treatment of other constitutional rights more generally. It would also require this Court to draw a new line in a purely legislative manner.

1. To begin, the State offers a half-hearted suggestion that its "undue burden" approach would "draw some support" from precedent. Petrs. Br. 47. But this proposal - just like Mississippi's first one - directly conflicts with Casey's assurance that "adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade" that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy" up until viability. 505 U.S. at 879 (emphases added); see also June Med. Servs., 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment).

***48** The State's proposal further conflicts with *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), *Stenberg v. Carhart,* 530 U.S. 914 (2000), and *Gonzales v. Carhart,* 550 U.S. 124 (2007). Each holds that states may not prohibit pre-viability abortion at any point in the second trimester, even though, as was true then and is true today, most people obtain abortions in the first trimester. [32] And, contrary to the State's claims that Gonzales supports the validity of a pre-viability ban, Petrs. Br. 44, *Gonzales* upheld a prohibition of one rarely-used abortion method only because the Court found that the standard method used throughout the second trimester remained available. 550 U.S. at 150-54. Indeed, the restriction in *Gonzales* did not prohibit any person from obtaining an abortion until viability. *Compare* *Stenberg,* 530 U.S. at

938-39, 945-46. Accordingly, *Gonzales,* too, applied the rule announced decades earlier: laws that prohibit abortion at any point before viability "strike at the right itself' and cannot stand. 550 U.S. at 157-58 (quoting *Casey,* 505 U.S. at 874); see also id. at 158 ("The three premises of *Casey* must coexist.").

2. Mississippi also says that the Ban impacts "only one week" of procedures - referring to the fact ***49** that the Providers offer abortion services to 16 weeks. Petrs. Br. 47. But that is no limiting principle. Does the State really mean to suggest that if providers in another state offered care to 17 or 18 weeks, a 15-week ban would then be unconstitutional? What if other states banned abortion at different pre-viability points of pregnancy, and then amended those bans from year to year, based purely on whether abortion was currently available there at 10 weeks, 14 weeks, or 20 weeks? These questions are sure to arise in nearly every permutation. The recent enactment of Texas S.B. 8 - and other states' pronouncements that they will consider similar laws - should make that plain.

More fundamentally, the State's brute numbercrunching is at odds with the recognition of constitutional rights in general. The very essence of a constitutional right is that the government cannot outright prohibit a certain subset of people, no matter how small, from exercising that right.

The Second Amendment, for example, would not tolerate a ban on owning handguns in studio apartments, even if only 4.5% of people lived in such dwellings. The recognition of the right to self-defense in the home deprives legislatures of "the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Heller,* 554 U.S. at 634. Campaign expenditures over $1,000,000 could not be prohibited on the ground that only a tiny percentage of Americans wanted to make such expenditures. *Cf. McCutcheon v. Fed. Election Comm'n,* 572 U.S. 185 (2014). Warrantless investigatory stops and searches could not be sanctioned on a particular roadway on ***50** the ground that few people in the state really need to travel along that thoroughfare. *Cf. City of Indianapolis v. Edmond,* 531 U.S. 32 (2000). Other examples abound. *See, e.g., Texas v. Johnson,* 491 U.S. 397 (1989) (invalidating state statute prohibiting flag burning, with no mention of how many engage in such activity); *Eisenstadt,* 405 U.S. at 453 (holding unconstitutional prohibition on distribution of contraceptives to single people because, "[i]f the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child") (emphasis added).

There are no half-measures here. Each of the State's purported alternatives would upend the balance struck in Casey and ultimately extinguish "the woman's liberty to determine whether to carry her pregnancy to full term." 505 U.S. at 869-70. Put another way, upholding the Ban under either "alternative" rationale the State offers would lead to the same thing: attempts by half the states in the Nation to forbid abortion entirely, and a judiciary left without tools to manage the resulting

litigation. The only way to avoid that outcome is to recognize, as the Court reaffirmed thirty years ago, that "a State's interest in the protection of [fetal] life falls short of justifying any plenary override of [the] individual liberty claims" at stake here. Id. at 857. Until viability, a state may regulate, but not ban, abortion.

*51 CONCLUSION

The judgment of the court of appeals should be affirmed.

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Footnotes

1 Unless otherwise indicated, all citations to Casey are to the plurality opinion of Justices O'Connor, Kennedy, and Souter.

2 Prior to enacting the Ban, Mississippi also prohibited abortion after 20 weeks Imp, and that ban remains in effect today. Miss. Code Ann. § 41-41-137.

3 Although the term "women" is used here and elsewhere, people of all gender identities may also become pregnant and seek abortion care. *See* *Reprod. Health Servs. v. Strange,* 3 F.4th 1240, 1246 n.2 (11th Cir. 2021).

4 *See, e.g.,* Resp'ts. Br., Casey, 1992 WL 12006423, at **33, 105-17 (Apr. 6, 1992) (arguing that Roe's use of "viability to define the contours of [the] right [to abortion] is at bottom arbitrary"); Petrs. Br., Webster, 1989 WL 1127643, at *13 (Feb. 23, 1989) (similar).

5 The claim that legal changes outside the United States have undermined *Casey* and Roe is incorrect. Petrs. Br. 31. To the contrary, the overwhelming global legal trend is towards liberalization of abortion access. *See generally* Int'l and Comparative Legal Scholars Br.; United Nations Mandate Holders Br. Moreover, in countries with legal traditions and democratic values most comparable to the United States, such as Great Britain and Canada, abortion is legal until at least viability. *See* Int'l and Comparative Legal Scholars Br. And many countries that have limits earlier in pregnancy continue to permit abortion for broad social and health reasons after that point, functionally allowing abortion later in pregnancy and making their laws entirely different from the Ban. *See id.*

6 The claim that abortion harms women's mental health has been roundly rejected by medical consensus. *See, e.g.,* Nat'l Acad. Scis., Eng'g & Med., *The Safety and Quality of Abortion Care in the United States* 150 (2018) ("[T]he rates of mental health problems for women with an unwanted pregnancy were the same whether they had an abortion or gave birth."); *see also generally* ACOG Br.

7 *See* Miss. Dep't of Health, Miss. Maternal Mortality Report 2013-2016, 5, 25 (Mar. 2021), https://perma.cc/H362-RN2Q (reporting 33.2 pregnancy-related deaths per 100,000 live births); CDC, Abortion Surveillance (2018), https://perma.cc/X2KW-MDSA (reporting 0.44 deaths per 100,000 legally induced abortions in the United States from 2013-2017).

8 *See also* Miss. Maternal Mortality Report at 5 (reporting 51.9 deaths per 100,000 live births for Black women compared to 18.9 deaths per 100,000 live births for white women).

9 Lawrence B. Finer, et al., *Timing of Steps and Rasons for Delay in Obtaining Abortions in the United States,* 74 Contraception 334, 341 (2006) (91% of second-trimester patients reported wanting to access abortion earlier).

10 *See* Social Science Experts Br.; *see also* Elizabeth Nash, et al., *Mississippi Is Attacking Roe v. Wade Head On - the Consequences Could Be Severe,* Guttmacher Instit. (Aug. 17, 2021), https://perma.cc/4W48-R2TA (number of people who obtain abortion after 15 weeks each year).

11 *See, e.g.,* Eleanor A. Drey, et al. *Risk Factors Associated With Presenting for Abortion in the Second Trimester,* 107 Obstetrics & Gynecology 128, 130 (2006).

12 *See, e.g.,* Diana Greene Foster, et al., *Timing of Pregnancy Discovery Among Women Seeking Abortion,* Contraception 1-6 (2021); Amy Branum, et al., *Trends in Timing of Pregnancy Awareness Among US Women,* 21 Matern. Child Health J. 715-26 (2017).

13 *See, e.g.,* Elizabeth Janiak, *Abortion Barriers and Perceptions of Gestational Age Among Women Seeking Abortion Care in the Latter Half of the Second Trimester,* 89(4) Contraception 322-27 (2014).

14 The arguments of the State and its amici about fetal pain equate pain with physiological reactions, such as reflex responses. Again, these arguments were made in previous cases. *See, e.g.,* S. Ctr. for Law & Ethics Br., Webster, 1989 WL 1127661, at *12 (Feb. 23, 1989); Bernard N. Nathanson, M.D., Br., Webster, 1988 WL 1026213, at **43-45 (Feb. 23, 1988). And the arguments are at odds with science: Medical consensus is clear that experiencing pain requires conscious awareness; for example, reflex responses can occur even under anesthesia. *See generally* Soc'y for Maternal-Fetal Med. Br.

15 Rachel K. Jones, et al., *Abortion Incidence and Service Availability in the United States, 2017,* Guttmacher Instit. (Sept. 2019), https://perma.cc/66E8-XUY5; Data Center: Number of Abortions, Guttmacher Instit., https://perma.cc/84EK-VLRX (providing data for number of abortions in previous decades).

16 *See* Nat'l Acads. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States,* at 29-31; Jessica E. Morse et al., *Reassessing Unintended Pregnancy: Toward a Patient-Centered Approach to Family Planning,* 44 Obstetrics & Gynecology Clinics 27, 27 (2017).

17 Induced Abortion in the United States, Guttmacher In-stit. (Sept. 2019), https://perma.cc/35ZJ-KZAW.

18 *See also e.g.,* M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US,* 13(29) BMC Women's Health at 6 (2013); Carr-Ellis Decl. in Supp. of Pls. Mot. for T.R.O. ¶ 11, D. Ct. Dkt. 5-1.

19 *See, e.g.,* Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States,* 119 Obstetrics and Gynecology 215-19 (2012).

20 *See, e.g.,* Lauren J. Ralph et al., *A Prospective Cohort Study of the Effect of Receiving Versus Being Denied an Abortion on Educational Attainment,* 29(6) Women's Health Issues 455-64 (2019) (among high school graduates, people denied a wanted abortion were less likely to complete postsecondary degrees compared to those who received a wanted abortion); Jennifer Manlove & Hannah Lantos, *Data Point: Half of 20- to 29-Year-Old Women Who Gave Birth in Their Teens Have a High School Diploma,* Child Trends (XX/XX/2018), https://perma.cc/QU2U-FW8V (young people who give birth are much less likely to obtain high school diploma relative to their counterparts).

21 *See, e.g.,* Christine Dehlendorf, et al., *Disparities in Abortion Rates: A Public Health Approach,* 103 Am. J. of Pub. Health 1772, 1775 (2013) ("[U]nintended childbirth is associated with decreased opportunities for education and paid employment..."); Adam Sonfield, et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children* 14-15, Guttmacher Instit. (Mar. 2013), https://perma.cc/TKD3-6YV3.

22 *See, e.g.,* Sarah C.M. Roberts, et al., *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion,* 12(144) BMC Med. at 5 (2014).

23 *See, e.g.,* Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who are Denied Wanted Abortions in the U.S.,* 108 Am. J. Pub. Health 407, 409, 412-13 (2018); Sarah Miller, *The Economic Consequences of Being Denied an Abortion,* Nat'l Bur. Econ. Res. Working Paper 26662 (2020), https://perma.cc/PB6H-4UEG; Diana Greene Foster, et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children,* 205 J. Pediatrics 183-89 (2019).

24 *See, e.g.,* Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women at Work* 7, McKinsey & Co. (2012), https://perma.cc/2642-UG6B (pregnant women are less likely to be hired and more likely to be denied promotions because of employers' preconceptions about their career plans); *see generally* Reva Siegel, *The Pregnant Citizen, from Suffrage to the Present,* Geo. L.J. 19th Amend. Special Ed. 19, 30-31, n.193-94 (2020) ("[R]esearch shows that pregnant women are negatively stereotyped, viewed as less competent and committed, and are less likely to be hired.") (discussing "motherhood penalty" and collecting studies).

25 Although Mississippi relies on John Hart Ely's 1973 writings to support its arguments against *Casey,* Petrs. Br. 40, Ely praised *Casey,* recognizing that "[o]ur society has indeed built up expectations on the basis of [Roe], particularly as regards the aspirations of women." John Hart Ely, *Letter to Justices Kennedy, O'Connor, and Souter Concerning* Planned Parenthood v. Casey (1992), in On Constitutional Ground 305 (1996). In Ely's view, "overruling [Roe] [] would have been a terrible mistake... [and] would weaken the Court's authority immeasurably." *Id.*

26 Federal courts have blocked these bans. *See, e.g.,* *Little Rock Family Planning Servs. v. Rutledge,* 984 F.3d 682, 688-89 (8th Cir. 2021) (affirming preliminary injunction); *Jackson Women's Health Org. v. Dobbs,* 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) (affirming preliminary injunction); *Planned Parenthood S. Atlantic v. Wilson,* 2021 WL 1060123, at *12 (D.S.C. Mar. 19, 2021) (preliminary injunction); *SisterSong Women of Color Reprod. Justice Collective v. Kemp,* 472 F. Supp. 3d 1297, 1312-14 (N.D. Ga. 2020) (permanent injunction), appeal filed, No. 20-13024 (11th Cir. Aug. 11, 2020); *EMW Women's Surg. Ctr. v. Beshear,* 2019 WL 1233575, at *2 (W.D. Ky. Mar. 15, 2019) (temporary restraining order); *Preterm-Cleveland v. Yost,* 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019) (preliminary injunction). *Even in* *Preterm-Cleveland v. McCloud,* 994 F.3d 512, 527, 535 (6th Cir. 2021) (en banc), the court reversed a preliminary injunction of a law prohibiting some abortions prior to viability because it concluded that the law is not a pre-viability abortion ban.

Other states could move to revive bans on abortion at various points in pregnancy if the Court discards the viability line. *See, e.g.,* *Stenehjem,* 795 F.3d at 773 (6-week ban).

27 Tennessee has a similar ban. *Memphis Ctr. for Reprod. Health v. Slattery,* No. 20-5969, F.4th (6th Cir. Sept. 10, 2021) (affirming preliminary injunction).

28 *Little Rock Family Planning Servs. v. Jegley,* 2021 WL 3073849 (E.D. Ark. July 20, 2021); *Robinson v. Marshall,* 415 F. Supp. 3d 1053 (M.D. Ala. 2019) (preliminary injunction).

29 *See, e.g.,* Ark. Code § 5-61-304; La. Rev. Stat. § 40:1061; Miss. Code Ann. § 41-41-45; see also Ctr. for Reprod. Rts., What If Roe Fell, https://perma.cc/FA96-P76K.

30 Additionally, although Mississippi discusses an interest in "protecting" the medical profession by banning abortions performed using the dilation and evacuation procedure, Petrs. Br. 7-8, 37, the State prohibited that procedure two years prior to the Ban, see Miss. Code Ann. § 41-41-155, undermining any claim that the Ban is even related to such an interest.

31 *See, e.g.,* Stephen Groves, GOP-Led States See Texas Law as *Model to Restrict Abortions,* Associated Press (Sept. 2, 2021), https://perma.cc/H5ZF-YBK5.

32 *Gonzales,* 550 U.S. at 156-60 (upholding prohibition on rarely-used second trimester method); Stenberg, 530 U.S. at 924 (invalidating prohibition on most common second trimester method, when "[a]pproximately 10% of all abortions are performed during the second trimester of pregnancy"); *Danforth,* 428 U.S. at 77-79 (invalidating prohibition on abortion procedure that accounted for majority of abortions after the first trimester).

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2021 WL 3145936 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Thomas E. DOBBS, M.D., M.P.H., State Health Officer of
the Mississippi Department of Health, et al., Petitioners,
v.
JACKSON WOMEN'S HEALTH ORGANIZATION, et al., Respondents.

No. 19-1392.
July 22, 2021.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Petitioners

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QUESTION PRESENTED

Whether all pre-viability prohibitions on elective abortions are unconstitutional.

*ii PARTIES TO THE PROCEEDING

Petitioners are Thomas E. Dobbs, M.D., M.P.H., in his official capacity as State Health Officer of the Mis-sissippi Department of Health, and Kenneth Cleve-land, M.D., in his official capacity as Executive Direc-tor of the Mississippi State Board of Medical Licen-sure.

Respondents are Jackson Women's Health Organ-ization, on behalf of itself and its patients, and Sa-cheen Carr-Ellis, M.D., M.P.H., on behalf of herself and her patients.

*iii TABLE OF CONTENTS

*v TABLE OF AUTHORITIES

Cases

*1 INTRODUCTION

On a sound understanding of the Constitution, the answer to the question presented in this case is clear and the path to that answer is straight. Under the Constitution, may a State prohibit elective abortions before viability? Yes. Why? Because nothing in consti-tutional text, structure, history, or tradition supports a right to abortion. A prohibition on elective abortions is therefore constitutional if it satisfies the rational-basis review that applies to all laws.

This case is made hard only because Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), hold that the Constitution protects a right to abortion. Under those cases, a state law restricting abortion may not pose an "undue burden" on obtain-ing an abortion before viability. 505 U.S. at 877 (plu-rality opinion). And "[b]efore viability," this Court has said, a State may not maintain "a prohibition of abor-tion," id. at 846 - despite the State's "important inter-ests" in protecting unborn life and women's health, Roe, 410 U.S. at 154. Both courts below understood Roe and Casey to require them to strike down Missis-sippi's Gestational Age Act because it prohibits (with exceptions for life and health) abortion after 15 weeks' gestation and thus before viability.

Roe and Casey are thus at odds with the straight-forward, constitutionally grounded answer to the question presented. So the question becomes whether this Court should overrule those decisions. It should. The stare decisis case for overruling Roe and Casey is overwhelming.

Roe and Casey are egregiously wrong. The conclu-sion that abortion is a constitutional right has no *2 basis in text, structure, history, or tradition. Roe based a right to abortion on decisions protecting as-pects of privacy under the Due Process Clause. 410 U.S. at 152-53. But Roe broke from prior cases by in-voking a general "right of privacy" unmoored from the Constitution. Notably, Casey did not embrace Roe's reasoning. See 505 U.S. at 846-53. And Casey's de-fense of Roe's result - based on the liberty this Court has afforded to certain "personal decisions," id. at 851, 853 - fails. Casey repeats Roe's flaws by failing to tie a right to abortion to anything in the Constitution. And abortion is fundamentally different from any right this Court has ever endorsed. No other right in-volves, as abortion does, "the purposeful termination of a potential life." Harris v. McRae, 448 U.S. 297, 325 (1980). So Roe broke from prior cases, Casey failed to rehabilitate it, and both recognize a right that has no basis in the Constitution.

Roe and Casey have proven hopelessly unworka-ble. Heightened scrutiny of abortion restrictions has not promoted administrability or predictability. And heightened scrutiny of abortion laws can never serve those aims. Because the Constitution does not protect a right to abortion, it provides no guidance to courts on how to account for the interests in this context. A court cannot "objectively ... weigh[ ]" or "meaning-fully] ... compare" the "imponderable values" in-volved. June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in judgment). Heightened scrutiny - be it the undue-burden standard or another heightened standard - is also "a completely unworkable method of accommo-dating" the state interests "in the abortion context." City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 454 (1983) (O'Connor, J., ***3** dissenting). While crediting States with important in-terests, Roe and Casey impede States from advancing them. Before viability the undue-burden standard has been understood to block a State from prohibiting abortion to assert those interests. And that standard forces a State to make an uphill climb even to adopt regulations advancing its interests. That is flawed. If a State's interests are "compelling" enough after via-bility to support a prohibition, they are "equally com-pelling before" then. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting).

Roe and Casey have inflicted significant damage. Those cases "disserve [ ] principles of democratic self-governance," Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 547 (1985), by "placing]" one of the most important, contested policy issues of our time largely "outside the arena of public debate and legislative action," Washington v. Glucks-berg, 521 U.S. 702, 720 (1997). Far from bringing peace to the controversy over abortion, Roe and Casey have made matters worse. See, e.g., Ruth Bader Gins-burg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 385-86 (1985) ("Heavy-handed judicial intervention [in Roe] was difficult to justify and appears to have provoked, not resolved, conflict."). Abortion jurisprudence has placed this Court at the center of a controversy that it can never resolve. And Roe and Casey have produced a jurisprudence that is at war with the demand that this Court act based on neutral principles. Abortion caselaw is pervaded by special rules - the undue-burden standard, the large-fraction test, and more - that feed the perception that "when it comes to abortion" this Court does not "evenhandedly apply [ ]" the law. ***4** Thornburgh, 476 U.S. at 814 (O'Connor, J., dissent-ing). Casey retained Roe's central holding largely on the view that overruling it would hurt this Court's le-gitimacy. 505 U.S. at 864-69. The last 30 years show the opposite. Roe and Casey are unprincipled deci-sions that have damaged the democratic process, poi-soned our national discourse, plagued the law - and, in doing so, harmed this Court.

The march of progress has left Roe and Casey be-hind. Those cases maintained that an unwanted preg-nancy could doom women to "a distressful life and fu-ture," Roe, 410 U.S. at 153, that abortion is a needed complement to contraception, Casey, 505 U.S. at 856, and that viability

marked a sensible point for when state interests in unborn life become compelling, id. at 860. Factual developments undercut those assess-ments. Today, adoption is accessible and on a wide scale women attain both professional success and a rich family life, contraceptives are more available and effective, and scientific advances show that an unborn child has taken on the human form and features months before viability. States should be able to act on those developments. But Roe and Casey shackle States to a view of the facts that is decades out of date.

Reliance interests do not support retaining Roe and Casey. Almost all of this Court's abortion cases have been fractured, with many Justices questioning Roe's central premises. The people have long been "on notice" of "misgivings" on this Court about Roe and Casey. Janus v. AFSCME, 138 S. Ct. 2448, 2484 (2018). And where, as with the undue-burden stand-ard, precedents "do[ ] not provide a clear or easily ap-plicable standard," "arguments for reliance based on [their] clarity are misplaced." Ibid. (internal quota-tion marks omitted). That abortion has remained a ***5** wholly unsettled policy issue also undermines reli-ance on Roe and Casey. Casey maintained that societal reliance interests favored retaining Roe. 505 U.S. at 855-56. Developments since Roe tell a different story. Innumerable women and mothers have reached the highest echelons of economic and social life inde-pendent of the right endorsed in those cases. Sweep-ing policy advances now promote women's full pursuit of both career and family. And many States have al-ready accounted for Roe and Casey's overruling.

Overruling Roe and Casey makes resolution of this case straightforward. The Mississippi law here pro-hibits abortions after 15 weeks' gestation, with excep-tions for medical emergency or severe fetal abnormal-ity. That law rationally furthers valid interests in pro-tecting unborn life, women's health, and the medical profession's integrity. It is therefore constitutional. If this Court does not overrule Roe and Casey's height-ened-scrutiny regime outright, it should at minimum hold that there is no pre-viability barrier to state pro-hibitions on abortion and uphold Mississippi's law. The court of appeals' judgment affirming a permanent injunction of the State's law should be reversed.

OPINIONS BELOW

The court of appeals' opinion (Petition Appendix (App.) la-37a) is reported at 945 F.3d 265. The court of appeals' order denying rehearing en banc (App.38a-39a) is unreported. The district court's decision grant-ing summary judgment to respondents (App.40a-55a) is reported at 349 F. Supp. 3d 536.

***6** JURISDICTION

The court of appeals' judgment was entered on De-cember 13, 2019. The court of appeals denied rehear-ing en banc on January 17, 2020. On March 19, 2020, Justice Alito extended the time to

file a petition for a writ of certiorari to and including June 15, 2020. The petition was filed on June 15, 2020. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Fourteenth Amendment's Due Process Clause provides: "nor shall any State deprive any person of life, liberty, or prop-erty, without due process of law." U.S. Const. amend. XIV, § 1.

Mississippi's Gestational Age Act, Miss. Code Ann. § 41-41-191, is reproduced at App.65a-74a.

STATEMENT

1. Enacted in 2018, Mississippi's Gestational Age Act prohibits abortion after 15 weeks' gestation, with exceptions for medical emergency or severe fetal ab-normality. App.70a; see App.65a-74a.

The Act sets forth several findings. To start, the Legislature found that the United States is one of few countries that permit elective abortions after 20 weeks' gestation. App.65a. After 12 weeks' gestation, 75% of all nations "do not permit abortion" "except (in ***7** most instances) to save the life and to preserve the physical health of the mother." Ibid.

Next, the Legislature made findings about fetal development. App.65a-66a. At 5-6 weeks' gestation, "an unborn human being's heart begins beating." App.65a. At about 8 weeks' gestation, he or she "be-gins to move about in the womb." Ibid. At 9 weeks, "all basic physiological functions are present," as are teeth, eyes, and external genitalia. App.66a. At 10 weeks, "vital organs begin to function" and "[h]air, fin-gernails, and toenails ... begin to form." Ibid. At 11 weeks, an unborn human being's diaphragm is devel-oping, "and he or she may even hiccup." Ibid. At 12 weeks' gestation, he or she "can open and close ... fin-gers," "starts to make sucking motions," and "senses stimulation from the world outside the womb." Ibid. He or she "has taken on the human form in all rele-vant respects." Ibid. (internal quotation marks omit-ted).

The Legislature then identified several state inter-ests concerning abortion. First, the State "has an in-terest in protecting the life of the unborn."' App.66a (quoting Planned Parenthood of Southeastern Penn-sylvania v. Casey, 505 U.S. 833, 873 (1992) (plurality opinion)). Second, the State has interests in protect- the medical profession. App.66a-67a. Most abor-tion procedures performed after 15 weeks' gestation, the Legislature found, are dilation-and-evacuation procedures that "involve the use of surgical instru-ments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb." App.66a. The Legislature found that

this "is a bar-baric practice" when performed for nontherapeutic reasons and is "demeaning to the medical profession." App.66a-67a. And third, the State has "legitimate ***8** interests from the outset of pregnancy in protecting the health of women." App.68a. Dilation-and-evacua-tion abortions risk "[m]edical complications." App.67a. These include: "pelvic infection; incomplete abortions (retained tissue); blood clots; heavy bleed-ing or hemorrhage; laceration, tear, or other injury to the cervix; puncture, laceration, tear, or other injury to the uterus; injury to the bowel or bladder; depres-sion; anxiety; substance abuse; and other emotional or psychological problems." Ibid. Abortion also carries "significant physical and psychological risks" to women that "increase with gestational age." Ibid. Af-ter 8 weeks' gestation, abortion's risks "escalate expo-nentially." Ibid. In abortions performed after 15 weeks' gestation, "there is a higher risk of requiring a hysterectomy, other reparative surgery, or blood transfusion." App.67a-68a.

In light of those findings, the Act provides: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or know-ingly perform, induce, or attempt to perform or induce an abortion" when "the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." App.70a. The Act also generally requires (with the same exceptions) a physician to "determin[e]" "probable gestational age" before any abortion and to file a report (omitting a pa-tient's identifying information) with the State Depart-ment of Health addressing abortions performed after 15 weeks' gestation. App.70a-71a. The Act permits sanctions, civil penalties, and additional enforcement. App.71a-72a.

2. Respondents Jackson Women's Health Organi-zation and its medical director filed this lawsuit chal-lenging the Act's legality. App.63a. They allege that ***9** they provide abortions up to 16 weeks' gestation and that the organization is the State's sole abortion clinic. D. Ct. Dkt. 23 at 7 ¶ 16, 20 ¶ 51.

The district court issued a TRO blocking the Act. App.62a-64a. It limited discovery to "whether the 15-week mark is before or after viability." App.60a. The court reasoned that the Act functions as a prohibition on abortions after 15 weeks' gestation, that under Roe and Casey a State "cannot 'support a prohibition of abortion' before viability regardless of "any interests" the State may have, and that the Act's lawfulness thus "hinges on a single question: whether the 15-week mark is before or after viability." App.59a, 60a (quoting Casey, 505 U.S. at 846). The court denied the State discovery on matters such as pre-viability fetal pain. App.60a-61a; App.56a-57a; see App.75a-100a (declaration provided as offer of proof on fetal pain).

After discovery, the court granted summary judgment to respondents and permanently enjoined the Act. App.40a-55a. The court reasoned: Supreme Court precedent establishes that "States may not ban abortions prior to viability." App.45a; see App.42a-44a. The Act is a "ban" on abortions at or before 15 weeks' gestation. App.55a; see App.48a. And 15 weeks' gestation "is prior to viability." App.45a; see App.44a-45a, 53a. So "the Act is unlawful." App.45a. The

court declined to assess whether the State's interests could justify the Act. App.47a-48a. The court also stated: "the Mississippi Legislature's professed interest in 'women's health' is pure gaslighting" (App.46a n.22); the Act "is closer to the old Mississippi - the Mississippi bent on controlling women and minorities" (ibid.); and "[t]he Mississippi Legislature has a history of disregarding the constitutional rights of its citizens" (App.50a n.40).

***10** 3. The Fifth Circuit affirmed. App. la-37a. As rele-vant here, the court of appeals explained that under Casey "no state interest can justify a pre-viability abortion ban," that 15 weeks' gestation is before via-bility, and that by prohibiting abortion after 15 weeks' gestation the Act "undisputedly prevents the abor-tions of some non-viable fetuses." App.8a, 11a-12a. The court rejected the argument that the district court should have weighed the State's interests in as-sessing the Act's validity. App.9a-13a. Because the Act "is a prohibition on pre-viability abortion," App.12a, the court explained, it is unconstitutional under Supreme Court precedent, App.13a. Judge Ho concurred in the judgment. He stated: "Nothing in the text or original understanding of the Constitution es-tablishes a right to an abortion." App.20a. But he be-lieved that "[a] good faith reading" of Supreme Court precedent required affirmance. Ibid.; see App .22a-29a, 37a. He added, however, that the district court's opinion "displays an alarming disrespect for ... mil-lions of Americans." App .21a. The Fifth Circuit de-nied rehearing. App.38a-39a.

4. This Court granted certiorari, limited to the first question presented by the State's petition: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." Pet. i; see JA60.

SUMMARY OF ARGUMENT

I. This Court should hold that a State may prohibit elective abortions where, as here, a rational basis sup-ports doing so. The Constitution does not protect a right to abortion or limit States' authority to restrict it. On a sound view of the Constitution, a state law restricting abortion is valid if it satisfies the rational-basis review that applies to all laws. Rational-basis ***11** review is not applied to abortion laws because this Court's precedents subject such laws to heightened scrutiny. This Court should overrule those prece-dents. Those precedents are grievously wrong, un-workable, damaging, and outmoded. Reliance inter-ests do not support retaining them. This Court should conclude that the Act rests on a rational basis and so is constitutional. The Act reasonably furthers valid interests in protecting unborn life, women's health, and the medical profession's integrity. The judgment below should be reversed.

II. At minimum, this Court should reject viability as a barrier to prohibiting elective abortions and re-ject the judgment below. A viability rule has no con-stitutional basis, it harms state interests, and it pro-duces other severe negative consequences.

ARGUMENT

I. This Court Should Hold That A Pre-Viability Prohibition On Elective Abortions Is Consti-tutional Where, As Here, A Rational Basis Supports The Prohibition.

The Constitution does not protect a right to abor-tion. It does not place limits - beyond those that apply to all laws - on state authority to restrict elective abortions. Under our Constitution, then, a State may prohibit elective abortions if a rational basis supports doing so. The question presented arises only because this Court's precedents hold that abortion restrictions are subject to heightened scrutiny. The lower courts could not do anything about that, but this Court can. This Court should overrule those precedents, uphold the Act, and reverse the judgment below.

*12 A. The Constitution Does Not Protect A Right To Abortion Or Limit The States' Authority To Restrict Abortion.

The Constitution does not protect a right to abortion. The Constitution's text says nothing about abortion. Nothing in the Constitution's structure implies a right to abortion or prohibits States from restricting it. See, e.g., U.S. Const. art. I, § 10 (denying States several powers but not the power to restrict abortion).

A right to abortion is not a "liberty" that enjoys substantive protection under the Due Process Clause. U.S. Const. amend. XIV, § 1. That Clause "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would ex-ist if they were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted). History does not show a deeply rooted right to abortion. Rather, history shows a long tradition - up to, at, and long after ratification of the Fourteenth Amendment - of States restricting abortion. At the end of 1849, 18 of the 30 States had statutes restricting abortion; by the end of 1864, 27 of the 36 States had them; and, at the end of 1868, the year the Fourteenth Amendment was ratified, 30 of the 37 States had such laws, as did 6 Territories. James S. Witherspoon, Reexamining Roe: Nine-teenth-Century Abortion Statutes and the Four-teenth Amendment, 17 St. Mary's J.L. 29, 33 (1985). At the Fourteenth Amendment's ratification, moreo-ver, many States restricted abortion broadly (and without regard to viability). See, e.g., id. at 34 (placing at 27 the number of States that, at the end of 1868, had statutes that "prohibited attempts to induce ***13** abortion before quickening"). The public would have understood that, consistent with the Fourteenth Amendment, States could restrict abortion to pursue legitimate interests and could do so throughout preg-nancy. And when Roe v. Wade, 410 U.S. 113 (1973), was decided, most States had "restrict[ed] ... abor-tions for at least a century." Id. at 174 (Rehnquist, J., dissenting);

see id. at 175 n.1 (listing 36 States' or Ter-ritories' laws restricting abortion), 176 n.2 (listing 21 States whose abortion laws in 1868 were in effect 100 years later).

Nor can a right to abortion be justified under Ober-gefell v. Hodges, 576 U.S. 644 (2015), which recognized a fundamental right to marry. Obergefell applied the understanding that when a right "is fundamental as a matter of history and tradition" - like marriage - then a State must have "a sufficient justification for excluding the relevant class" from exercising it. Id. at 671. That understanding has no relevance here, where the question is not "who [may] exercise[ ]" a fundamental right to abortion but whether the Constitution protects such a right at all. Ibid.

Because nothing in text, structure, history, or tradition makes abortion a fundamental right or denies States the power to restrict it, that "power [ ]" is "reserved to the States." U.S. Const. amend X. Judicial review of abortion restrictions should be limited to the rational-basis review that applies to all laws. Glucks-berg, 521 U.S. at 728. A state law restricting abortion is constitutional if it is "rationally related to legitimate government interests." Ibid.

*14 B. This Court Should Overrule Its Precedents Subjecting Abortion Restrictions To Heightened Scrutiny.

This Court's abortion precedents depart from a sound understanding of the Constitution. In Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), this Court held that abortion is a right specially protected by the Fourteenth Amendment, and so laws restricting it must withstand heightened scrutiny. Casey described Roe's "essential holding," which the lower courts thought dispositive here, to include a rule that, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." 505 U.S. at 846; see App.6a-13a; App.43a, 47a-48a.

This Court should overrule Roe and Casey. Stare decisis is "at its weakest" with constitutional rulings, Knick v. Township of Scott, 139 S. Ct. 2162, 2177 (2019), and the case for overruling here is overwhelming. Roe and Casey are egregiously wrong. They have proven hopelessly unworkable. They have inflicted profound damage. Decades of progress have overtaken them. Reliance interests do not support retaining them. And nothing but a full break from those cases can stem the harms they have caused.

1. This Court's Abortion Precedents Are Egregiously Wrong.

Roe and Casey are egregiously wrong. See Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Ka-vanaugh, J., concurring in part) (whether a precedent is "grievously or egregiously wrong" is a lead stare decisis consideration). As just explained, their ***15** conclusion that abortion is a constitutional right triggering heightened scrutiny, Casey, 505 U.S. at 869-79 (plurality opinion); Roe, 410 U.S. at 155-56, has no basis in text or structure, and history and tradition show that abortion is not a right protected by the Due Process Clause. Supra Part I-A.

Roe grounded a right to abortion on a constitutional "right of privacy" recognized in cases preceding it. 410 U.S. at 152-53. This was profoundly erroneous. The Constitution does not protect a general "right of privacy." It protects aspects of privacy through specific textual prohibitions on government action (e.g., U.S. Const. amend. I, IV) or structural features that limit government power (such as federalism and the separation of powers). No textual prohibition or structural feature guarantees a right to abortion. And although this Court's cases provide that the "liberty" protected by the Due Process Clause may sometimes embrace certain unenumerated privacy interests, those interests would need grounding in history and tradition - which a right to abortion lacks. See Glucksberg, 521 U.S. at 723-24 (the substantive-due-process question is not whether an interest is "consistent with this Court's substantive-due-process line of cases," but whether it is supported by "this Nation's history and practice"). Consistent with these points, Griswold v. Connecticut, 381 U.S. 479 (1965), on which Roe relied and which applied the most expansive approach to the right of privacy among pre-Roe cases, finds grounding in text and tradition. In invalidating a state law regulating the use of contraceptives, Griswold vindicated the textually and historically grounded Fourth Amendment protection against government invasion of the home - which would likely have been necessary to prosecute under the ***16** statute. E.g., id. at 480, 484-85. Griswold also vindicated our history and tradition of safeguarding "the marriage relationship" - which raises privacy interests "older than the Bill of Rights." Id. at 486. Roe departed from prior cases by invoking a sweeping general "right of privacy" unmoored from constitutional text, structure, history, and tradition.

Casey did not embrace Roe's right-of-privacy reasoning, and instead grounded Roe's holding on an "explication of individual liberty" that focused on the constitutional protection that this Court's cases have afforded "to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 505 U.S. at 851, 853; see id. at 846-53. This effort shares the flaws of Roe's reasoning. The Constitution does protect certain liberty interests in these categories - just as it protects certain privacy interests. But those interests need grounding in text, structure, history, or tradition. And although certain liberty interests in these categories can claim the backing of history and tradition, a right to abortion cannot. Again, history shows that when the Fourteenth Amendment was ratified - and for a century thereafter - the public would have understood that it left States free to legislate comprehensively on abortion. Supra Part I-A.

Beyond all of these points is another that fundamentally distinguishes abortion from any privacy or liberty interest that this Court has ever recognized. None of the privacy or liberty interests embraced in this Court's cases involves, as abortion does, "the purposeful termination of a potential life." Harris v. McRae, 448 U.S. 297, 325 (1980). Abortion is thus "different in kind from" other interests "that the Court has protected under the rubric of personal or family ***17** privacy and autonomy." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting). Roe itself acknowledged that "[t]he pregnant woman cannot be isolated in her privacy." 410 U.S. at 159. Casey too recognized that abortion is "a unique act." 505 U.S. at 852. But the Court in both cases failed to confront what that means - that a right to abortion cannot be justified by a right of privacy or a right to make important personal decisions. Nowhere else in the law does a right of privacy or right to make personal decisions provide a right to destroy a human life. C Obergefell, 576 U.S. at 679 ("[T]hese cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties."); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (similar). So Roe's departure from the Constitution and past cases - and Casey's stare-decisis-focused adherence to that departure, see 505 U.S. at 853; infra Part I-B - fail to account for the material difference between a right to abortion and interests recognized in other cases.

These features - that a right to abortion has no basis in constitutional text, structure, history, or tradition, and that such a right is fundamentally different from any right recognized by this Court - show that Roe and Casey were "poorly reasoned." Janus v. AF-SCME, 138 S. Ct. 2448, 2479 (2018). Abortion restrictions should be subject only to the rational-basis review that applies to every law.

Some have attempted to defend a right to abortion under equal-protection principles. See, e.g., Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some ***18** 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."). Of course, the "fact that the justification" for Roe "continues to evolve" itself "undermin[es] the force of stare decisis." Knick, 139 S. Ct. at 2178. And this reconstruction of Roe lacks merit. This Court's cases "establish conclusively" that "the disfavoring of abortion ...is not ipso facto sex discrimination." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 272-73 (1993). Abortion restrictions like the one here do not "treat anyone differently from anyone else or draw any distinction between persons." Vacco v. Quill, 521 U.S. 793, 800 (1997) (rejecting equal-protection challenge to prohibition on assisting suicide). And far from evincing an inherently discriminatory purpose, "there are common and respectable reasons for opposing [abortion], other than hatred of, or condescension toward (or indeed any view

at all concerning), women as a class - as is evident from the fact that men and women are on both sides of the issue." Bray, 506 U.S. at 270. Indeed, the Act here promotes women's health, and it protects unborn girls and boys equally. See App.66a-68a, 70a. Attempts to re-ground Roe on equal-protection footing fail.

Roe and Casey are, in sum, irreconcilable with constitutional text and "historical meaning" - which provides compelling grounds to overrule them. Ramos, 140 S. Ct. at 1405; see Crawford v. Washington, 541 U.S. 36, 42, 68-69 (2004) (overruling where precedent "stray[ed] from the original meaning"); Collins v. Youngblood, 497 U.S. 37, 50 (1990) (overruling where precedent "departed] from" original meaning).

***19 2. This Court's Abortion Precedents Are Hopelessly Unworkable.**

This Court's abortion jurisprudence has proved "unworkable." Montejo v. Louisiana, 556 U.S. 778, 792 (2009); see, e.g., Payne v. Tennessee, 501 U.S. 808, 827 (1991) (this Court "has never felt constrained to follow precedent" that has proved "unworkable").

First, heightened scrutiny of abortion restrictions has not promoted administrability, clarity, or predictability - core features of a workable legal standard. See, e.g., Payne, 501 U.S. at 827 (stare decisis aims to "promote[] the evenhanded, predictable, and consistent development of legal principles"). Thirty years under Casey's undue-burden standard shows this. There is no objective way to decide whether a burden is "undue." Casey, 505 U.S. at 877 (plurality opinion). This Court accordingly divides deeply in case after case not just over what result Casey requires, see, e.g., Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), but also over what Casey even means. Compare, e.g., June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2120-32 (2020) (plurality opinion) (finding undue burden based on one view of Casey), with id. at 2135-42 (Roberts, C.J., concurring in judgment) (finding undue burden despite a different view of Casey), and with id. at 2154-65 (Alito, J., dissenting) (rejecting finding of undue burden and voting to remand for trial, on a view of Casey different from the plurality's). And this administrability problem will plague any heightened-scrutiny regime for reviewing abortion restrictions. Because the Constitution does not protect a right to abortion in the first place, it provides no guidance on how to gauge or balance the interests in this context. The "imponderable values" here are ones that a court cannot "objectively ... weigh[ ] or ***20** "meaningful [ly] ... compare." Id. at 2136 (Roberts, C.J., concurring in judgment).

This Court has overruled precedent in circumstances like these. In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), this Court overruled a federalism precedent

that required courts to examine whether a governmental function is "traditional, integral, or necessary." Id. at 546 (internal quotation marks omitted). Such a constitutionally unmoored inquiry, this Court explained, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." Ibid. The same is true for the inquiry whether an abortion restriction satisfies a heightened standard. Just as the Constitution does not speak to whether a governmental function is "traditional," it does not speak to whether a burden on abortion is "undue." Indeed, soon after Roe it was clear that policing the limitations that an abortion right imposes on state authority would be "a difficult and continuing venture." *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 92 (1976) (White, J., concurring in part and dissenting in part). Experience under Casey shows that that venture cannot produce a workable, administrable, predictable jurisprudence.

Second, heightened scrutiny is an unworkable mechanism for accommodating state interests in the abortion context. Workability extends beyond whether a precedent is administrable and predictable: this Court also asks whether a precedent worka-bly accounts for the interests at stake. See, e.g., Garcia, 469 U.S. at 531, 546 (overruling precedent that had sought to serve "federalism principles" where that precedent could not "be faithful to the role of federalism in a democratic society"). Although the ***21** undue-burden standard aimed to better honor States' interests and allow them greater leeway to legislate on abortion than did strict scrutiny, e.g., Casey, 505 U.S. at 875 (plurality opinion), it has failed at the task - as any heightened-scrutiny standard would fail. The undue-burden standard broadly diminishes a State's pre-viability interests in protecting unborn life, women's health, and the medical profession's integrity. It impedes a State from prohibiting abortion to pursue those interests and forces a State to make an uphill climb even to adopt modest regulations pursuing them. See also infra Part II-A.

The workable approach to accommodating the competing interests here is to return the matter to "legislators, not judges." June Medical, 140 S. Ct. at 2136 (Roberts, C.J., concurring in judgment). Abor-tion policy is as suited to legislative judgment as it is unsuited to judicial refereeing. The question of how the law should treat abortion "is fraught with judg-ments of policy and value over which opinions are sharply divided." Maher v. Roe, 432 U.S. 464, 479 (1977). Under our Constitution, such issues "are to be resolved by the will of the people." Thornburgh, 476 U.S. at 796 (White, J., dissenting). That is all the more important when medical and other advances matter so much. Legislatures should be able to re-spond to those advances, which they cannot do in the face of flawed precedents that are anchored to dec-ades-stale views of life and health. See also infra Parts I-B-4, II-A. The task will be hard for legislators and the people too. But the Constitution leaves the task of debate and compromise to them. When im-portant, imponderable values are at stake, and when the Constitution does not take sides on which value prevails, the matter is for legislatures - ***22** "[i]rrespective of the difficulty of the task." *City*

of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 456 n.4 (1983) (O'Connor, J., dissenting).

Casey maintained that Roe "has in no sense proven unworkable," "representing as it does a simple limita-tion beyond which a state law is unenforceable." 505 U.S. at 855 (internal quotation marks omitted). Al-though Roe requires "judicial assessment of state laws" on abortion, Casey stated, "the required deter-minations fall within judicial competence." Ibid. This is wrong, as the last 30 years make clear. Roe supplied workability only in the sense that, by employing strict scrutiny, it predictably required invalidating nearly any pre-viability state abortion law of substance. Ca-sey recognized that Roe's disregard for state interests had to be abandoned - which is to say, Casey recog-nized that Roe failed to workably account for state in-terests. *See id.* at 871-76 (plurality opinion). Casey tried to improve upon Roe by replacing strict scrutiny with the undue-burden standard. But that standard too defeats important state interests rather than ac-counts for them. See also infra Part II-A. And Casey exacerbated the workability problems under Roe. By replacing strict scrutiny with another heightened-scrutiny regime, Casey waved in the administrability problems that have plagued abortion caselaw ever since. Again, last year the five Justices supporting the Court's judgment in *June Medical* could not agree on what Casey means, and the five Justices who agreed on what Casey means could not agree on the judg-ment. Roe and Casey are irredeemably unworkable.

***23 3. This Court's Abortion Precedents Have Inflicted Severe Damage.**

Roe and Casey have caused "significant negative jurisprudential [and] real-world consequences," Ra-mos, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part), and will continue to do so until this Court over-rules them. See also Payne, 501 U.S. at 825-27.

First, this Court's abortion jurisprudence "dis-serves principles of democratic self-governance." Gar-cia, 469 U.S. at 547. The Constitution generally leaves to "the States" and "the people" the power to address important policy issues. U.S. Const. amend. X. Yet Roe and Casey block the States and the people from fully protecting unborn life, women's health, and their professions. As long as those cases stand, the people and their elected representatives can never achieve, through person-to-person engagement and deliberation, any real compromise on the hard issue of abortion. See Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("By extending constitutional protec-tion to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."). This Court's precedents wall off too many options and force people to look to the Judiciary to solve the abortion issue - which, 50 years shows, it cannot do. *See Preterm-Cleveland v. McCloud,* 994 F.3d 512, 536, 537 (6th Cir. 2021) (Sutton, J.,

concurring) ("judicial authority over" abortion results in "a warping of democracy and a perceived manipulation of the decision-making pro-cess").

Second, abortion jurisprudence has harmed the Nation. "The issue of abortion is one of the most con-tentious and controversial in contemporary American ***24** society." Stenberg v. Carhart, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring). Although Casey sought to "call[ ] the contending sides" to end that controversy, 505 U.S. at 867, the controversy has not abated. Un-like Miranda warnings, for example, a right to abor-tion has not become an "embedded," manageable part of "our national culture." Dickerson v. United States, 530 U.S. 428, 443 (2000). Our national discourse re-mains marked by heated, zero-sum disputes about abortion, abortion engulfs confirmation hearings, and "[d]ay after day, week after week, and year after year, regardless of the case being argued and the case being handed down, the issue that brings protesters to the plaza of the Supreme Court building is abortion." Dahlia Lithwick, Foreword: Roe v. Wade at Forty, 74 Ohio St. L.J. 5, 11 (2013). The national fever on abor-tion can break only when this Court returns abortion policy to the States - where agreement is more com-mon, compromise is often possible, and disagreement can be resolved at the ballot box. E.g., A. Raymond Randolph, Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion, 29 Harv. J.L. & Pub. Pol'y 1035, 1060 (2006) ("The legislature can make choices among these variants, observe the results, and act again as observation may dictate. Experience in one state may benefit others ... ."").

Third, abortion jurisprudence is at war with the constitutional demand that this Court act based on neutral principles of law. This Court's abortion cases are pervaded by special rules that apply largely or only in the abortion context. This Court applies a spe-cial standard of scrutiny (the undue-burden stand-ard), Casey, 505 U.S. at 876-78 (plurality opinion); it applies a special test for facial constitutional chal-lenges (the large-fraction test), id. at 895; and ***25** ordinary principles of statutory interpretation often "fall[ ] by the wayside" when this Court "confront[s] a statute regulating abortion," Gonzales, 550 U.S. at 153. Members of this Court have called out many other examples. E.g., Whole Woman's Health, 136 S. Ct. at 2350-53 (Alito, J., dissenting) (severability); Danforth, 428 U.S. at 100-01 (White, J., concurring in part and dissenting in part) (same); June Medical, 140 S. Ct. at 2171-73 (Gorsuch, J., dissenting) (appel-late review of factual findings); id. at 2173-75 (stand-ing); id. at 2176-78 (prospective injunctive relief); id. at 2178-79 (treatment of factbound prior decisions).

Too many Members of this Court, in too many cases, over too many decades have called out this spe-cial-rules problem to dismiss it. "The permissible scope of abortion regulation is not the only constitu-tional issue on which this Court is divided, but - ex-cept when it comes to abortion - the Court has gener-ally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhand-edly applying uncontroversial legal doctrines to cases that come before

it." Thornburgh, 476 U.S. at 814 (O'Connor, J., dissenting). This all contributes to a perception of the Court that does "damage to the Court's legitimacy." Casey, 505 U.S. at 869. The Judiciary should not apply "the law of abortion." *Webster v. Reproductive Health Services,* 492 U.S. 490, 541 (1989) (Blackmun, J., concurring in part and dissent-ing in part). It should apply the law - in abortion cases as in every other case.

Fourth, abortion jurisprudence has had an "insti-tutionally debilitating effect" on the Judiciary. Thorn-burgh, 476 U.S. at 814 (O'Connor, J., dissenting). The Roe/Casey regime endlessly injects this Court into "a hotly contested moral and political issue." Id. at 796 ***26** (White, J., dissenting). Continued judicial involve-ment here contributes to public perception of this Court as a political branch, cf. Beal v. Doe, 432 U.S. 438, 461 (1977) (Marshall, J., dissenting) ("The [Court's] abortion decisions are sound law and un-doubtedly good policy.") (emphasis added), and has subjected this Court to pressure that only political bodies should receive. This flows inevitably from this Court's taking an "expansive role" on a policy matter that should be left to the political process. Thorn-burgh, 476 U.S. at 814 (O'Connor, J., dissenting); see Randolph, 29 Harv. J.L. & Pub. Pol'y at 1061 (Judge Friendly observed that heightened judicial involve-ment in abortion, "however popular at the moment with many high-minded people, would ultimately bring the courts into the deserved disfavor to which they came dangerously near in the 1920's and 1930's").

Casey retained Roe's central holding largely on the view that overruling it would hurt this Court's legiti-macy. 505 U.S. at 864-69. According to Casey, this Court's legitimacy derives from "substance and per-ception": the Court must not just make "principled" decisions but must do so "under circumstances in which their principled character is sufficiently plausi-ble to be accepted by the Nation." Id. at 865-66. The Court thought it could not achieve that in overruling Roe: it lacked (it thought) "the most compelling rea-son" to overrule and so it would look like it was doing so "unnecessarily and under pressure." Id. at 867.

The last 30 years show that assessment to be wrong. As explained, Roe and Casey are profoundly unprincipled decisions that have damaged the demo-cratic process, poisoned our national discourse, plagued the law, and harmed the perception of this ***27** Court. Retaining those precedents harms this Court's legitimacy. This Court can thus offer the Nation an overwhelming case for overruling Roe and Casey. And a principled affirmation that the Constitution leaves most issues to the people - and that abortion is such an issue - would be a powerful example to the Nation of this Court's "commitment to the rule of law." Id. at 869.

Stare decisis "permits society to presume that bed-rock principles are founded in the law rather than in the proclivities of individuals, and thereby contrib-utes to the integrity of our constitutional system of government, both in appearance and in fact." Vasquez v. Hillery, 474 U.S. 254, 265-66

(1986). For the rea-sons given above, these aims are served by overruling Roe and Casey. And consider one more. Under Roe and Casey the Judiciary mows down state law after state law, year after year, on a critical policy issue. That is dangerously corrosive to our constitutional system. Cf. United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (recognizing that "repeated and essentially head-on confrontations be-tween the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either," and that "[t]he public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-re-straint in the utilization of our power to negative the actions of the other branches"). Invalidating a state law should always be a grave matter. See, e.g., Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by represent-atives of its people, it suffers a form of irreparable in-jury.") (brackets omitted). If an area of this Court's ***28** constitutional jurisprudence requires this Court to strike down state law after state law, that jurispru-dence needs a firm constitutional basis. Abortion ju-risprudence has no such basis. The matter should be returned to the States and the people.

4. Legal And Factual Progress Have Overtaken This Court's Abortion Prec-edents.

Legal and factual developments have "eroded" Roe and Casey's "underpinnings." *Janus v. AFSCME,* 138 S. Ct. 2448, 2482 (2018).

Start with legal developments. First, Roe and Ca-sey are irreconcilable with this Court's rigorous, now "established method of substantive-due-process anal-ysis." Glucksberg, 521 U.S. at 720. That analysis fore-closes from substantive-due-process protection inter-ests that, like a right to abortion, are unmoored from (indeed, defeated by) history and tradition. Supra Part I-A. Second, since Roe and Casey this Court has refused to hold in any other context that liberty or pri-vacy interests support a constitutional right to effect "the purposeful termination" of a human life (actual or "potential"). Harris v. McRae, 448 U.S. 297, 325 (1980); see Glucksberg, 521 U.S. at 728 (holding that a right to "assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause"). This reaffirms that the right to abortion is an outlier among this Court's cases. And third, the special-rules regime applied in abortion cases shows that Roe and Casey represent a stark de-parture from this Court's general approach of apply-ing neutral rules of law. *Supra* Part I-B-3.

***29** Now take factual developments. First, modern op-tions regarding and views about childbearing have dulled concerns on which Roe rested. Roe suggested that, without abortion, unwanted children could "force upon" women "a distressful life and future." 410 U.S. at 153. But numerous laws enacted since Roe - addressing pregnancy discrimination, requiring leave time,

assisting with childcare, and more - facilitate the ability of women to pursue both career success and a rich family life. See, e.g., infra Part I-B-5. And today all 50 States and the District of Columbia have enacted "safe haven" laws, giving women bearing un-wanted children the option of "leaving [the] newborn directly in the care of the state until it can be adopted." *McCorvey v. Hill,* 385 F.3d 846, 851 (5th Cir. 2004) (Jones, J., concurring); see, e.g., Children's Bureau, HHS, Infant Safe Haven Laws 2 (2016), https://perma.cc/ZL5D-9X24.

Second, even if abortion may once have been thought critical as an alternative to contraception, see Casey, 505 U.S. at 856, changed circumstances under-mine that view. Policy can effect dramatic expansions in access to contraceptives. *See, e.g., Laurie Sobel et al.,* The Future of Contraceptive Coverage 4 (Kaiser Family Foundation, Issue Brief, Jan. 2017), https://perma.cc/T7TY-FVTT ("By 2013, most women had no out-of-pocket costs for their contraception, as median expenses for most contraceptive methods, in-cluding the IUD and the pill, dropped to zero."). And failure rates for all major contraceptive categories have declined since Casey, see, e.g., Aparna Sundaram et al., Contraceptive Failure in the United States: Es-timates from the 2006-2010 National Survey of Fam-ily Growth, 49 Persps. on Sexual & Reprod. Health 7, 11 tbl.2 (2017), with some methods now approaching ***30** zero, see CDC, Birth Control Methods (XX/XX/2020), https://perma.cc/6NCC-SDEV. Contraceptive devel-opments undercut any claim that Roe is needed to en-able "women to participate equally in the economic and social life of the Nation" by "facilitat[ing] ... their ability to control their reproductive lives." Casey, 505 U.S. at 856; see Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 741 (2014) (Ginsburg, J., dissenting) (Casey's "understanding" applies to broadened access to contraception).

Third, advances in medicine and science have eroded the assumptions of 30 - and 50 - years ago. Casey recognized that "time has overtaken some of Roe's factual assumptions," including about abortion risks and the timing of viability. 505 U.S. at 860. Ca-sey thought that those changes "have no bearing on the validity of Roe's central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." Ibid. Whatever the truth of that statement in 1992, events have left it behind. Advances in "neonatal and medi-cal science," McCorvey, 385 F.3d at 852 (Jones, J., con-curring), now show that an unborn child has "taken on 'the human form' in all relevant respects" by 12 weeks' gestation, App.66a (quoting Gonzales v. Car-hart, 550 U.S. 124, 160 (2007)). Knowledge of when the unborn are sensitive "to pain" has progressed con-siderably. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 774 (8th Cir. 2015). And while the Roe Court thought there was no "consensus" among those "trained in ... medicine" as to whether "life ... is pre-sent throughout pregnancy," 410 U.S. at 159, the Court has since acknowledged that "by common un-derstanding and scientific terminology, a fetus is a ***31** living organism while within

the womb," before and after viability, Gonzales, 550 U.S. at 147. Yet Casey and Roe still impede a State from acting on this infor-mation by prohibiting pre-viability abortions.

The United States finds itself in the company of China and North Korea as some of the only countries that permit elective abortions after 20 weeks' gesta-tion. App.65a; see, e.g., Center for Reproductive Rights, The World's Abortion Laws (2021), https://perma.cc/8TH8-WEDJ. That is not progress. The time has come to recognize as much.

5. Reliance Interests Do Not Support Re-taining This Court's Abortion Prece-dents.

No legitimate reliance interests call for retaining Roe and Casey. See, e.g., Payne v. Tennessee, 501 U.S. 808, 828 (1991); Ramos v. Louisiana, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part) (the reliance inquiry "focuses on the legitimate expecta-tions of those who have reasonably relied on the prec-edent").

First, abortion jurisprudence's claim to reliance is undermined by how fractured and unsettled that ju-risprudence has always been. See, e.g., Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63-64, 66 (1996) (con-sidering fractured nature of precedent in stare decisis analysis); *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 390 (1937) ("the close division by which" a prior decision was reached is a ground for reconsidering that decision). Roe was decided over two "spirited dis-sents challenging" the decision's "basic underpin-nings." Payne, 501 U.S. at 828-29; accord Knick v. Township of Scott, 139 S. Ct. 2162, 2178 (2019) ***32** (overruling a decision that had "come in for repeated criticism over the years from Justices of this Court and many respected commentators"). And in the dec-ades since Roe, this Court's abortion cases have con-sistently been "decided by the narrowest of margins," with "Members of the Court" repeatedly "ques-tion[ing]" Roe and later Casey. Payne, 501 U.S. at 828-30. Casey was itself sharply fractured. It was led by a three-Justice joint opinion that no other Justice joined in full and was issued against four Justices' votes to overrule Roe. This fracturing persists. Again, just last year in June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103 (2020), the five Justices sup-porting the Court's judgment could not agree on why - indeed, those five Justices could not even agree on how to read Casey, the lead precedent to which lower courts must look to decide abortion cases. Com-pare id. at 2120-32 (plurality opinion), with id. at 2135-39 (Roberts, C.J., concurring in judgment).

This fractured, unsettled jurisprudence shows that any reliance on Roe and Casey is not reasonable. To start, it shows that people have long been "on no-tice" of "misgivings" on this Court about Roe and Ca-sey. Janus, 138 S. Ct. at 2484. Next, where, as here, precedent "does not provide a clear or easily applica-ble standard," "arguments for reliance based on its clarity are misplaced." Ibid.

(internal quotation marks omitted). Roe and Casey do not supply a work-able legal standard to begin with. Supra Part I-B-2. And the fractured, confusion-sowing nature of this Court's abortion cases exacerbates that problem. In-deed, within months of this Court's decision in June Medical, the courts of appeals had already divided over whether the Chief Justice's opinion supplies the controlling legal standard. See ***33** Planned Parenthood of Indiana & Kentucky, Inc. v. Box, 991 F.3d 740, 751-52 (7th Cir. 2021) (declining to treat the Chief Justice's opinion as controlling and recognizing that two other circuits have held otherwise). Add to all this the Court's use of special rules in the abortion context: This Court's cases cannot produce reasonable reliance when "governing legal standards are open to revision in every case." Thornburgh v. American College of Ob-stetricians & Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting). Roe and Casey thus fail to "promote[ ] the evenhanded, predictable, and con-sistent development of legal principles" - and so can-not "foste[ ] reliance." Payne, 501 U.S. at 827.

Second, reliance on Roe and Casey is undermined by the reality that abortion has for 50 years continued to be a wholly unsettled policy issue. Roe did not an-nounce a rule that has governed quietly and unques-tioned for decades. Soon after Roe, Congress consid-ered constitutional amendments aimed at overturn-ing it. E.g., H.J. Res. 427, 93d Cong., 119 Cong. Rec. 7569, 7591 (1973); S.J. Res. 3, 98th Cong., 129 Cong. Rec. 671-75 (1983). Many States have enacted laws exploring Roe's bounds ever since. The legitimacy, limits, and policy responses to this Court's abortion cases have been contested continuously for five dec-ades. This too saps any claim that reliance interests support Roe and Casey. This Court has overruled precedent even where "[m]ore than 20 States ha[d] statutory schemes built on [it]" and "[t]hose laws un-derpin [ned] thousands of ongoing contracts involving millions of employees." Janus, 138 S. Ct. at 2487 (Ka-gan, J., dissenting). Overruling Roe and Casey, by contrast, would leave the States with exactly as much authority to protect abortion as they have now.

***34** Third, Roe and Casey do not raise reliance inter-ests in the traditional sense at all. This Court has in-voked reliance interests most strongly where upend-ing a precedent could broadly undercut reasonable ex-pectations that have formed the basis for long-term plans and commitments that cannot readily be un-wound, as "in cases involving property and contract rights." Payne, 501 U.S. at 828. Casey itself appeared to acknowledge that a judicially announced right to abortion does not call up any traditional form of reli-ance. 505 U.S. at 855-56. Abortion, it said, is "custom-arily ... an unplanned response to ... unplanned activ-ity," and arguably "reproductive planning could take virtually immediate account of' a change in the law. Id. at 856.

Casey maintained that reliance interests favored retaining Roe because, "for two decades of economic and social developments, people have organized inti-mate relationships and made choices that define their views of themselves and their places in society, in re-liance on the availability of abortion in the event that contraception should fail." Ibid. But given the many flaws

in Roe and Casey, the possibility that contracep-tion might fail is a weak ground for retaining them - particularly given contraceptive advances since Ca-sey. Supra Part I-B-4. Further, this Court is not in a position to gauge such societal reliance. That reality may help explain why some of this Court's most im-portant - and societally imp actful - decisions overrul-ing precedent do not even mention reliance. E.g., Brown v. Board of Education, 347 U.S. 483 (1954).

Casey added: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their re-productive lives." 505 U.S. at 856. This again is not an ***35** assessment that this Court is in a position to make. And the only authority that Casey cited for this claim says that women's "growing labor force participation and college attendance" began "long before abortion became legal" and that the "relationship between low-ered fertility among women and their higher labor force participation rates" is "complex and variable" and "not subject to generalization." Rosalind Pollack Petchesky, Abortion and Woman's Choice 109, 133 n.7 (rev. ed. 1990). Casey's assessment would, moreover, be greeted coolly by many women and mothers who have reached the highest echelons of economic and so-cial life independent of the right bestowed on them by seven men in Roe. Many laws (largely post-dating Roe) protect equal opportunity - including prohibi-tions on sex and pregnancy discrimination in employ-ment (e.g., Pregnancy Discrimination Act (1978), *see* 42 U.S.C. § 2000e(k)), guarantees of employment leave for pregnancy and birth (e.g., Family and Medi-cal Leave Act of 1993, see 29 U.S.C. § 2612), and sup-port to offset the costs of childcare for working moth-ers (e.g., child-and-dependent-care tax credit, see 26 U.S.C. § 21). Casey gives no good reason to believe that decades of advances for women rest on Roe, and evidence is to the contrary.

Casey said that the reliance inquiry "counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." 505 U.S. at 855. Repudiating the rule of Roe and Casey would not itself bar a single abortion. It would simply let the people resolve the issue them-selves through the democratic process. Indeed, many States have already accounted for Roe and Casey's overruling: some by statutorily codifying the right en-dorsed in those cases or otherwise providing broad ***36** access to abortion, e.g., Cal. Health & Safety Code § 123460 et seq.; Ill. Comp. Stat., ch. 775 § 55/1-1 et seq.; N.Y. Pub. Health Law § § 2599-aa, 2599-bb; oth-ers by adopting restrictions that cannot stand under Roe and Casey but would take effect if they were over-ruled, e.g., Idaho Code § 18-622; Miss. Code Ann. § 41-45. Our Constitution "is made for people of funda-mentally differing views." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). A post-Roe world will honor that foundational feature.

Stare decisis's "greatest purpose is to serve a con-stitutional ideal - the rule of law." Citizens United v. FEC, 558 U.S. 310, 378 (2010) (Roberts, C.J., concur-ring). Adhering to Roe and

Casey "does more to dam-age this constitutional ideal than to advance it." Ibid. This Court should overrule Roe and Casey.

C. This Court Should Conclude That The Act Satisfies Rational-Basis Review And So Is Constitutional.

Overruling Roe and Casey makes resolving the question presented straightforward: An abortion re-striction is constitutional if it satisfies the same ra-tional-basis review that applies to all laws. Under ra-tional-basis review, a court asks only whether the law at issue is "rationally related to legitimate govern-ment interests." Washington v. Glucksberg, 521 U.S. 702, 728 (1997). The Act satisfies that standard.

The Act itself identifies three valid state objectives and it rationally relates to each one. First, the State asserted its "interest in protecting the life of the un-born." App.66a. This Court has endorsed that inter-est. E.g., Casey, 505 U.S. at 846. The Act rationally ***37** relates to that interest by generally prohibiting abor-tion after 15 weeks' gestation. App.70a. The Legisla-ture could reasonably believe that this would save un-born lives.

Second, the State asserted its interest "in protect-ing the health of women." App.68a. That interest is legitimate. E.g., Casey, 505 U.S. at 846. The Act iden-tifies several "risks" to women that increase as preg-nancy progresses. App.67a; see ibid. (listing possible medical complications). In abortions performed after 15 weeks' gestation, the Legislature added, "there is a higher risk of requiring a hysterectomy, other repar-ative surgery, or blood transfusion." App.67a-68a. By limiting abortion after 15 weeks' gestation, App.70a, the Legislature could have reasonably believed that it was averting these harms to some women.

Third, the State asserted its interest in protecting the medical profession's integrity. App.66a-67a. That interest is legitimate. E.g., Gonzales, 550 U.S. at 157. The Act rationally relates to it. The Legislature found that most abortion procedures performed after 15 weeks' gestation "involve the use of surgical instru-ments to crush and tear the unborn child apart before removing the pieces of the dead child from the womb." App.66a. The Legislature concluded that this "is a barbaric practice" when performed for nontherapeutic reasons and is "demeaning to the medical profession." App.66a-67a. The Legislature could reasonably be-lieve that prohibiting abortions after 15 weeks' gesta-tion would protect the profession by reducing poten-tial exposure to a demeaning, harmful practice.

Any of these interests justifies the Act. It does not matter that another State might weigh these inter-ests differently. Under rational-basis review, "making ***38** an independent appraisal of the competing interests involved" goes "beyond the judicial function." Harris v. McRae, 448 U.S.

297, 326 (1980). And it does not matter if the Act "is not perfectly tailored to" its "end[s]" - rational-basis review does not require such precision. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (per cu-riam); see also Glucksberg, 521 U.S. at 728 n.21 (re-jecting as irrelevant the contention "that Washington could better promote and protect [its interests] through regulation, rather than prohibition"). The Act satisfies rational-basis review, so it is constitutional. The court of appeals' judgment should be reversed.

II. At Minimum This Court Should Hold That Vi-ability Is Not A Barrier To Prohibiting Elec-tive Abortions And Should Reject The Judg-ment Below.

Even if this Court does not reject heightened scru-tiny for abortion restrictions, it should reject any rule barring a State from prohibiting elective abortions be-fore viability and should reject the judgment below.

A. This Court Should Reject Viability As A Barrier To Prohibiting Elective Abor-tions.

The courts below understood Roe and Casey to erect a bright-line rule that "no state interest can jus-tify a pre-viability abortion ban." App.8a. Because the Act prohibits some pre-viability abortions, the lower courts reasoned, it is unconstitutional under Roe and Casey - regardless of any interests the State may have. App.8a-13a; App.44a-48a; cf. Casey, 505 U.S. at 879 (plurality opinion) (identifying "the central hold-ing of Roe" as: "a State may not prohibit any woman ***39** from making the ultimate decision to terminate her pregnancy before viability"). Other lower courts have taken the same approach to similar laws.

This Court should reject a rule that a State may not prohibit any elective abortions before viability. Such a rule rests on flawed reasoning that has no con-stitutional or principled basis. It fails to accommodate state interests. It inflicts severe negative conse-quences. It is not well grounded in precedent.

First, a viability rule is baseless. Like a right to abortion itself, a viability rule has no basis in the Con-stitution. Supra Part I-A. Nothing in constitutional text or structure protects a right to an abortion before viability or prevents States from restricting abortion before viability.

Even if the "liberty" secured by the Due Process Clause did protect some right to abortion, nothing in constitutional history or tradition supports tying such a right to viability. History shows that when the Four-teenth Amendment was ratified the American public understood that States could prohibit abortion before viability. By the end of 1868, the year the Fourteenth Amendment was ratified, most States prohibited at-tempts to induce abortion before quickening - which Roe understood to be 6-12 weeks before viability. E.g., James S. Witherspoon, Reexamining Roe: Nine-teenth-

Century Abortion Statutes and the Four-teenth Amendment, 17 St. Mary's J.L. 29, 33-34 (1985) (finding that at the end of 1868, 30 of the 37 States had statutes restricting abortion, and 27 of those 30 States prohibited attempts to induce abor-tion before quickening); Roe, 410 U.S. at 132 (quick-ening usually occurs at 16-18 weeks of pregnancy); ***40** id. at 160 (viability usually occurs at 24-28 weeks of preg-nancy).

This Court's cases do not provide persuasive sup-port for a viability rule. Roe concluded that the State's interest in unborn life becomes "compelling" at viabil-ity "because the fetus then presumably has the capa-bility of meaningful life outside the womb." 410 U.S. at 163. Casey added: viability "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the inde-pendent 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." 505 U.S. at 870 (plurality opinion). Each explanation boils down to a circular assertion: when an unborn child can live out-side the womb then the State's interest is compelling because the unborn child can live outside the womb. That explanation "mistake[s] a definition for a syllo-gism" and is linked to nothing in the Constitution. John Hart Ely, The Wages of Crying Wolf: A Com-ment on Roe v. Wade, 82 Yale L.J. 920, 924 (1973). All Casey adds to Roe is to emphasize "the independent existence of the second life." But that adds no content and fails to explain why (limited) independence mat-ters or should serve as the centerpiece of a constitu-tional framework. Independence is a particularly flawed justification. Even after viability, an unborn life will remain dependent: viability contemplates the ability to live with "artificial aid." Roe, 410 U.S. at 160. Indeed, well after birth any child will be highly dependent on others for survival. It makes no sense to say that a State has a compelling interest in an un-born girl's life when she can survive somewhat inde-pendently but not when she needs a little more help.

***41** In explaining why viability has "an element of fair-ness," Casey said: "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." 505 U.S. at 870 (plurality opinion). But this provides no basis for a viability line. Innu-merable other points before viability could be deemed to promote fairness just as well. Respondents do not provide abortions after 16 weeks' gestation - weeks before viability. That undercuts any suggestion that viability is central to fairness. Given the difficult line-drawing that the competing interests call for - and on which the Constitution gives no guidance - only legis-latures can properly decide what is fair in this con-text.

Second, a viability rule disserves the state inter-ests recognized in this Court's cases. This Court's cases credit States' interests in protecting women's health and unborn life "from the outset of ... preg-nancy," Casey, 505 U.S. at 846, and "in protecting the integrity and ethics of the medical profession," Glucks berg, 521 U.S. at 731. But a viability rule hob-bles a State from acting on those interests. No matter the value a State places on unborn life, it may never fully act on that

judgment before viability. That is un-sound. A State's interest, "if compelling after" one point in pregnancy, "is equally compelling before" that point. Thornburgh, 476 U.S. at 795 (White, J., dis-senting). Nor can a State fully protect women. Al-though health risks increase as pregnancy progresses, App.67a, States must, under a viability rule, sur-mount a heightened-scrutiny bar whenever they seek to address pre-viability risks by restricting abortion. This prevents States from providing health benefits and protections that they can provide in other ***42** contexts. Cf. Gonzales v. Carhart, 550 U.S. 124, 163 (2007) (emphasizing that this Court "has given state and federal legislatures wide discretion to pass legis-lation in areas where there is medical and scientific uncertainty"). And a viability rule thwarts the state interest in maintaining the mediical profession's in-tegrity. Williamson v. Lee Optical Co., 348 U.S. 483, 489-91 (1955) (affirming State's broad power when regulating "members of a profession"). No matter what a State learns - about fetal pain, about when unborn life takes on the human form, about women's health, about what effect performing abortions has on doctors - the State cannot fully act on that knowledge before viability.

Third, a viability rule produces significant negative consequences. Beyond defeating state interests in a sweeping way (as just explained), and beyond the grave consequences of Roe and Casey overall, supra Part I-B-3, a viability rule produces its own damaging consequences. For one, it "remove[s] the states' ability to account for advances in medical and scientific technology that have greatly expanded our knowledge of prenatal life." MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 774 (8th Cir. 2015) (internal quotation marks and brackets omitted). Again, a State cannot account for what it may learn about unborn life - about pain perception, how early a child fully takes on the human form, and more. But see Webster v. Reproductive Health Services, 492 U.S. 490, 552 (1989) (Blackmun, J., concurring in part and dissenting in part) (State's interest "increases ... dramatically" as "capacity to feel pain ... increases day by day"). In practical effect, a State must shut its eyes to these developments: a viability rule prevents it from fully acting on them.

***43** For another, a viability rule makes constitution-ally decisive such factors as the state of medicine and a woman's proximity and access to sufficient medical care. See, e.g., City of Akron v. Akron Center for Re-productive Health, Inc., 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (faulting a framework that is "inherently tied to the state of medical technology that exists whenever particular litigation ensues"); MKB Mgmt., 795 F.3d at 774 (a viability rule "tie[s] a state's interest in unborn children to developments in obstetrics, not to developments in the unborn"). A vi-ability rule also means that a State was blocked from prohibiting particular abortions in 1973 but may to-day prohibit the same abortions. See, e.g., Edwards v. Beck, 786 F.3d 1113, 1118 (8th Cir. 2015) (per curiam) ("scientific advancements" since Roe "have moved the viability point back"). The arbitrary nature of a via-bility rule is a terrible flaw in a judicially announced rule of constitutional law.

The unprincipled nature of a viability rule harms the Judiciary. Under our Constitution, a legislature "may draw lines which appear arbitrary" - say, a 55-mile-per-hour speed limit. Casey, 505 U.S. at 870 (plu-rality opinion). But a court must "justify the lines [it] draw[s]." Ibid. A stages-of-pregnancy framework - like one anchored to viability - conflicts with the Ju-diciary's "need to decide cases based on the applica-tion of neutral principles." City of Akron, 462 U.S. at 452 (O'Connor, J., dissenting). There is no principled reason "why the State's interest in protecting poten-tial human life" - or protecting women's health and the medical profession's integrity - "should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regula-tion after viability but prohibiting it before viability." ***44** Webster, 492 U.S. at 519 (plurality opinion); accord City of Akron, 462 U.S. at 461 (O'Connor, J., dissent-ing) ("[P]otential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. ... The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before via-bility or any point afterward."). A viability rule erects an arbitrary line that produces arbitrary results. That cannot stand from the Branch that must act based on principle. Casey, 505 U.S. at 865 ("a decision without principled justification would be no judicial act at all").

There is no persuasive reason for a viability rule. Casey's defenses of a viability-centered heightened-scrutiny framework do not justify a rule that a State may not prohibit any abortions before viability. Casey itself upheld laws that would have prohibited some pre-viabilty abortions - including laws imposing a 24-hour waiting period and a parental-consent re-quirement. See infra Part II-B. And a viability rule cannot be reconciled with this Court's decision in Gon-zales upholding a prohibition on an abortion proce-dure performed both before and after viability. 550 U.S. at 147. This Court has thus already "blur[red] the line... between previability and postviability abortions." Id. at 171 (Ginsburg, J., dissenting). In ar-ticulating a viability line, moreover, this Court has considered the State's interest "in the protection of po-tential life," 505 U.S. at 871 (plurality opinion), but has not addressed its interest in preventing fetal pain - an interest backed by medical and scientific ad-vances since Roe, MKB Mgmt., 795 F.3d at 774.

Casey asserted that Roe's viability line was "elab-orated with great care." 505 U.S. at 870 (plurality ***45** opinion). As already explained, that is not so. Roe's (and Casey's) defense of a viability-based regime is circular and without substance. And Roe's canvassing of the historical treatment of abortion did not disclose a historical basis for a viability rule. 410 U.S. at 129-47. Casey maintained that "no line other than viability ... is more workable." 505 U.S. at 870 (plurality opinion). But even if viability did provide a measure of workability in a heightened-scrutiny framework (and it does not, supra Part I-B-2), that would not jus-tify making it an unyielding barrier, regardless of the state interests involved, to prohibitions on abortions. Last, Casey said that the Court had twice reaffirmed a viability line "in the face of great opposition."

505 U.S. at 870 (plurality opinion). But that again does not support a firm rule that a State may not prohibit any abortions before viability.

This Court should reject a viability rule. Reasons for rejecting heightened scrutiny, supra Part I, apply here. And the poor reasoning, harm to state interests, and other negative consequences with a viability rule itself decisively favor rejecting it - and negate any precedential force that such a rule can claim.

B. This Court Should Reject The Judgment Below.

For reasons already given, the soundest way to re-solve this case is to reject heightened scrutiny for abortion restrictions and reverse the judgment below under rational-basis review. Supra Part I; see Citizens United v. FEC, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) ("It should go without saying ... that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."). If this Court rejects a viability rule but is not prepared ***46** to reject heightened scrutiny, however, it should still reverse the court of appeals' judgment. Two chief al-ternatives are addressed below.

First, if this Court does not adopt rational-basis review, it should hold that the Act satisfies any stand-ard of constitutional scrutiny including strict scru-tiny, reverse the judgment below, and leave for an-other day the question of what standard applies in the absence of a viability rule. The Court could hold that the State's interests in protecting unborn life, women's health, and the medical profession's integ-rity are, at a minimum, compelling at 15 weeks' ges-tation - when risks to women have increased consid-erably, App.67a-68a; when the child's basic physiolog-ical functions are all present, his or her vital organs are functioning, and he or she can open and close fin-gers, make sucking motions, and sense stimuli from outside the womb, App.66a; and thus when a doctor would be extinguishing a life that has clearly taken on the human form. The Court could hold that the Act serves those "compelling interest[s]" in a "narrowly tailored" way. Williams-Yulee v. Florida Bar, 575 U.S. 433, 444 (2015). It prohibits abortions after 15 weeks' gestation except when a woman's health is at risk (the medical-emergency exception, App.70a) or when the unborn life is likely not to survive outside the womb (the severe-fetal-abnormality exception, ibid.; see App.69a).

Second, and alternatively, this Court could reject a viability rule, clarify the undue-burden standard, and reverse on the ground that the Act does not im-pose an undue burden. On this approach, the Court could hold that the undue-burden standard is "a standard of general application," Casey, 505 U.S. at 876 (plurality opinion), that does not categorically bar ***47** prohibitions of pre-viability abortions. That holding would draw some support from the fact that Casey up-held restrictions on abortion that would prohibit some pre-viability abortions. E.g., id. at 881-87 (joint

opin-ion) (upholding 24-hour waiting period, which would prohibit pre-viability abortions sought the day before viability); id. at 899-900 (joint opinion) (upholding pa-rental-consent provision, which would prohibit abor-tions for minors who could not secure consent or a ju-dicial bypass). Casey upheld those provisions on the ground that they did not "constitute an undue bur-den." June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2137 (2020) (Roberts, C.J., concurring in judgment).

Applying that approach here, this Court could hold that a State may prohibit elective abortions before vi-ability if it does not impose a substantial obstacle to "a significant number of women" seeking abortions. Ibid.; cf. Casey, 505 U.S. at 895 (assessing facial chal-lenge by looking to whether abortion restriction "will operate as a substantial obstacle" "in a large fraction of the cases in which" it "is relevant"). Respondents allege that they do not perform abortions after 16 weeks' gestation, so the Act reduces by only one week the time in which abortions are available in Missis-sippi. D. Ct. Dkt. 23 at 20 ¶ 51. Under no sound meas-ure of the Act's facial validity does it impose an un-constitutional burden. See D. Ct. Dkt. 5-1 at 2 ¶ 7; D. Ct. Dkt. 85-5 at 11 (providing data indicating that in 2017 at most 4.5% of the women who obtained abor-tions from respondents did so after 15 weeks' gesta-tion). Indeed, given that the vast majority of abortions take place in the first trimester, a 15-week law like the Act does not pose an undue burden because it does not "prohibit any woman from making the ultimate ***48** decision to terminate her pregnancy." Gonzales, 550 U.S. at 146; see CDC, Abortion Surveillance - Find-ings and Reports (Nov. 25, 2020), https://perma.cc/33EE-Z2PY ("The majority of abor-tions in 2018 took place early in gestation: 92.2% of abortions were performed at < 13 weeks' gestation ... . It just prevents a woman from doing so when the health risks are magnified, when the unborn child has fully taken on "the human form," Gonzales, 550 U.S. at 160, and when the typical method of accom-plishing it is (a State could conclude) as "brutal" and "gruesome" as what the Court permitted Congress to ban in Gonzales, id. at 182 (Ginsburg, J., dissenting). The Act also provides medical-emergency and severe-fetal-abnormality exceptions, which confirm that there is no undue burden. And if this Court believes that its existing approach to assessing facial chal-lenges to abortion restrictions does not allow this re-sult, that is another reason to reject Casey outright.

However this Court answers the question pre-sented, it should reject the judgment below. At least it should reject a viability rule and uphold the Act. But the best resolution is overruling Roe and Casey and upholding the Act under rational-basis review. Only that approach will eliminate the grave errors of Roe and Casey, restore workability, pare back decades of negative consequences, and allow the people to ad-dress this hard issue.

CONCLUSION

"The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." Webster, 492 U.S. at 521 (opin-ion of Rehnquist, C.J.). Roe and Casey - and a ***49** viability rule - do not meet that goal. And they never can. Retaining them harms the Constitution, the country, and this Court. This Court should hold that the Act is constitutional because it satisfies rational-basis review, overrule Roe and Casey, and reverse the judgment below.

Respectfully submitted.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WHOLE WOMAN'S HEALTH ET AL. *v.* JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.

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

No. 21–463. Argued November 1, 2021—Decided December 10, 2021

The Court granted certiorari before judgment in this case to determine whether the petitioners may pursue a pre-enforcement challenge to Texas Senate Bill 8—the Texas Heartbeat Act—a Texas statute enacted in 2021 that prohibits physicians from performing or inducing an abortion if the physician detected a fetal heartbeat. S. B. 8 does not allow state officials to bring criminal prosecutions or civil actions to enforce the law but instead directs enforcement through "private civil actions" culminating in injunctions and statutory damages awards against those who perform or assist with prohibited abortions. Tex. Health & Safety Code Ann. §§171.204(a), 171.207(a), 171.208(a)(2), (3). Tracking language from *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, S. B. 8 permits abortion providers to defeat any suit against them by showing, among other things, that holding them liable would place an "undue burden" on women seeking abortions. §§171.209(a)–(b).

The petitioners are abortion providers who sought pre-enforcement review of S. B. 8 in federal court based on the allegation that S. B. 8 violates the Federal Constitution. The petitioners sought an injunction barring the following defendants from taking any action to enforce the statute: a state-court judge, Austin Jackson; a state-court clerk, Penny Clarkston; Texas attorney general, Ken Paxton; executive director of the Texas Medical Board, Stephen Carlton; executive director of the Texas Board of Nursing, Katherine Thomas; executive director of the Texas Board of Pharmacy, Allison Benz; executive commissioner of the Texas Health and Human Services Commission, Cecile Young;

Syllabus

and a single private party, Mark Lee Dickson. The public-official defendants moved to dismiss the complaint citing, among other things, the doctrine of sovereign immunity. Mr. Dickson also moved to dismiss, claiming that the petitioners lacked standing to sue him. The District Court denied these motions. The public-official defendants filed an interlocutory appeal with the Fifth Circuit under the collateral order doctrine, which allows immediate appellate review of an order denying sovereign immunity. The Fifth Circuit decided to entertain a second interlocutory appeal filed by Mr. Dickson given the overlap in issues between his appeal and the appeal filed by the public-official defendants. The Fifth Circuit denied the petitioners' request for an injunction barring the law's enforcement pending resolution of the merits of the defendants' appeals, and instead issued an order staying proceedings in the District Court until that time. The petitioners then filed a request for injunctive relief with the Court, seeking emergency resolution of their application ahead of S. B. 8's approaching effective date. In the abbreviated time available for review, the Court concluded that the petitioners' filings failed to identify a basis in existing law that could justify disturbing the Fifth Circuit's decision to deny injunctive relief. *Whole Woman's Health* v. *Jackson*, 594 U. S. ___, ___. The petitioners then filed another emergency request asking the Court to grant certiorari before judgment to resolve the defendants' appeals in the first instance, which the Court granted.

Held: The order of the District Court is affirmed in part and reversed in part, and the case is remanded.

___F. Supp. 3d ___, affirmed in part, reversed in part, and remanded.

JUSTICE GORSUCH announced the judgment of the Court, and delivered the opinion of the Court except as to Part II–C, concluding that a pre-enforcement challenge to S. B. 8 under the Federal Constitution may proceed past the motion to dismiss stage against certain of the named defendants but not others. Pp. 4–11, 14–17.

(a) Because the Court granted certiorari before judgment, the Court effectively stands in the shoes of the Court of Appeals and reviews the defendants' appeals challenging the District Court's order denying their motions to dismiss. As with any interlocutory appeal, the Court's review is limited to the particular order under review and any other ruling "inextricably intertwined with" or "necessary to ensure meaningful review of" it. *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 51. In this preliminary posture, the ultimate merits question, whether S. B. 8 is consistent with the Federal Constitution, is not before the Court. P. 4.

(b) The Court concludes that the petitioners may pursue a pre-enforcement challenge against certain of the named defendants but not others. Pp. 4–11, 14–17.

Syllabus

(1) Under the doctrine of sovereign immunity, named defendants Penny Clarkston (a state-court clerk) and Austin Jackson (a state-court judge) should be dismissed. The petitioners have explained that they hope to certify a class and request an order enjoining all state-court clerks from docketing S. B. 8 cases, and all state-court judges from hearing them. The difficulty with this theory of relief is that States are generally immune from suit under the terms of the Eleventh Amendment or the doctrine of sovereign immunity. While the Court in *Ex parte Young*, 209 U. S. 123, did recognize a narrow exception allowing an action to prevent state officials from enforcing state laws that are contrary to federal law, that exception is grounded in traditional equity practice. *Id.*, at 159–160. And as *Ex parte Young* itself explained, this traditional exception does not normally permit federal courts to issue injunctions against state-court judges or clerks. The traditional remedy against such actors has been some form of appeal, not an *ex ante* injunction preventing courts from hearing cases. As stated in *Ex parte Young*, "an injunction against a state court" or its "machinery" "would be a violation of the whole scheme of our Government." *Id.*, at 163. The petitioners' clerk-and-court theory thus fails under *Ex parte Young*.

It fails for the additional reason that no Article III "case or controversy" between "adverse litigants" exists between the petitioners who challenge S. B. 8 and either the state-court clerks who may docket disputes against the petitioners or the state-court judges who decide those disputes. *Muskrat* v. *United States*, 219 U. S. 346, 361; see *Pulliam* v. *Allen* 466 U. S. 522, 538, n. 18. Further, as to remedy, Article III does not confer on federal judges the power to supervise governmental operations. The petitioners offer no meaningful limiting principle that would apply if federal judges could enjoin state-court judges and clerks from entertaining disputes under S. B. 8. And if the state-court judges and clerks qualify as "adverse litigants" for Article III purposes in the present case, when would they not? Many more questions than answers would present themselves if the Court journeyed the way of the petitioners' theory. Pp. 4–9.

(2) Texas Attorney General Paxton should be dismissed. The petitioners seek to enjoin him from enforcing S. B. 8, which the petitioners suggest would automatically bind any private party interested in pursuing an S. B. 8 suit. The petitioners have not identified any enforcement authority the attorney general possesses in connection with S. B. 8 that a federal court might enjoin him from exercising. The petitioners point to a state statute that says the attorney general "may institute an action for a civil penalty of $1,000" for violations of "this subtitle or a rule or order adopted by the [Texas Medical B]oard," Tex. Occ. Code Ann. §165.101, but the qualification "this subtitle" limits the

attorney general's enforcement authority to the Texas Occupational Code, and S. B. 8 is not codified within "this subtitle." Nor have the petitioners identified for us any "rule or order adopted by the" Texas Medical Board that the attorney general might enforce against them. And even if the attorney general did have some enforcement power under S. B. 8 that could be enjoined, the petitioners have identified no authority that might allow a federal court to parlay any defendant's enforcement authority into an injunction against any and all unnamed private parties who might seek to bring their own S. B. 8 suits. Consistent with historical practice, a court exercising equitable authority may enjoin named defendants from taking unlawful actions. But under traditional equitable principles, no court may "enjoin the world at large," *Alemite Mfg. Corp.* v. *Staff*, 42 F. 2d 832 (CA2), or purport to enjoin challenged "laws themselves." *Whole Woman's Health,* 594 U. S., at ___ (citing *California* v. *Texas*, 593 U. S. ___, ___ (slip op, at 8)). Pp. 9–11.

(3) The petitioners name other defendants (Stephen Carlton, Katherine Thomas, Allison Benz, and Cecile Young), each of whom is an executive licensing official who may or must take enforcement actions against the petitioners if the petitioners violate the terms of Texas's Health and Safety Code, including S. B. 8. Eight Members of the Court hold that sovereign immunity does not bar a pre-enforcement challenge to S. B. 8 against these defendants. Pp. 11–14.

(4) The sole private defendant, Mr. Dickson, should be dismissed. Given that the petitioners do not contest Mr. Dickson's sworn declarations stating that he has no intention to file an S. B. 8 suit against them, the petitioners cannot establish "personal injury fairly traceable to [Mr. Dickson's] allegedly unlawful conduct." See *California*, 593 U. S., at ___ (slip op, at 9). P. 14.

(c) The Court holds that the petitioners may bring a pre-enforcement challenge in federal court as one means to test S. B. 8's compliance with the Federal Constitution. Other pre-enforcement challenges are possible too; one such case is ongoing in state court in which the plaintiffs have raised both federal and state constitutional claims against S. B. 8. Any individual sued under S. B. 8 may raise state and federal constitutional arguments in his or her defense without limitation. Whatever a state statute may or may not say about a defense, applicable federal constitutional defenses always stand available when properly asserted. See U. S. Const., Art. VI. Many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one. See, *e.g.*, *Snyder* v. *Phelps*, 562 U. S. 443 (First Amendment used as a defense to a state tort suit). Other viable avenues to contest the law's compliance with the Federal Constitution also may be possible and the

Syllabus

Court does not prejudge the possibility. Pp. 14–16.

GORSUCH, J., announced the judgment of the Court, and delivered the opinion of the Court except as to Part II–C. ALITO, KAVANAUGH, and BARRETT, JJ., joined that opinion in full, and THOMAS, J., joined except for Part II–C. THOMAS, J., filed an opinion concurring in part and dissenting in part. ROBERTS, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BREYER and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 21–463

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS *v.* AUSTIN REEVE JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December 10, 2021]

JUSTICE GORSUCH announced the judgment of the Court, and delivered the opinion of the Court except as to Part II–C.

The Court granted certiorari before judgment in this case to determine whether, under our precedents, certain abortion providers can pursue a pre-enforcement challenge to a recently enacted Texas statute. We conclude that such an action is permissible against some of the named defendants but not others.

I

Earlier this year Texas passed the Texas Heartbeat Act, 87th Leg., Reg. Sess., also known as S. B. 8. The Act prohibits physicians from "knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child" unless a medical emergency prevents compliance. Tex. Health & Safety Code Ann. §§171.204(a), 171.205(a) (West Cum. Supp. 2021). But the law generally does not allow state officials to bring criminal prosecutions or civil enforcement actions. Instead, S. B. 8 directs enforcement "through . . .

private civil actions" culminating in injunctions and statutory damages awards against those who perform or assist prohibited abortions. §§171.207(a), 171.208(a)(2), (3). The law also provides a defense. Tracking language from *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), the statute permits abortion providers to defeat any suit against them by showing, among other things, that holding them liable would place an "undue burden" on women seeking abortions. §§171.209(a)–(b).[1]

After the law's adoption, various abortion providers sought to test its constitutionality. Not wishing to wait for S. B. 8 actions in which they might raise their arguments in defense, they filed their own pre-enforcement lawsuits. In all, they brought 14 such challenges in state court seeking, among other things, a declaration that S. B. 8 is inconsistent with both the Federal and Texas Constitutions. A summary judgment ruling in these now-consolidated cases arrived last night, in which the abortion providers prevailed on certain of their claims. *Van Stean* v. *Texas*, No. D–1–GN–21–004179 (Dist. Ct. Travis Cty., Tex., Dec. 9, 2021).

Another group of providers, including the petitioners before us, filed a pre-enforcement action in federal court. In their complaint, the petitioners alleged that S. B. 8 violates the Federal Constitution and sought an injunction barring the following defendants from taking any action to enforce the statute: a state-court judge, Austin Jackson; a state-court clerk, Penny Clarkston; Texas attorney general, Ken

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[1] JUSTICE SOTOMAYOR suggests that the defense described in S. B. 8 supplies only a "shell of what the Constitution requires" and effectively "nullif[ies]" its guarantees. *Post*, at 2–4 (opinion concurring in judgment in part and dissenting in part); see also *post*, at 1, n. 1 (ROBERTS, C. J., concurring in judgment in part and dissenting in part). But whatever a state statute may or may not say, applicable federal constitutional defenses always stand fully available when properly asserted. See U. S. Const., Art. VI.

Paxton; executive director of the Texas Medical Board, Stephen Carlton; executive director of the Texas Board of Nursing, Katherine Thomas; executive director of the Texas Board of Pharmacy, Allison Benz; executive commissioner of the Texas Health and Human Services Commission, Cecile Young; and a single private party, Mark Lee Dickson.

Shortly after the petitioners filed their federal complaint, the individual defendants employed by Texas moved to dismiss, citing among other things the doctrine of sovereign immunity. App. to Pet. for Cert. 3a. The sole private defendant, Mr. Dickson, also moved to dismiss, claiming that the petitioners lacked standing to sue him. 13 F. 4th 434, 445 (CA5 2021) (*per curiam*). The District Court denied the motions. *Ibid.*

The defendants employed by Texas responded by pursuing an interlocutory appeal in the Fifth Circuit under the collateral order doctrine. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy*, *Inc.*, 506 U. S. 139, 147 (1993) (collateral order doctrine allows immediate appellate review of order denying claim of sovereign immunity). Mr. Dickson also filed an interlocutory appeal. The Fifth Circuit agreed to take up his appeal because the issues it raised overlapped with those already before the court in the Texas official defendants' appeal. 13 F. 4th, at 438–439.

Separately, the petitioners also sought relief from the Fifth Circuit. Citing S. B. 8's impending effective date, they asked the court to issue an injunction suspending the law's enforcement until the court could hear and decide the merits of the defendants' appeals. *Ibid.* The Fifth Circuit declined the petitioners' request. Instead, that court issued an order staying proceedings in the District Court until it could resolve the defendants' appeals. App. to Pet. for Cert. 79a; 13 F. 4th, at 438–439, 443.

In response to these developments, the petitioners sought emergency injunctive relief in this Court. In their filing,

the petitioners asked us to enjoin any enforcement of S. B. 8. And given the statute's approaching effective date, they asked us to rule within two days. The Court took up the application and, in the abbreviated time available for review, concluded that the petitioners' submission failed to identify a basis in existing law sufficient to justify disturbing the Court of Appeals' decision denying injunctive relief. *Whole Woman's Health* v. *Jackson*, 594 U. S. ___ (2021).

After that ruling, the petitioners filed a second emergency request. This time they asked the Court to grant certiorari before judgment to resolve the defendants' interlocutory appeals in the first instance, without awaiting the views of the Fifth Circuit. This Court granted the petitioners' request and set the case for expedited briefing and argument. 595 U. S. ___ (2021).

II

Because this Court granted certiorari before judgment, we effectively stand in the shoes of the Court of Appeals. See *United States* v. *Nixon*, 418 U. S. 683, 690–692 (1974); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, D. Himmelfarb, Supreme Court Practice 2-11 (11th ed. 2019). In this case, that means we must review the defendants' appeals challenging the District Court's order denying their motions to dismiss. As with any interlocutory appeal, our review is limited to the particular orders under review and any other ruling "inextricably intertwined with" or "necessary to ensure meaningful review of" them. *Swint* v. *Chambers County Comm'n*, 514 U. S. 35, 51 (1995). In this preliminary posture, the ultimate merits question—whether S. B. 8 is consistent with the Federal Constitution—is not before the Court. Nor is the wisdom of S. B. 8 as a matter of public policy.

A

Turning to the matters that are properly put to us, we

begin with the sovereign immunity appeal involving the state-court judge, Austin Jackson, and the state-court clerk, Penny Clarkston. While this lawsuit names only one state-court judge and one state-court clerk as defendants, the petitioners explain that they hope eventually to win certification of a class including all Texas state-court judges and clerks as defendants. In the end, the petitioners say, they intend to seek an order enjoining all state-court clerks from docketing S. B. 8 cases and all state-court judges from hearing them.

Almost immediately, however, the petitioners' theory confronts a difficulty. Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity. See, *e.g.*, *Alden* v. *Maine*, 527 U. S. 706, 713 (1999). To be sure, in *Ex parte Young*, this Court recognized a narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law. 209 U. S. 123, 159–160 (1908). But as *Ex parte Young* explained, this traditional exception does not normally permit federal courts to issue injunctions against state-court judges or clerks. Usually, those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties. If a state court errs in its rulings, too, the traditional remedy has been some form of appeal, including to this Court, not the entry of an *ex ante* injunction preventing the state court from hearing cases. As *Ex parte Young* put it, "an injunction against a state court" or its "machinery" "would be a violation of the whole scheme of our Government." *Id.*, at 163.

Nor is that the only problem confronting the petitioners' court-and-clerk theory. Article III of the Constitution affords federal courts the power to resolve only "actual controversies arising between adverse litigants." *Muskrat* v.

United States, 219 U. S. 346, 361 (1911). Private parties who seek to bring S. B. 8 suits in state court may be litigants adverse to the petitioners. But the state-court clerks who docket those disputes and the state-court judges who decide them generally are not. Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes. Judges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions, not to wage battle as contestants in the parties' litigation. As this Court has explained, "no case or controversy" exists "between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Pulliam* v. *Allen*, 466 U. S. 522, 538, n. 18 (1984).

Then there is the question of remedy. Texas Rule of Civil Procedure 24 directs state-court clerks to accept complaints and record case numbers. The petitioners have pointed to nothing in Texas law that permits clerks to pass on the substance of the filings they docket—let alone refuse a party's complaint based on an assessment of its merits. Nor does Article III confer on federal judges some "amorphous" power to supervise "the operations of government" and reimagine from the ground up the job description of Texas state-court clerks. *Raines* v. *Byrd*, 521 U. S. 811, 829 (1997) (internal quotation marks omitted).

Troubling, too, the petitioners have not offered any meaningful limiting principles for their theory. If it caught on and federal judges could enjoin state courts and clerks from entertaining disputes between private parties under *this* state law, what would stop federal judges from prohibiting state courts and clerks from hearing and docketing disputes between private parties under *other* state laws? And if the state courts and clerks somehow qualify as "adverse litigants" for Article III purposes in the present case, when would they not? The petitioners offer no satisfactory answers.

Instead, only further questions follow. Under the petitioners' theory, would clerks have to assemble a blacklist of banned claims subject to immediate dismissal? What kind of inquiry would a state court have to apply to satisfy due process before dismissing those suits? How notorious would the alleged constitutional defects of a claim have to be before a state-court clerk would risk legal jeopardy merely for filing it? Would States have to hire independent legal counsel for their clerks—and would those advisers be the next target of suits seeking injunctive relief? When a party hales a state-court clerk into federal court for filing a complaint containing a purportedly unconstitutional claim, how would the clerk defend himself consistent with his ethical obligation of neutrality? See Tex. Code of Judicial Conduct Canon 3(B)(10) (2021) (instructing judges and court staff to abstain from taking public positions on pending or impending proceedings). Could federal courts enjoin those who perform other ministerial tasks potentially related to litigation, like the postal carrier who delivers complaints to the courthouse? Many more questions than answers would present themselves if the Court journeyed this way.

Our colleagues writing separately today supply no answers either. They agree that state-court judges are not proper defendants in this lawsuit because they are "in no sense adverse" to the parties whose cases they decide. *Post*, at 4 (opinion of ROBERTS, C. J.). At the same time, our colleagues say they would allow this case to proceed against clerks like Ms. Clarkston. See *ibid.*; see also *post*, at 7 (opinion of SOTOMAYOR, J.). But in doing so they fail to address the many remedial questions their path invites. They neglect to explain how clerks who merely docket S. B. 8 lawsuits can be considered "adverse litigants" for Article III purposes while the judges they serve cannot. And they fail to reconcile their views with *Ex parte Young*. THE CHIEF JUSTICE acknowledges, for example, that clerks set in motion the "'machinery'" of court proceedings. *Post*, at 3. Yet

he disregards *Ex parte Young*'s express teaching against enjoining the "machinery" of courts. 209 U. S., at 163.

JUSTICE SOTOMAYOR seems to admit at least part of the problem. She concedes that older "wooden" authorities like *Ex parte Young* appear to prohibit suits against state-court clerks. *Post*, at 7. Still, she insists, we should disregard those cases in favor of more "modern" case law. *Ibid.* In places, THE CHIEF JUSTICE's opinion seems to pursue much the same line of argument. See *post*, at 4. But even overlooking all the other problems attending our colleagues' "clerks-only" theory, the authorities they cite do not begin to do the work attributed to them.

Most prominently, our colleagues point to *Pulliam*. But that case had nothing to do with state-court clerks, injunctions against them, or the doctrine of sovereign immunity. Instead, the Court faced only the question whether the suit before it could proceed against a judge consistent with the distinct doctrine of judicial immunity. 466 U. S., at 541–543. As well, the plaintiff sought an injunction only to prevent the judge from enforcing a rule of her own creation. *Id.*, at 526. No one asked the Court to prevent the judge from processing the case consistent with state statutory law, let alone undo *Ex parte Young*'s teaching that federal courts lack such power under traditional equitable principles. Tellingly, our colleagues do not read *Pulliam* to authorize claims against state-court judges in this case. And given that, it is a mystery how they might invoke the case as authority for claims against (only) state-court clerks, officials *Pulliam* never discussed.

If anything, the remainder of our colleagues' cases are even further afield. *Mitchum* v. *Foster* did not involve state-court clerks, but a judge, prosecutor, and sheriff. See 315 F. Supp. 1387, 1388 (ND Fla. 1970) (*per curiam*). When it came to these individuals, the Court held only that the Anti-Injunction Act did not bar suit against them. 407 U. S. 225, 242–243 (1972). Once more, the Court did not purport

to pass judgment on any sovereign immunity defense, let alone suggest any disagreement with *Ex parte Young*. To the contrary, the Court went out of its way to emphasize that its decision should not be taken as passing on the question whether "principles of equity, comity, and federalism" might bar the suit. 407 U. S., at 243. Meanwhile, *Shelley* v. *Kraemer* did not even involve a pre-enforcement challenge against any state-official defendant. 334 U. S. 1 (1948). There, the petitioners simply sought to raise the Constitution as a *defense* against other private parties seeking to enforce a restrictive covenant, *id.*, at 14, much as the petitioners here would be able to raise the Constitution as a defense in any S. B. 8 enforcement action brought by others against them. Simply put, nothing in any of our colleagues' cases supports their novel suggestion that we should allow a pre-enforcement action for injunctive relief against state-court clerks, all while simultaneously holding the judges they serve immune.

B

Perhaps recognizing the problems with their court-and-clerk theory, the petitioners briefly advance an alternative. They say they seek to enjoin the Texas attorney general from enforcing S. B. 8. Such an injunction, the petitioners submit, would also automatically bind any private party who might try to bring an S. B. 8 suit against them. Reply Brief for Petitioners 21. But the petitioners barely develop this back-up theory in their briefing, and it too suffers from some obvious problems.

Start with perhaps the most straightforward. While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws, the petitioners do not direct this Court to any enforcement authority the attorney general possesses in connection with S. B. 8 that a federal court might enjoin him from exercising. Maybe the closest the petitioners come is when they point to a state

statute that says the attorney general "may institute an action for a civil penalty of $1,000" for violations of "this subtitle or a rule or order adopted by the [Texas Medical B]oard." Tex. Occ. Code Ann. §165.101 (West 2012). But the qualification "this subtitle" limits the attorney general's enforcement authority to the Texas Occupational Code, specifically §§151.001 through 171.024. By contrast, S. B. 8 is codified in the Texas Health and Safety Code at §§171.201–171.212. The Act thus does not fall within "this subtitle." Nor have the petitioners identified for us any "rule or order adopted by the" Texas Medical Board related to S. B. 8 that the attorney general might enforce against them. To be sure, some of our colleagues suggest that the Board might in the future promulgate such a rule and the attorney general might then undertake an enforcement action. *Post*, at 3 (opinion of ROBERTS, C. J.) (citing 22 Tex. Admin. Code §190.8(7) (West 2021)). But this is a series of hypotheticals and an argument even the petitioners do not attempt to advance for themselves.

Even if we could overcome this problem, doing so would only expose another. Supposing the attorney general did have some enforcement authority under S. B. 8, the petitioners have identified nothing that might allow a federal court to parlay that authority, or any defendant's enforcement authority, into an injunction against any and all unnamed private persons who might seek to bring their own S. B. 8 suits. The equitable powers of federal courts are limited by historical practice. *Atlas Life Ins. Co.* v. *W. I. Southern, Inc.*, 306 U. S. 563, 568 (1939). "A court of equity is as much so limited as a court of law." *Alemite Mfg. Corp.* v. *Staff*, 42 F. 2d 832 (CA2 1930) (L. Hand, J.). Consistent with historical practice, a federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions. But under traditional equitable principles, no court may "lawfully enjoin the world at

large," *ibid.*, or purport to enjoin challenged "laws themselves," *Whole Woman's Health*, 594 U. S., at ___ (slip op., at 1) (citing *California* v. *Texas*, 593 U. S. ___, ___ (2021) (slip op., at 8)).

Our colleagues offer no persuasive reply to this problem. THE CHIEF JUSTICE does not address it. Meanwhile, JUSTICE SOTOMAYOR offers a radical answer, suggesting once more that this Court should cast aside its precedents requiring federal courts to abide by traditional equitable principles. *Post*, at 9, n. 3. This time, however, JUSTICE SOTOMAYOR does not claim to identify any countervailing authority to support her proposal. Instead, she says, it is justified purely by the fact that the State of Texas in S. B. 8 has "delegat[ed] its enforcement authority to the world at large." *Ibid.* But somewhat analogous complaints could be levied against private attorneys general acts, statutes allowing for private rights of action, tort law, federal antitrust law, and even the Civil Rights Act of 1964. In some sense all of these laws "delegate" the enforcement of public policy to private parties and reward those who bring suits with "bount[ies]" like exemplary or statutory damages and attorney's fees. Nor does JUSTICE SOTOMAYOR explain where her novel plan to overthrow this Court's precedents and expand the equitable powers of federal courts would stop—or on what theory it might plausibly happen to reach just this case or maybe those exactly like it.[2]

C

While this Court's precedents foreclose some of the petitioners' claims for relief, others survive. The petitioners

[2]This is not to say that the petitioners, or other abortion providers, lack potentially triable state-law claims that S. B. 8 improperly delegates state law enforcement authority. Nor do we determine whether any particular S. B. 8 plaintiff possesses standing to sue under state justiciability doctrines. We note only that such arguments do not justify federal courts abandoning traditional limits on their equitable authority and our precedents enforcing them.

also name as defendants Stephen Carlton, Katherine Thomas, Allison Benz, and Cecile Young. On the briefing and argument before us, it appears that these particular defendants fall within the scope of *Ex parte Young*'s historic exception to state sovereign immunity. Each of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including S. B. 8. See, *e.g.*, Tex. Occ. Code Ann. §164.055(a); Brief for Petitioners 33–34. Accordingly, we hold that sovereign immunity does not bar the petitioners' suit against these named defendants at the motion to dismiss stage.[3]

JUSTICE THOMAS alone reaches a different conclusion. He emphasizes that suits seeking equitable relief against executive officials are permissible only when supported by tradition. See *post*, at 2–3 (opinion concurring in part and dissenting in part). He further emphasizes that the relevant tradition here, embodied in *Ex parte Young*, permits equitable relief against only those officials who possess authority to enforce a challenged state law. *Post*, at 3–4. We agree with all of these principles; our disagreement is restricted to their application.

JUSTICE THOMAS suggests that the licensing-official defendants lack authority to enforce S. B. 8 because that statute says it is to be "exclusively" enforced through private civil actions "[n]otwithstanding . . . any other law." See Tex. Health & Safety Code Ann. §171.207(a). But the same provision of S. B. 8 *also* states that the law "may not be construed to . . . limit the enforceability of any other laws that regulate or prohibit abortion." §171.207(b)(3). This saving clause is significant because, as best we can tell from the briefing before us, the licensing-official defendants *are*

[3]The petitioners may proceed against Ms. Young solely based on her authority to supervise licensing of abortion facilities and ambulatory surgical centers, and not with respect to any other enforcement authority under Chapter 171 of the Texas Health and Safety Code.

charged with enforcing "other laws that regulate . . . abortion." Consider, for example, Texas Occupational Code §164.055, titled "Prohibited Acts Regarding Abortion." That provision states that the Texas Medical Board "shall take an appropriate disciplinary action against a physician who violates . . . Chapter 171, Health and Safety Code," a part of Texas statutory law that *includes* S. B. 8. Accordingly, it appears Texas law imposes on the licensing-official defendants a duty to enforce a law that "regulate[s] or prohibit[s] abortion," a duty expressly preserved by S. B. 8's saving clause. Of course, Texas courts and not this one are the final arbiters of the meaning of state statutory directions. See *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496, 500 (1941). But at least based on the limited arguments put to us at this stage of the litigation, it appears that the licensing defendants do have authority to enforce S. B. 8.[4]

In the face of this conclusion, JUSTICE THOMAS advances an alternative argument. He stresses that to maintain a suit consistent with this Court's *Ex parte Young* and Article III precedents, "it is not enough that petitioners 'feel inhibited'" or "'chill[ed]'" by the abstract possibility of an enforcement action against them. *Post*, at 6–7. Rather, they must show at least a credible threat of such an action against them. *Post*, at 7. Again, we agree with these observations in principle and disagree only on their application

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[4]Tending to confirm our understanding of the statute is the fact that S. B. 8 expressly prohibits "enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter." Tex. Health & Safety Code Ann. §171.207(a). This language suggests that the Texas Legislature knew how to prohibit collateral enforcement mechanisms when it adopted S. B. 8, and understood that it was necessary to do so. To read S. B. 8 as barring any collateral enforcement mechanisms without a specific exclusion would thus threaten to render this statutory language superfluous. See *Kallinen* v. *Houston*, 462 S. W. 3d 25, 28 (Tex. 2015) (courts should avoid treating any statutory language as surplusage); *Kungys* v. *United States*, 485 U. S. 759, 778 (1988) (same).

to the facts of this case. The petitioners have plausibly alleged that S. B. 8 has already had a direct effect on their day-to-day operations. See Complaint ¶¶103, 106–109. And they have identified provisions of state law that appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate S. B. 8. In our judgment, this is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed.

D

While this interlocutory appeal focuses primarily on the Texas official defendants' motion to dismiss on grounds of sovereign immunity and justiciability, before we granted certiorari the Fifth Circuit also agreed to take up an appeal by the sole private defendant, Mr. Dickson. In the briefing before us, no one contests this decision. In his appeal, Mr. Dickson argues that the petitioners lack standing to sue him because he possesses no intention to file an S. B. 8 suit against them. Mr. Dickson has supplied sworn declarations so attesting. See, *e.g.*, Brief for Respondent Dickson 32. The petitioners do not contest this testimony or ask us to disregard it. Accordingly, on the record before us the petitioners cannot establish "personal injury fairly traceable to [Mr. Dickson's] allegedly unlawful conduct." *California* v. *Texas*, 593 U. S., at ___ (slip op., at 9) (internal quotation marks omitted). No Member of the Court disagrees with this resolution of the claims against Mr. Dickson.

III

While this should be enough to resolve the petitioners' appeal, a detour is required before we close. JUSTICE SOTOMAYOR charges this Court with "shrink[ing]" from the task of defending the supremacy of the Federal Constitution over state law. *Post*, at 10. That rhetoric bears no relation to reality.

The truth is, many paths exist to vindicate the supremacy of federal law in this area. Even aside from the fact that eight Members of the Court agree sovereign immunity does not bar the petitioners from bringing this pre-enforcement challenge in federal court, everyone acknowledges that other pre-enforcement challenges may be possible in state court as well.[5] In fact, 14 such state-court cases already seek to vindicate both federal and state constitutional claims against S. B. 8—and they have met with some success at the summary judgment stage. See *supra,* at 2. Separately, any individual sued under S. B. 8 may pursue state and federal constitutional arguments in his or her defense. See n. 1, *supra.* Still further viable avenues to contest the law's compliance with the Federal Constitution also may be possible; we do not prejudge the possibility. Given all this, JUSTICE SOTOMAYOR'S suggestion that the Court's ruling somehow "clears the way" for the "nullification" of federal law along the lines of what happened in the Jim Crow South not only wildly mischaracterizes the impact of today's decision, it cheapens the gravity of past wrongs. *Post*, at 11.

The truth is, too, that unlike the petitioners before us, those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments. This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court. In fact, general federal question jurisdiction did not even exist for much of this Nation's history. See *Mims* v. *Arrow Financial Services*, *LLC*, 565 U. S. 368, 376 (2012). And pre-enforcement review under the statutory regime the petitioners invoke,

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[5] JUSTICE SOTOMAYOR's complaint thus isn't really about *whether* this case should proceed. It is only about *which* particular defendants the petitioners may sue in this particular lawsuit. And even when it comes to that question, JUSTICE SOTOMAYOR agrees with the Court regarding the proper disposition of several classes of defendants—state-court judges, licensing officials, and Mr. Dickson.

42 U. S. C. §1983, was not prominent until the mid-20th century. See *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961); see also R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 994 (7th ed. 2015). To this day, many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one. See, *e.g.*, *Snyder* v. *Phelps*, 562 U. S. 443 (2011) (First Amendment used as a defense to a state tort suit).

Finally, JUSTICE SOTOMAYOR contends that S. B. 8 "chills" the exercise of federal constitutional rights. If nothing else, she says, this fact warrants allowing further relief in this case. *Post*, at 1–2, 7–8. Here again, however, it turns out that the Court has already and often confronted—and rejected—this very line of thinking. As our cases explain, the "chilling effect" associated with a potentially unconstitutional law being "'on the books'" is insufficient to "justify federal intervention" in a pre-enforcement suit. *Younger* v. *Harris*, 401 U. S. 37, 42, 50–51 (1971). Instead, this Court has always required proof of a more concrete injury and compliance with traditional rules of equitable practice. See *Muskrat*, 219 U. S., at 361; *Ex parte Young*, 209 U. S., at 159–160. The Court has consistently applied these requirements whether the challenged law in question is said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right. The petitioners are not entitled to a special exemption.

Maybe so, JUSTICE SOTOMAYOR replies, but what if other States pass legislation similar to S. B. 8? Doesn't that possibility justify throwing aside our traditional rules? *Post*, at 10. It does not. If other States pass similar legislation, pre-enforcement challenges like the one the Court approves today may be available in federal court to test the constitutionality of those laws. Again, too, further pre-enforcement challenges may be permissible in state court and federal

law may be asserted as a defense in any enforcement action. To the extent JUSTICE SOTOMAYOR seems to wish even *more* tools existed to combat this type of law, Congress is free to provide them. In fact, the House of Representatives recently passed a statute that would purport to preempt state laws like S. B. 8. See H. R. 3755, 117th Cong., 1st Sess. (2021). But one thing this Court may never do is disregard the traditional limits on the jurisdiction of federal courts just to see a favored result win the day. At the end of that road is a world in which "[t]he division of power" among the branches of Government "could exist no longer, and the other departments would be swallowed up by the judiciary." 4 Papers of John Marshall 95 (C. Cullen ed. 1984).[6]

IV

The petitioners' theories for relief face serious challenges but also present some opportunities. To summarize: (1) The Court unanimously rejects the petitioners' theory for relief against state-court judges and agrees Judge Jackson should be dismissed from this suit. (2) A majority reaches the same conclusion with respect to the petitioners' parallel theory for relief against state-court clerks. (3) With respect to the back-up theory of relief the petitioners present against Attorney General Paxton, a majority concludes that he must be dismissed. (4) At the same time, eight Justices hold this case may proceed past the motion to dismiss stage against Mr. Carlton, Ms. Thomas, Ms. Benz, and Ms. Young, defendants with specific disciplinary authority over medical licensees, including the petitioners. (5) Every Member of

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[6] JUSTICE SOTOMAYOR charges this Court with "delay" in resolving this case. See *post*, at 11. In fact, this case has received extraordinary solicitude at every turn. This Court resolved the petitioners' first emergency application in approximately two days. The Court then agreed to decide in the first instance the merits of an appeal pending in the Court of Appeals. The Court ordered briefing, heard argument, and issued an opinion on the merits—accompanied by three separate writings—all in fewer than 50 days.

the Court accepts that the only named private-individual defendant, Mr. Dickson, should be dismissed.

The order of the District Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. 21–463

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS *v.* AUSTIN REEVE JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December 10, 2021]

JUSTICE THOMAS, concurring in part and dissenting in part.

I join all but Part II–C of the Court's opinion. In my view, petitioners may not maintain suit against any of the governmental respondents under *Ex parte Young*, 209 U. S. 123 (1908).[1] I would reverse in full the District Court's denial of respondents' motions to dismiss and remand with instructions to dismiss the case for lack of subject-matter jurisdiction.

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[1] I also would hold that petitioners lack Article III standing. As I have explained elsewhere, abortion providers lack standing to assert the putative constitutional rights of their potential clients. See *June Medical Services L. L. C.* v. *Russo*, 591 U. S. ___, ___–___ (2020) (dissenting opinion) (slip op., at 12–14). Third-party standing aside, petitioners also have not shown injury or redressability for many of the same reasons they cannot satisfy *Ex parte Young*. For injury, petitioners have shown no likelihood of enforcement by any respondent, let alone that enforcement is "certainly impending." *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 410 (2013) (internal quotation marks omitted). For redressability, we held last Term that a party may not "attack an unenforceable statutory provision," because this Court may not issue "an advisory opinion without the possibility of any judicial relief." *California* v. *Texas*, 593 U. S. ___, ___ (2021) (slip op., at 9) (internal quotation marks omitted); see also *Muskrat* v. *United States*, 219 U. S. 346, 361 (1911). Likewise here, petitioners seek a declaration that S. B. 8 is unlawful even though no respondent can or will enforce it.

To begin, there is no freestanding constitutional right to pre-enforcement review in federal court. See *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200, 220 (1994) (Scalia, J., concurring in part and concurring in judgment). Such a right would stand in significant tension with the longstanding Article III principle that federal courts generally may not "give advisory rulings on the potential success of an affirmative defense before a cause of action has even accrued." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 142 (2007) (THOMAS, J., dissenting); see also *Coffman* v. *Breeze Corps.*, 323 U. S. 316, 324 (1945) (a party may not "secur[e] an advisory opinion in a controversy which has not arisen").

That said, a party subject to imminent threat of state enforcement proceedings may seek a kind of pre-enforcement review in the form of a "negative injunction." This procedural device permits a party to assert "in equity . . . a defense that would otherwise have been available in the State's enforcement proceedings at law." *Virginia Office for Protection and Advocacy* v. *Stewart*, 563 U. S. 247, 262 (2011) (Kennedy, J., concurring); accord, *Douglas* v. *Independent Living Center of Southern Cal., Inc.*, 565 U. S. 606, 620 (2012) (ROBERTS, C. J., dissenting). In *Ex parte Young*, this Court recognized that use of this negative injunction against a governmental defendant provides a narrow exception to sovereign immunity. See 209 U. S., at 159–160. That exception extends no further than permitting private parties in some circumstances to prevent state officials from bringing an action to enforce a state law that is contrary to federal law.

The negative injunction remedy against state officials countenanced in *Ex parte Young* is a "standard tool of equity," J. Harrison, Ex Parte *Young*, 60 Stan. L. Rev. 989, 990 (2008), that federal courts have authority to entertain under their traditional equitable jurisdiction, see Judiciary

Act of 1789, §11, 1 Stat. 78. As we have explained elsewhere, a federal court's jurisdiction in equity extends no further than "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U. S. 308, 318 (1999) (internal quotation marks omitted). For this reason, a negative injunction must fall "within some clear ground of equity jurisdiction." *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 285 (1909); see also *Missouri* v. *Jenkins*, 515 U. S. 70, 127 (1995) (THOMAS, J., concurring) ("[C]ourts of equity must be governed by rules and precedents no less than the courts of law"). Federal courts therefore lack "power to create remedies previously unknown to equity jurisprudence." *Grupo Mexicano,* 527 U. S., at 332.

The principal opinion "agree[s] with all of these principles." *Ante,* at 12. I part ways with the principal opinion only in its conclusion that the four licensing-official respondents are appropriate defendants under *Ex parte Young*. For at least two reasons, they are not.

First, an *Ex parte Young* defendant must have "some connection with the enforcement of the act"—*i.e.*, "the right and the power to enforce" the "act alleged to be unconstitutional." 209 U. S., at 157, 161. The only "act alleged to be unconstitutional" here is S. B. 8. And that statute explicitly denies enforcement authority to any governmental official. On this point, the Act is at least triply clear. The statute begins: "*Notwithstanding* . . . *any other law*, the requirements of this subchapter shall be enforced *exclusively* through . . . private civil actions." Tex. Health & Safety Code Ann. §171.207(a) (West Cum. Supp. 2021) (emphasis added). The Act continues: "No enforcement of this subchapter . . . in response to violations of this subchapter, may be taken or threatened by this state . . . or an executive or administrative officer or employee of this state." *Ibid.*

Later on, S. B. 8 reiterates: "Any person, *other than an officer or employee of a state or local governmental entity in this state*, may bring a civil action." §171.208(a) (emphasis added). In short, the Act repeatedly confirms that respondent licensing officials, like any other governmental officials, "hav[e] no duty at all with regard to the act," and therefore cannot "be properly made parties to the suit." *Ex parte Young*, 209 U. S., at 158.

The principal opinion does not dispute the meaning of these provisions. Instead, it finds residual enforcement authority for the licensing officials elsewhere in S. B. 8. In its saving clause, the Act provides that no court may construe S. B. 8 as "limit[ing] the enforceability of any other laws that regulate or prohibit abortion." §171.207(b)(3). If one of these "other laws" permits a governmental official to enforce S. B. 8, the principal opinion reasons, the saving clause preserves that enforcement authority. The principal opinion then proposes that the Texas Medical Board may enforce S. B. 8 under §164.055 of the Texas Occupations Code. Thus, on that view, S. B. 8 permits the Medical Board to discipline physicians for violating the statute despite the Act's command that "the requirements of this subchapter shall be enforced *exclusively* through . . . private civil actions," "*[n]otwithstanding . . . any other law*." Tex. Health & Safety Code Ann. §171.207(a) (emphasis added).

Rather than introduce competing instructions in S. B. 8, I would read the Act as a "'harmonious whole.'" *Roberts* v. *Sea-Land Services, Inc.*, 566 U. S. 93, 100 (2012). By its terms, S. B. 8's saving clause preserves enforcement only of laws that "*regulate or prohibit abortion*." §171.207(b)(3) (emphasis added). Such laws include, for example, restrictions on late-term or partial-birth abortions. See §§171.044, 174.102. Section 164.055 of the Texas Occupations Code, by contrast, does not "regulate or prohibit abortion." As the principal opinion explains, that provision

merely grants authority to the Texas Medical Board to enforce *other* laws that *do* regulate abortion. See Tex. Occ. Code Ann. §164.055 (West 2012). Thus, the saving clause does not apply, and S. B. 8 explicitly forecloses enforcement of its requirements by the Texas Medical Board.[2]

The principal opinion contends that the Act "confirm[s its] understanding" by explicitly proscribing criminal prosecution. *Ante,* at 13, n. 3 (citing Tex. Health & Safety Code Ann. §171.207(a)). By withholding criminal enforcement authority, the principal opinion argues, S. B. 8 tacitly leaves at least some civil enforcement authority in place. But "[t]he force of any negative implication . . . depends on context." *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 381 (2013). A statute may "indicat[e] that adopting a particular rule . . . was probably not meant to signal any exclusion." *Ibid.* (internal quotation marks omitted).

That is the case here. Again, S. B. 8 repeatedly bars governmental enforcement. See *supra,* at 3–4. That Texas identified a "specific example" of withheld enforcement authority alongside the Act's "general" proscription "is not inconsistent with the conclusion that [S. B. 8] sweeps as broadly as its language suggests." *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 226–227 (2008). Texas "may have simply intended to remove any doubt" that criminal prosecution is unavailable under S. B. 8. *Id.,* at 226; see also

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[2] For the remaining licensing officials—the heads of the Texas Health and Human Services Commission, the Texas Board of Nursing, and the Texas Board of Pharmacy—the principal opinion identifies no law that connects these officials to S. B. 8 or overrides the Act's preclusion of governmental enforcement authority. Indeed, as to the Health and Human Services Commission, S. B. 8 explicitly forecloses enforcement authority. The Act states: "The commission shall enforce [Chapter 171] except for Subchapter H," where S. B. 8 is codified, "which shall be enforced exclusively through . . . private civil enforcement actions . . . and may not be enforced by the commission." Tex. Health & Safety Code Ann. §171.005 (West 2021).

Yellen v. *Confederated Tribes of Chehalis Reservation*, 594 U. S. ___, ___ (2021) (GORSUCH, J., dissenting) (slip op., at 14) ("illustrative examples can help orient affected parties and courts to Congress's thinking"). It is unsurprising that Texas repeated itself to make its point "doubly sure." *Barton* v. *Barr*, 590 U. S. __, __ (2020) (slip op., at 16). And, in all events, "[r]edundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text." *Ibid.*[3]

Second, even when there is an appropriate defendant to sue, a plaintiff may bring an action under *Ex parte Young* only when the defendant "threaten[s] and [is] about to commence proceedings." 209 U. S., at 156. Our later cases explain that "the prospect of state suit must be imminent." *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 382 (1992). Here, none of the licensing officials has threatened enforcement proceedings against petitioners because none has authority to bring them. Petitioners do not and cannot dispute this point.

Rather, petitioners complain of the "chill" S. B. 8 has on the purported right to abortion. But as our cases make clear, it is not enough that petitioners "feel inhibited" because S. B. 8 is "on the books." *Younger* v. *Harris*, 401 U. S. 37, 42 (1971) (internal quotation marks omitted). Nor is a "vague allegation" of potential enforcement permissible. *Boise Artesian*, 213 U. S., at 285. To sustain suit against the licensing officials, whether under Article III or *Ex parte Young*, petitioners must show at least a credible and specific threat of enforcement to rescind their medical licenses or assess some other penalty under S. B. 8. See *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149, 159 (2014). Petitioners offer nothing to make this showing. Even if the

[3] Because the principal opinion's errors rest on misinterpretations of Texas law, the Texas courts of course remain free to correct its mistakes. See, *e.g., Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703, 709, n. 8 (1985).

licensing-official respondents had enforcement authority, the chance of them using it is, at present, entirely "imaginary" and "speculative." *Younger*, 401 U. S., at 42.

The irony of this case is that S. B. 8 has generated more litigation against those who *oppose* abortion than those who *perform* it. Respondent Clarkston, a state-court clerk, reports that only three S. B. 8 complaints have been filed in the State of Texas, none of which has been served. Brief for Respondent Clarkston 9–10. The private litigants brought those actions only after a San Antonio doctor performed a postheartbeat abortion and openly advertised it in the Washington Post. See A. Braid, Why I Violated Texas's Extreme Abortion Ban, Washington Post, Sept. 19, 2021, p. A31, col. 2. Opponents of abortion, meanwhile, have been sued 14 times in the Texas state courts, including by some of the very petitioners in this case. See Brief for Respondent Clarkston 10.[4] Petitioners cast aspersions on the Texas state courts, but those courts are not dawdling in these preenforcement actions. The Texas courts held summary-judgment hearings on November 10 and entered partial judgment for the abortion providers on December 9. See *Van Stean* v. *Texas*, No. D–1–GN–21–004179 (Dist. Ct. Travis Cty., Tex., Dec. 9, 2021). Simply put, S. B. 8's supporters are under greater threat of litigation than its detractors.

Despite the foregoing, the principal opinion indicates that the prospect of suit by the licensing respondents is imminent. It cites petitioners' complaint, but the only relevant paragraph conclusorily asserts a "risk [of] professional discipline" because certain respondents allegedly "retain the

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[4] Dr. Braid also has filed suit in the Northern District of Illinois against the three *pro se* plaintiffs who filed S. B. 8 actions against him. See Complaint in *Braid* v. *Stilley,* No. 21–cv–5283 (Oct. 5, 2021), ECF Doc. 1. Two of the three S. B. 8 plaintiffs have made filings in the case, and both are proceeding *pro se*. Meanwhile, 12 attorneys, all from major law firms or interest groups, represent Dr. Braid.

authority and duty to enforce *other* statutes and regulations . . . that could be triggered by a violation of S. B. 8." Complaint ¶107. This "conclusory statemen[t]," paired with a bare "'legal conclusion,'" cannot survive a motion to dismiss. *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678 (2009).

* * *

I would instruct the District Court to dismiss this case against all respondents, including the four licensing officials, because petitioners may not avail themselves of the exception to sovereign immunity recognized in *Ex parte Young*. I join the Court's opinion in all other respects and respectfully dissent only from Part II–C.

SUPREME COURT OF THE UNITED STATES

No. 21–463

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS *v.* AUSTIN REEVE JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December 10, 2021]

CHIEF JUSTICE ROBERTS, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in the judgment in part and dissenting in part.

Texas has passed a law banning abortions after roughly six weeks of pregnancy. See S. B. 8, 87th Leg., Reg. Sess. (2021). That law is contrary to this Court's decisions in *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). It has had the effect of denying the exercise of what we have held is a right protected under the Federal Constitution.[1]

Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review. To cite just a few, the law authorizes "[a]ny person," other than a government official, to bring a lawsuit against anyone who

[1] The law states that abortion providers may raise an "undue burden" defense, see *ante,* at 2, but that defense is no more than a distorted version of the undue burden standard set forth in *Casey*, 505 U. S. 833. The defense in the statute does not, for example, allow defendants to rely on the effect that an award of relief would have on others throughout the State, see Tex. Health & Safety Code Ann. §171.209(d)(2) (West Cum. Supp. 2021), even though our precedents specifically permit such reliance. *June Medical Services L. L. C.* v. *Russo,* 591 U. S. ___, ___–___ (2020) (opinion of BREYER, J.) (slip op., at 32–35). The provision, after all, is entitled "Undue Burden Defense *Limitations*." See §171.209 (emphasis added).

"aids or abets," or intends to aid or abet, an abortion performed after roughly six weeks; has special preclusion rules that allow multiple lawsuits concerning a single abortion; and contains broad venue provisions that allow lawsuits to be brought in any of Texas's 254 far flung counties, no matter where the abortion took place. See Tex. Health & Safety Code Ann. §§171.208(a), (e)(5), 171.210 (West Cum. Supp. 2021). The law then provides for minimum liability of $10,000 plus costs and fees, while barring defendants from recovering their own costs and fees if they prevail. §§171.208(b), (i). It also purports to impose backward-looking liability should this Court's precedents or an injunction preventing enforcement of the law be overturned. §§171.208(e)(2), (3). And it forbids many state officers from directly enforcing it. §171.207.

These provisions, among others, effectively chill the provision of abortions in Texas. Texas says that the law also blocks any pre-enforcement judicial review in federal court. On that latter contention, Texas is wrong. As eight Members of the Court agree, see *ante,* at 11, petitioners may bring a pre-enforcement suit challenging the Texas law in federal court under *Ex parte Young*, 209 U. S. 123 (1908), because there exist state executive officials who retain authority to enforce it. See, *e.g.*, Tex. Occ. Code Ann. §164.055(a) (West 2021). Given the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay.

In my view, several other respondents are also proper defendants. First, under Texas law, the Attorney General maintains authority coextensive with the Texas Medical Board to address violations of S. B. 8. The Attorney General may "institute an action for a civil penalty" if a physician violates a rule or order of the Board. Tex. Occ. Code Ann. §165.101. The Board's rules—found in the Texas Administrative Code, see 22 Tex. Admin. Code §160.1(a) (West 2021)—prohibit licensed physicians from violating Texas's

Health and Safety Code, which includes S. B. 8. See 22 Tex. Admin. Code §190.8(7) ("the Board shall take appropriate disciplinary action against a physician who violates . . . Chapter 171, Texas Health and Safety Code"); S. B. 8, 87th Leg., Reg. Sess. (2021) (amending Chapter 171 of the Texas Health and Safety Code by adding Subchapter H). Under Texas law, then, the Attorney General maintains authority to "take enforcement actions" based on violations of S. B. 8. *Ante,* at 12. He accordingly also falls within the scope of *Young*'s exception to sovereign immunity. *Ante*, at 9–10.

The same goes for Penny Clarkston, a court clerk. Court clerks, of course, do not "usually" enforce a State's laws. *Ante,* at 5. But by design, the mere threat of even unsuccessful suits brought under S. B. 8 chills constitutionally protected conduct, given the peculiar rules that the State has imposed. Under these circumstances, the court clerks who issue citations and docket S. B. 8 cases are unavoidably enlisted in the scheme to enforce S. B. 8's unconstitutional provisions, and thus are sufficiently "connect[ed]" to such enforcement to be proper defendants. *Young*, 209 U. S., at 157. The role that clerks play with respect to S. B. 8 is distinct from that of the judges. Judges are in no sense adverse to the parties subject to the burdens of S. B. 8. But as a practical matter clerks are—to the extent they "set[] in motion the machinery" that imposes these burdens on those sued under S. B. 8. *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U. S. 337, 338 (1969).

The majority contends that this conclusion cannot be reconciled with *Young*, pointing to language in *Young* that suggests it would be improper to enjoin courts from exercising jurisdiction over cases. *Ante*, at 7–8; *Young*, 209 U. S., at 163. Decisions after *Young*, however, recognize that suits to enjoin state court proceedings may be proper. See *Mitchum* v. *Foster*, 407 U. S. 225, 243 (1972); see also *Pulliam* v. *Allen*, 466 U. S. 522, 525 (1984). And this conclusion is consistent with the entire thrust of *Young* itself. Just as

in *Young*, those sued under S. B. 8 will be "harass[ed] . . . with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment." 209 U. S., at 160. Under these circumstances, where the mere "commencement of a suit," and in fact just the threat of it, is the "actionable injury to another," the principles underlying *Young* authorize relief against the court officials who play an essential role in that scheme. *Id.,* at 153. Any novelty in this remedy is a direct result of the novelty of Texas's scheme.[2]

* * *

The clear purpose and actual effect of S. B. 8 has been to nullify this Court's rulings. It is, however, a basic principle that the Constitution is the "fundamental and paramount law of the nation," and "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Indeed, "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States* v. *Peters*, 5 Cranch 115, 136 (1809). The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake.

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[2] A recent summary judgment ruling in state court found S. B. 8 unconstitutional in certain respects, not including the ban on abortions after roughly six weeks. See *ante*, at 2, 15. That order—which does not grant injunctive relief and has not yet been considered on appeal—does not legitimate the State's effort to legislate away a federally protected right.

SUPREME COURT OF THE UNITED STATES

No. 21–463

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS *v.* AUSTIN REEVE JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December 10, 2021]

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER and JUSTICE KAGAN join, concurring in the judgment in part and dissenting in part.

For nearly three months, the Texas Legislature has substantially suspended a constitutional guarantee: a pregnant woman's right to control her own body. See *Roe* v. *Wade*, 410 U. S. 113 (1973); *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992). In open defiance of this Court's precedents, Texas enacted Senate Bill 8 (S. B. 8), which bans abortion starting approximately six weeks after a woman's last menstrual period, well before the point of fetal viability. Since S. B. 8 went into effect on September 1, 2021, the law has threatened abortion care providers with the prospect of essentially unlimited suits for damages, brought anywhere in Texas by private bounty hunters, for taking any action to assist women in exercising their constitutional right to choose. The chilling effect has been near total, depriving pregnant women in Texas of virtually all opportunity to seek abortion care within their home State after their sixth week of pregnancy. Some women have vindicated their rights by traveling out of State. For the many women who are unable to do so, their only alternatives are to carry unwanted pregnancies to

term or attempt self-induced abortions outside of the medical system.

The Court should have put an end to this madness months ago, before S. B. 8 first went into effect. It failed to do so then, and it fails again today. I concur in the Court's judgment that the petitioners' suit may proceed against certain executive licensing officials who retain enforcement authority under Texas law, and I trust the District Court will act expeditiously to enter much-needed relief. I dissent, however, from the Court's dangerous departure from its precedents, which establish that federal courts can and should issue relief when a State enacts a law that chills the exercise of a constitutional right and aims to evade judicial review. By foreclosing suit against state-court officials and the state attorney general, the Court effectively invites other States to refine S. B. 8's model for nullifying federal rights. The Court thus betrays not only the citizens of Texas, but also our constitutional system of government.

I

I have previously described the havoc S. B. 8's unconstitutional scheme has wrought for Texas women seeking abortion care and their medical providers.[1] I do not repeat those details here, but I briefly outline the law's numerous procedural and substantive anomalies, most of which the Court simply ignores.

S. B. 8 authorizes any person—who need not have any relationship to the woman, doctor, or procedure at issue—to sue, for at least $10,000 in damages, anyone who performs, induces, assists, or even intends to assist an abortion in violation of Texas' unconstitutional 6-week ban. See Tex. Health & Safety Code Ann. §171.208(a) (West Cum. Supp.

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[1] See *United States* v. *Texas*, 595 U. S. ___, ___–___ (2021) (SOTOMAYOR, J., concurring in part and dissenting in part) (slip op., at 4–7); *Whole Woman's Health* v. *Jackson*, 594 U. S. ___, ___–___ (2021) (SOTOMAYOR, J., dissenting) (slip op., at 1–3).

2021). Those vulnerable to suit might include a medical provider, a receptionist, a friend who books an appointment, or a ride-share driver who takes a woman to a clinic.

Importantly, S. B. 8 also modifies state-court procedures to make litigation uniquely punitive for those sued. It allows defendants to be haled into court in any county in which a plaintiff lives, even if that county has no relationship to the defendants or the abortion procedure at issue. §171.210(a)(4). It gives the plaintiff a veto over any venue transfer, regardless of the inconvenience to the defendants. §171.210(b). It prohibits defendants from invoking nonmutual issue or claim preclusion, meaning that if they prevail, they remain vulnerable to suit by any other plaintiff anywhere in the State for the same conduct. §171.208(e)(5). It also bars defendants from relying on any nonbinding court decision, such as persuasive precedent from other trial courts. §171.208(e)(4). Although it guarantees attorney's fees and costs to prevailing plaintiffs, §171.208(b)(3), it categorically denies them to prevailing defendants, §171.208(i), so they must finance their own defenses no matter how frivolous the suits. These provisions are considerable departures from the norm in Texas courts and in most courts across the Nation.[2]

S. B. 8 further purports to limit the substantive defenses

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[2]S. B. 8's procedural meddling is not limited to suits filed under the law. To deter efforts to seek pre-enforcement review, the law also establishes a special fee-shifting provision for affirmative challenges to Texas abortion laws, including S. B. 8 itself. Under that provision, any person or entity, including an attorney or a law firm, who seeks declaratory or injunctive relief against the enforcement of any state restriction on abortion is jointly and severally liable to pay the costs and attorney's fees of a prevailing party. Tex. Civ. Prac. & Rem. Code Ann. §30.022 (West Cum. Supp. 2021). The provision specifies that it is "not a defense" to liability for attorney's fees if "the court in the underlying action held that" any part of the fee-shifting provision "is invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion." §30.022(d)(3).

that defendants may raise. It permits what it calls an "undue burden" defense, but redefines that standard to be a shell of what the Constitution requires: Rather than considering the law's cumulative effect on abortion access, see *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. 582, 609–624 (2016), it instructs state courts to focus narrowly on the effect on the parties, §§171.209(b)(2), (d)(2). It further purports to impose retroactive liability for abortion care provided while the law is enjoined if the injunction is later overturned on appeal, §171.208(e)(3), as well as for abortion care provided while *Roe* and *Casey* are in effect if this Court later overrules one of those cases, §171.209(e).

As a whole, these provisions go beyond imposing liability on the exercise of a constitutional right. If enforced, they prevent providers from seeking effective pre-enforcement relief (in both state and federal court) while simultaneously depriving them of effective post-enforcement adjudication, potentially violating procedural due process. To be sure, state courts cannot restrict constitutional rights or defenses that our precedents recognize, nor impose retroactive liability for constitutionally protected conduct. Such actions would violate a state officer's oath to the Constitution. See U. S. Const., Art. VI, cl. 3. Unenforceable though S. B. 8 may be, however, the threat of its punitive measures creates a chilling effect that advances the State's unconstitutional goals.

II

This Court has confronted State attempts to evade federal constitutional commands before, including schemes that forced parties to expose themselves to catastrophic liability as state-court defendants in order to assert their rights. Until today, the Court had proven equal to those challenges.

In 1908, this Court decided *Ex parte Young*, 209 U. S. 123. In *Young*, the Court considered a Minnesota law fixing

new rates for railroads and adopting high fines and penalties for failure to comply with the rates. *Id.,* at 128–129, 131. The law purported to provide no option to challenge the new rates other than disobeying the law and taking "the risk . . . of being subjected to such enormous penalties." *Id.,* at 145. Because the railroad officers and employees "could not be expected to disobey any of the provisions . . . at the risk of such fines and penalties," the law effectively resulted in "a denial of any hearing to the company." *Id.,* at 146.

The Court unequivocally rejected this design. Concluding that the legislature could not "preclude a resort to the courts . . . for the purpose of testing [the law's] validity," the Court decided the companies could obtain pre-enforcement relief by suing the Minnesota attorney general based on his "connection with the enforcement" of the challenged act. *Id.,* at 146, 157. The Court so held despite the fact that the attorney general's only such connection was the "general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question." *Id.,* at 161. Over the years, "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 105 (1984) (quoting *Young*, 209 U. S., at 160); accord, *e.g., Virginia Office for Protection and Advocacy* v. *Stewart*, 563 U. S. 247, 254–255 (2011).

Like the stockholders in *Young*, abortion providers face calamitous liability from a facially unconstitutional law. To be clear, the threat is not just the possibility of money judgments; it is also that, win or lose, providers may be forced to defend themselves against countless suits, all across the State, without any prospect of recovery for their losses or expenses. Here, as in *Young*, the "practical effect of [these] coercive penalties for noncompliance" is "to foreclose all access to the courts," "a constitutionally intolerable choice."

Thunder Basin Coal Co. v. *Reich*, 510 U. S. 200, 218 (1994). "It would be an injury to [a] complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity." *Young*, 209 U. S., at 160. In fact, the circumstances at hand present an even stronger need for pre-enforcement relief than in *Young*, given how S. B. 8 not only threatens a multiplicity of suits, but also turns state-court procedures against providers to ensure they cannot effectively defend their rights in a suit.

Under normal circumstances, providers might be able to assert their rights defensively in state court. See *ante,* at 15. These are not normal circumstances. S. B. 8 is structured to thwart review and result in "a denial of any hearing." *Young*, 209 U. S., at 146. To that end, the law not only disclaims direct enforcement by state officials to frustrate pre-enforcement review, but also skews state-court procedures and defenses to frustrate post-enforcement review. The events of the last three months have shown that the law has succeeded in its endeavor. That is precisely what the Court in *Young* sought to avoid. It is therefore inaccurate to characterize the foregoing analysis as advocating "an unqualified right to pre-enforcement review of constitutional claims in federal court." *Ante,* at 15. If that were so, the same charge could be leveled against the Court's decision in *Young*.

In addition, state-court clerks are proper defendants in this action. This Court has long recognized that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State." *Shelley* v. *Kraemer*, 334 U. S. 1, 14 (1948). In *Shelley*, private litigants sought to enforce restrictive racial covenants designed to preclude Black Americans from home ownership and to preserve residential segregation. The Court explained that these ostensibly private covenants involved state action because "but

for the active intervention of the state courts, supported by the full panoply of state power," the covenants would be unenforceable. *Id.,* at 19. Here, there is more. S. B. 8's formidable chilling effect, even before suit, would be nonexistent if not for the state-court officials who docket S. B. 8 cases with lopsided procedures and limited defenses. Because these state actors are necessary components of that chilling effect and play a clear role in the enforcement of S. B. 8, they are proper defendants.

These longstanding precedents establish how, and why, the Court should authorize relief against these officials as well. The Court instead hides behind a wooden reading of *Young*, stitching out-of-context quotations into a cover for its failure to act decisively. The Court relies on dicta in *Young* stating that "the right to enjoin an individual . . . does not include the power to restrain a court from acting in any case brought before it" and that "an injunction against a state court would be a violation of the whole scheme of our Government." 209 U. S., at 163. Modern cases, however, have recognized that suit may be proper even against state-court judges, including to enjoin state-court proceedings. See *Mitchum* v. *Foster*, 407 U. S. 225, 243 (1972); see also *Pulliam* v. *Allen*, 466 U. S. 522, 525 (1984). The Court responds that these cases did not expressly address sovereign immunity or involve court clerks. *Ante,* at 8–9. If language in *Young* posed an absolute bar to injunctive relief against state-court proceedings and officials, however, these decisions would have been purely advisory.

Moreover, the Court has emphasized that "the principles undergirding the *Ex parte Young* doctrine" may "support its application" to new circumstances, "novelty notwithstanding." *Stewart*, 563 U. S., at 261. No party has identified any prior circumstance in which a State has delegated an enforcement function to the populace, disclaimed official enforcement authority, and skewed state-court procedures

to chill the exercise of constitutional rights. Because S. B. 8's architects designed this scheme to evade *Young* as historically applied, it is especially perverse for the Court to shield it from scrutiny based on its novelty.[3]

Next, the Court claims that *Young* cannot apply because state-court clerks are not adverse to the petitioners. *Ante,* at 5–6. As THE CHIEF JUSTICE explains, however, *ante,* at 3 (opinion concurring in judgment in part and dissenting in part), the Texas Legislature has ensured that docketing S. B. 8 cases is anything but a neutral action. With S. B. 8's extreme alterations to court procedure and substantive defenses, the Texas court system no longer resembles a neutral forum for the adjudication of rights; S. B. 8 refashions that system into a weapon and points it directly at the petitioners. Under these circumstances, the parties are sufficiently adverse.

Finally, the Court raises "the question of remedy." *Ante,* at 6. For the Court, that question cascades into many others about the precise contours of an injunction against Texas court clerks in light of state procedural rules. *Ante,* at 6–7. Vexing though the Court may find these fact-intensive questions, they are exactly the sort of tailoring work that District Courts perform every day. The Court should have afforded the District Court an opportunity to craft appropriate relief before throwing up its hands and declaring the task unworkable. For today's purposes, the answer is

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[3] The Court responds by seizing on my mention of S. B. 8's chilling effect. *Ante,* at 16. No one contends, however, that pre-enforcement review should be available whenever a state law chills the exercise of a constitutional right. Rather, as this Court explained in *Young*, pre-enforcement review is necessary "when the penalties for disobedience are . . . so enormous" as to have the same effect "as if the law in terms prohibited the [litigant] from seeking judicial construction of laws which deeply affect its rights." 209 U. S., at 147. All the more so here, where the State achieves its unconstitutional aim using novel procedural machinations that the Court fails to acknowledge.

simple: If, as our precedents make clear (and as the question presented presumes), S. B. 8 is unconstitutional, contrary state rules of civil procedure must give way. See U. S. Const., Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land").

In the midst of its handwringing over remedy, the Court also complains that the petitioners offer no "meaningful limiting principles for their theory." *Ante,* at 6. That is incorrect. The petitioners explain: "Where, as here, a State law (1) deliberately seeks to evade federal judicial review by outsourcing enforcement of the law to private individuals without any personal stake, while forbidding state executive officials from direct enforcement; and (2) creates special rules for state-court adjudication to maximize harassment and make timely and effective protection of constitutional rights impossible, federal relief against clerks is warranted." Reply Brief for Petitioners 6. The petitioners do not argue that pre-enforcement relief against state-court clerks should be available absent those two unique circumstances, and indeed, those circumstances are why the petitioners are threatened with a multiplicity of suits and face a constitutionally intolerable choice under *Young*.[4]

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[4]The Court also holds that the Texas attorney general is not a proper defendant. For the reasons explained by THE CHIEF JUSTICE, *ante,* at 2–3, this conclusion fails even under the Court's own logic.

The Court further observes that "no court may 'lawfully enjoin the world at large.'" *Ante,* at 10–11 (quoting *Alemite Mfg. Corp.* v. *Staff*, 42 F. 2d 832 (CA2 1930)). But the petitioners do not seek such relief. It is Texas that has taken the unprecedented step of delegating its enforcement authority to the world at large without requiring any pre-existing stake. Under the Court's precedents, private actors who take up a State's mantle "exercise . . . a right or privilege having its source in state authority" and may "be described in all fairness as . . . state actor[s]." *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 620 (1991). This Court has not held that state actors who have actual notice of an injunction may

III

My disagreement with the Court runs far deeper than a quibble over how many defendants these petitioners may sue. The dispute is over whether States may nullify federal constitutional rights by employing schemes like the one at hand. The Court indicates that they can, so long as they write their laws to more thoroughly disclaim all enforcement by state officials, including licensing officials. This choice to shrink from Texas' challenge to federal supremacy will have far-reaching repercussions. I doubt the Court, let alone the country, is prepared for them.

The State's concessions at oral argument laid bare the sweeping consequences of its position. In response to questioning, counsel for the State conceded that pre-enforcement review would be unavailable even if a statute imposed a bounty of $1,000,000 or higher. Tr. of Oral Arg. 50–53. Counsel further admitted that no individual constitutional right was safe from attack under a similar scheme. Tr. of Oral Arg. in *United States* v. *Texas*, No. 21–588, pp. 59–61, 64–65. Counsel even asserted that a State could further rig procedures by abrogating a state supreme court's power to bind its own lower courts. *Id.,* at 78–79. Counsel maintained that even if a State neutered appellate courts' power in such an extreme manner, aggrieved parties' only path to a federal forum would be to violate the unconstitutional law, accede to infringement of their substantive and procedural rights all the way through the state supreme court, and then, at last, ask this Court to grant discretionary certiorari review. *Ibid.* All of these burdens would layer atop

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flout its terms, even if it nominally binds other state officials, and it errs by implying as much now. The Court responds by downplaying how exceptional Texas' scheme is, but it identifies no true analogs in precedent. See *ante,* at 11 (identifying only "somewhat" analogous statutes). S. B. 8 is no tort or private attorneys general statute: It deputizes anyone to sue without establishing any pre-existing personal stake (*i.e.,* standing) and then skews procedural rules to favor these plaintiffs.

S. B. 8's existing manipulation of state-court procedures and defenses.

This is a brazen challenge to our federal structure. It echoes the philosophy of John C. Calhoun, a virulent defender of the slaveholding South who insisted that States had the right to "veto" or "nullif[y]" any federal law with which they disagreed. Address of J. Calhoun, Speeches of John C. Calhoun 17–43 (1843). Lest the parallel be lost on the Court, analogous sentiments were expressed in this case's companion: "The Supreme Court's *interpretations* of the Constitution are not the Constitution itself—they are, after all, called *opinions*." Reply Brief for Intervenors in No. 21–50949 (CA5), p. 4.

The Nation fought a Civil War over that proposition, but Calhoun's theories were not extinguished. They experienced a revival in the post-war South, and the violence that ensued led Congress to enact Rev. Stat. §1979, 42 U. S. C. §1983. "Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum*, 407 U. S., at 240. Thus, §1983's "very purpose," consonant with the values that motivated the *Young* Court some decades later, was "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum*, 407 U. S., at 242 (quoting *Ex parte Virginia*, 100 U. S. 339, 346 (1880)).

S. B. 8 raises another challenge to federal supremacy, and by blessing significant portions of the law's effort to evade review, the Court comes far short of meeting the moment. The Court's delay in allowing this case to proceed has had catastrophic consequences for women seeking to exercise their constitutional right to an abortion in Texas. These consequences have only rewarded the State's effort at nullification. Worse, by foreclosing suit against state-

court officials and the state attorney general, the Court clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree.

This is no hypothetical. New permutations of S. B. 8 are coming. In the months since this Court failed to enjoin the law, legislators in several States have discussed or introduced legislation that replicates its scheme to target locally disfavored rights.[5] What are federal courts to do if, for example, a State effectively prohibits worship by a disfavored religious minority through crushing "private" litigation burdens amplified by skewed court procedures, but does a better job than Texas of disclaiming all enforcement by state officials? Perhaps nothing at all, says this Court.[6] Although some path to relief not recognized today may yet exist, the Court has now foreclosed the most straightforward route under its precedents. I fear the Court, and the country, will come to regret that choice.

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In its finest moments, this Court has ensured that constitutional rights "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor

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[5] See Brief for Petitioners 48–49 (collecting examples targeting abortion rights and gun rights). In addition, one day after oral argument, Ohio legislators introduced a variation on S. B. 8 that would impose a near total ban on abortion care in that State. See H. B. 480, 134th Gen. Assem., Reg. Sess. (Ohio 2021).

[6] Not one of the Court's proffered alternatives addresses this concern. The Court deflects to Congress, *ante,* at 17, but the point of a constitutional right is that its protection does not turn on the whims of a political majority or supermajority. The Court also hypothesizes that state courts might step in to provide pre-enforcement relief, even where it has prohibited federal courts from doing so. *Ante,* at 15, 16. As the State concedes, however, the features of S. B. 8 that aim to frustrate pre-enforcement relief in federal court could have similar effects in state court, potentially limiting the scope of any relief and failing to eliminate the specter of endless litigation. Tr. of Oral Arg. 86–88.

nullified indirectly by them through evasive schemes . . . whether attempted 'ingeniously or ingenuously.'" *Cooper* v. *Aaron*, 358 U. S. 1, 17 (1958) (quoting *Smith* v. *Texas*, 311 U. S. 128, 132 (1940)). Today's fractured Court evinces no such courage. While the Court properly holds that this suit may proceed against the licensing officials, it errs gravely in foreclosing relief against state-court officials and the state attorney general. By so doing, the Court leaves all manner of constitutional rights more vulnerable than ever before, to the great detriment of our Constitution and our Republic.